



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION

ELC SUIT NO. 126 OF 2012

BEN ALOICE ANGATIA t/a

WOOD PARK INNPLAINTIFF/APPLICANT

-VERSUS-

CITY COUNCIL OF NAIROBI....1ST DEFENDANT/RESPONDENT

ANYIM GEORGE KRISPO (Administrator, Estate of

KRISPO OTIENO ANYIM.....2ND DEFENDANT/RESPONDENT

RULING

The plaintiff by a notice of motion application dated 13th March, 2012 seeks an injunction restraining the 2nd defendant, his servants, employees, agents and assigns, from evicting interfering with the plaintiff's business known as Kaloleni Beer Shop located within the Kaloleni Social Hall, Nairobi and comprising the toilet, Kitchen, car park and extension located outside the Kaloleni Social Hall.

The plaintiff has founded his application on the grounds set out on the face of the application and on the grounds contained in the supporting affidavit sworn by the plaintiff on 13th March, 2012 and a further affidavit sworn on 21st March, 2012. The 1st Defendant and the 2nd defendant have both filed replying affidavits in opposition to the plaintiff's application for injunction. All the parties have also filed submission in respect of their respective positions in the matter.

Briefly the plaintiff's case is that on or about the 16th of January, 2009 he entered a tenancy agreement with the 1st defendant whereof the 1st defendant rented out to the plaintiff an ascertained portion of Kaloleni Social Hall, Nairobi, otherwise referred to as the Kaloleni Beer Shop where of the plaintiff established and manages a bar. The plaintiff states the premises were served with a toilet, kitchen and parking all of which were located outside but near the premises. However, the plaintiff has not furnished any lease and/or tenancy agreement between him and the 1st defendant which would have not only identified the premises let but would also have set out the terms of the lease. This being a disposition of an interest in land there is the question whether or not the provisions of the Section 3(3) of the Law

Contract Act Cap 23 Laws of Kenya were met.

Section 3(3) of the said Act require an agreement for the disposition of land to be in writing and signed by all the parties to the agreement and the signatures of the persons signing the agreement attested by a witness.

The plaintiff claims that the 2nd defendant misrepresented to him that he was legally entitled as owner pursuant to a letter of allotment made to him by the 1st defendant to the space where the toilet and parking were located. The plaintiff signed a lease agreement with the 2nd defendant dated 25th January, 2010 for the use of the said facilities which were stated to be within the 2nd defendant's premises.

The plaintiff avers that he refurbished the toilet and kitchen at his own cost for them to meet the health requirements of the 1st defendant and subsequently came to learn that he beacon certificate dated 10th February, 1998 delineating the premises allocated to the 2nd defendant was revoked by the 1st defendant on 18th April, 2006 suggesting the 2nd defendant was not entitled to ownership of the portion that he leased to the plaintiff. This prompted the plaintiff to withhold payment of rent payment to the 2nd defendant as per their lease agreement which triggered the 2nd defendant to demand payment of rent arrears and/or vacation by the plaintiff from the leased premises. This culminated with the institution of the present suit by the plaintiff For his part the 2nd defendant reiterates that he was allocated a commercial plot adjacent to Kaloleni Social Hall in respect of which he made the full payment of Kshs. 110,000/= being on account of stand premium Kshs. 100,000/= and ground rent Kshs. 10,000/=. The 2nd Defendant states he was additionally issued a formal letter of allotment dated 10th February, 1998 which attached a plan and indicating the leased premises were approximately 0.16 hectares. Also issued to the 2nd defendant was a beacon certificate No. 1652 dated 10th February, 1998 showing the plot dimensions. An internal memo from the Chief Land Surveyor to Director of Social Services and Housing of the 1st Defendant dated 28th July, 2011 exhibited by both the plaintiff and the 2nd defendant acknowledges the existence of a boundary dispute since the year 2006 which was yet to be resolved. The memo indicates because of the dispute the beacon certificate issued with respect to a commercial plot in Kaloleni vide Letter of allotment dated 10th February, 1998 was revoked on 18th April, 2006. The memo went on to conclude that the dispute can only be resolved once the boundaries are confirmed. Of significance is that the allotment of the commercial plot to the 2nd defendant was not revoked and still stands save that he dimensions required to be reconfirmed. Indeed vide a further internal memo dated 25th January, 2012 from Principal Lands Surveyor to Surveyor Matoke Aloys of the 1st Defendant provided thus:-

“RE: RE-ESTABLISHMENT OF BEACONS

Please refer to the attached PDP for the plot “Existing open bar” next to Kaloleni Social Hall and belonging to Mr. Krispus Otieno Anyim – Allotment CP & ARCH/01058 dated 10th February, 1998.

You are asked to undertake the task of re-establishing all the missing beacons and maintain the plot area enclosed thereof.

B. KIHINGO

PRINCIPAL LAND SURVEYOR

The 1st defendant through its Legal Director, Karisa Iha has sworn a replying affidavit dated 24th April, 2013 and contends the 1st defendant has been wrongly enjoined to the suit and that the reliefs sought against the 1st Defendant cannot be granted. The 1st defendant contends the plaintiff can only move the court by way of judicial review and cannot seek an injunction against the 1st defendant. The 1st defendant denies having acted in collusion with the 2nd defendant.

I have reviewed the Notice of Motion application together with the affidavits filed in support and opposition and have further considered the submissions by the parties and make the following observations and/or findings:-

1. The plaintiff even though being in possession and operating the Kaloleni Beer Shop at the Kaloleni Social Hall has not furnished any evidence of a lease or tenancy agreement to show the terms of such lease/tenancy and/or the description of the leased premises. The plaintiff has not come out clearly to show what it is the 1st Defendant leased to him. It is usual whenever it is a portion of premises that is leased to include a sketch plan to delineate and describe the leased premises. The absence of any written lease agreement between the plaintiff and the 1st defendant leaves a doubt as to what really was constituted in the lease/tenancy agreement. The requirement that all contracts for the disposition of any interest in land comply with Section 3(3) of the Laws of Kenya have its relevance in instances such as in the present case. It is little wonder that the plaintiff opted to enter a side agreement to access facilities that his lease with the 1st Defendant may not have offered. The plaintiff may also have contracted with the 1st defendant without carrying out the necessary due diligence which would have revealed that the 2nd defendant staked claims to some of the facilities that the plaintiff required for his business.
2. The 2nd defendant it is not in dispute was allocated the commercial plot adjacent to Kaloleni Social Hall by the 1st Defendant vide the letter of allotment dated 10th February, 1998 which per the plan attached and the beacon certificate issued suggests that for the plaintiff to operate his business he needed to make use of part of the 2nd defendant's plot. The plaintiff acknowledged this fact and on that basis entered into the lease agreement with the 2nd defendant dated 25th January, 2010 as per annexure marked "KDA7" in the 2nd defendant's replying affidavit.

The plaintiff contends that the beacon certificate issued to the 2nd defendant in respect of the allocated land was revoked and therefore the 2nd defendant misrepresented to him that he was the owner of the disputed portion. It needs to be noted that even though the 1st defendant confirm the beacon certificate was revoked on 18th April, 2006 the revocation was because it was perceived there was a boundary dispute which could only be resolved once the boundaries are confirmed. The revocation of the beacon certificate did not affect the allocation of the plot to the 2nd defendant who remained the lawful allottee pending the fixing of the boundaries.

3. No interlocutory relief is sought against the 1st Defendant in the notice of motion and I therefore will not make any findings on the issues that the 1st defendant has raised in its replying affidavit and its submission which issues at any rate I consider can only be dealt within the context of the competency of the suit against the 1st defendant either at the trial and/or in an application made in that regard by a relevant party.

Having reviewed and considered the material placed before the court I am not persuaded the plaintiff has satisfied the principles upon which an injunction can be granted as enunciated in the **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**. The plaintiff in the instant case has not demonstrated he has a prima facie case with a probability of success. As pointed out above there is no evidence to show what was leased to him by the 1st defendant and what the terms of the lease were. As for the 2nd defendant he has tendered evidence to show he was allocated the commercial plot adjacent to Kaloleni Social though it is acknowledged a boundary dispute exists. The plaintiff and 2nd defendant entered a lease agreement whereby the plaintiff was to sublet space from the 2nd defendant which shows the plaintiff acknowledged the 2nd defendant's ownership of the subject portion of the premises. The withdrawal of the beacon certificate in my view did not invalidate the 2nd defendant's allocation of the plot and until the boundaries are fixed the 2nd defendant continues to have a valid claim on the plot as allocated. For those reasons I find and hold that the plaintiff has not established a prima facie case with a probability of success.

As to whether or not the plaintiff would suffer irreparable harm if the injunction is not granted I answer in the negative. The plaintiff has not demonstrated that he would suffer irreparable harm. He infact had entered a lease agreement with the 2nd defendant to cater for his concerns. I hold and find that the plaintiff cannot suffer any damage that cannot be compensated in damages in case he is successful at the conclusion of the trial.

I need not consider the balance of convenience as I have already made a finding that the plaintiff has not satisfied the first two conditions for the grant of an injunction.

I find and hold that the plaintiff's Notice of Motion dated 13th March, 2013 lacks any merit and I order that the same to be dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant/Respondent

..... for the 2nd Defendant/Respondent