



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC CASE NO. 494 OF 2012

PAULINA WANJIKU NGUGI.....PLAINTIFF

-VERSUS-

PETER MBIYU GACHIRI.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

I have before me the plaintiff's notice of motion dated 9th August 2012 seeking an order of injunction to restrain the defendants from entering, trespassing or in any manner interfering with Plot No. 3/205 located in Soweto Kayole area pending the hearing and determination of this suit. The plaintiff/applicant basis the application on the grounds set out on the face of the application namely:-

1. That the Plaintiff/Applicant is the legal owner of Plot No. 3/205 located in Kayole Soweto area and has paid all dues to the 2nd defendant/respondent.
2. That the plaintiff purchased the land from City Council of Nairobi and thereafter letters of allotment issued and has continued to be its legal owner even laying down a structural foundation to construct a residential plot.
3. On diverse dates in the year 2012 the 1st defendant on false and misdirected assumption of legal ownership erected a stone wall, temporary iron sheet house and a security gate and has now commenced serious construction.

The plaintiff additionally has sworn an affidavit in support of the application dated 9th august 2012 and a further affidavit dated 21st September, 2012. The 1st defendant for his part opposes the application by the plaintiff and has sworn a replying affidavit dated 12th September, 2012.

The Brief facts of the case are that the plaintiff claims legal ownership of Plot No. 3/205 which she claims was allocated to her vide letter of allotment dated 20th September, 1990 marked "PWN1" in her replying affidavit. The plaintiff has paid all the necessary dues and charges to the City Council, 2nd defendant herein and holds the card for the plot marked "PWN2" in her replying affidavit. The plaintiff claims that the 2nd Defendant on 17th January, 2012 issued an enforcement notice requiring the removal of illegal structures on Plot No. 3/205 and as she was not the one who had erected, the structures she visited the site and found indeed somebody had erected a wall and Mabati Structures on

her plot. Upon inquiry the plaintiff states she was informed it was one Duncan Katune who was developing the plot. It is unclear how the plaintiff decided it was the 1st defendant who was the culprit but upon service of the application the 1st defendant responded and claimed the plot that was in contention was allocated to his deceased mother, Grace Wanjiru Gachiri. The 1st defendant has exhibited a purported letter of allocation of a Plot No. 3/205A dated 20th September 1990 to Grace Wanjiru Gachiri. The 1st defendant claims it is this plot 3/205A that they have been in occupation of and which they have since sold to Paul Gichira Mwangi and has been transferred to him as per the exhibit marked "GWG4" in the 1ST Defendants Replying Affidavit. Effectively therefore the 1st Defendant as from this date of transfer of the plot ceased to have any further interest in the disputed plot. The 2nd defendant has sworn a replying affidavit through Karisa Iha its Director of legal Affairs dated 1st March, 2013.

The 2nd Defendant contends that to the extent the parties claim there are 2 plots it is imperative for the 2 plots to be established by survey. The 2nd defendant contends that the plaintiff and the 1st defendant have not provided evidential proof of the current status of the alleged separate properties. The 2nd defendant submits that the disputed ownership was not referred to the 2nd defendant before the institution of the suit for investigation.

While there is an issue as to whether or not there is a plot No. 3/205A and Plot NO. 3/205 in the Soweto Village the court finds that on the basis of the material placed before the court it is not possible to make any definitive findings at this stage as to whether there are 2 distinct plots or it is one and the same plot referred to variously by the parties. In case the 2 plots referred to by the parties are distinct it will be necessary to establish their physical location on the ground.

I have considered and evaluated the affidavits filed in support and opposition to the plaintiff's application and I have reviewed the annexures to the affidavits and further I have considered the submissions filed by the parties counsel in support of their respective position and I am not persuaded that the plaintiff has established and/or demonstrated that she has a prima facie case with a probability of success. There is a dispute as to whether or not there are 2 plots namely plot 3/205 and 3/205A which the plaintiff and the 1st defendant respectively claim and in case both plots exist where the same are located in regard to each other on the ground. More significantly the 1st defendant has disclosed that he and his sister sold and had their late mothers plot No. 3/205A transferred to a third party and that transaction was witnessed by the District Officer of the area on 13th July, 2012 before the institution of the instant suit. In the event, any order sought as against the 1st defendant may be in vain as the 1st defendant has ceased to have any interest in the suit property.

In the premises it is my holding and finding that the plaintiff has not demonstrated she has a prima facie case with a probability of success.

As to whether the plaintiff will suffer irreparable loss/damage if the injunctive order is not granted it is my view that she has not shown and/or demonstrated that she stands to suffer irreparable harm; since 1990 when the plaintiff claims she was allocated the plot she apparently has not developed the same in any way as she alleges to only have laid a foundation for a residential structure.

Having held that the plaintiff has failed to demonstrate she has a prima facie case with a probability of success and that she would not suffer irreparable harm or damage if the injunction is not granted I find and hold that the plaintiff's Notice of Motion application dated 9th August 2012 lacks any merit and the same is ordered dismissed with costs to the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants