



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC SUIT NO. 575 OF 2012

EVANSON GATHURA BAIYA.....PLAINTIFF

VERSUS

GRACE WAMBUI KIBORO1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED.....2ND DEFENDANT

RULING

The Plaintiff has moved the court by way of a Notice of Motion dated 4th September 2012 brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. He is seeking a temporary prohibitory injunction against the Defendants either by themselves, their agents, servants, employees, proxies and/or any person claiming under them from trespassing, alienating, selling, transferring, trading on and/or interfering in any manner with Plot No. V5463 also known as C1579 situated within the Embakasi Ranch Company Limited (hereinafter referred to as the suit property) pending the hearing and determination of the suit herein. He is also seeking an order that the O.C.S Ruai Police Station do supervise and enforce the order.

The Plaintiff claims in his supporting affidavit sworn on 4th September 2012 and a further affidavit sworn on 5th November 2012 that he is the legal owner of plot of the suit property, and acquired the same from the 2nd Defendant's shareholder and allottee in the year 2010. Further, that the 2nd Defendant issued the Plaintiff with an ownership certificate for the suit property upon payment of transfer fee and identified the said property to him upon payment of site visit fee. The Plaintiff alleges that the Defendants through their agents, and or servants have now trespassed on the suit property and the 1st Defendant is developing the said property.

The Plaintiff attached as evidence the sale agreement with the original allottee of the suit property dated 30th April 2010. He also brought evidence of payment of a transfer fee of Kshs.25,000/= per plot and site visit fee of Kshs.5,000 per plot to the 2nd Defendant with respect to the suit property and the plot ownership certificates issued to him and the original allottee with respect to the suit property.

The Plaintiff stated that upon completing the transfer process he took possession of the suit property from the year 2010 and fenced it, built a site office and a pit latrine and embarked on farming thereon. However, that on or about 2nd August 2012, the 1st Defendant alleged to be owner of the suit property,

and on 28th August 2012 she went to the site with her employees and/or agents and started digging trenches thereon.

The 1st Defendant in a replying affidavit sworn on 8th October 2012 stated that she is an original share holder of the 2nd Defendant having bought one ordinary share from the said company in 1991, and was subsequently issued with a share certificate number dated the 15th day of March 1991 which she attached as evidence. Further, that by virtue of such membership, she was allotted a plot number P4225 also known as C1579 on the 2nd Defendant's ranch situated within the Embakasi Ruai area.

The 1st Defendant stated that the 2nd Defendant's official surveyor thereafter pointed out and identified the demarcations and beacons of the said plot namely P4225 also known as C1579 in the year 1991, and that she has enjoyed quiet possession of the said plot for many years. However, that in the month of February 2012 her quiet possession and enjoyment of the said parcel of land was interrupted by a person who claimed to have been allocated the said plot in the year 2008 or thereabout by the 2nd Defendant. The 1st Defendant stated that following the said interruption, and after various reports to the Ruai Police Station and meetings with and letters to the 2nd Defendant it was ruled that the suit property was hers. She stated that the Plaintiff's case is and can only be entirely against the 2nd Defendant.

There was no response filed by the 2nd Defendant to the Plaintiff's Notice of Motion.

The Plaintiff and 1st Defendant filed written submissions in court, which they relied upon during the hearing of the Notice of Motion on 4th June 2013. The Plaintiff's counsel in submissions dated 31st January 2013 reiterated the arguments made in the foregoing. The Defendant's counsel in submissions dated 21st May 2013 submitted that the 1st Defendant has shown a *prima facie* case as she had produced a share certificate showing that she has been a shareholder of the 2nd Defendant, and in possession of the suit property since 1991.

Further, that the Plaintiff's sale agreement cannot be produced in evidence as it has not been assessed for stamp duty nor the said duty been paid, and counsel relied on **Weetabix Limited vs Healthy U Two Thousand Limited (2006) eKLR** in this respect. Lastly, that having been in possession of the suit property since 1991, and having deposited building materials thereon, the 1st Defendant is the one who stood to suffer irreparable loss and damage and the balance of convenience tilted in her favour.

Having considered the arguments made by the parties, I note that the Plaintiff and 1st Defendant both purport to have been allocated the suit property. The Plaintiff has produced evidence of the purchase of the plot V5463 also known as C1579 from the original allottee, and of the plot ownership certificate issued to him by the 2nd Defendant. The 1st Defendant has argued in this respect that the said sale agreement cannot be produced in evidence pursuant to section 19 of the Stamp Duty Act (Cap 480 of the Laws of Kenya) as no stamp duty was paid on it. Section 19 of the Stamp Duty Act provides that subject to certain exceptions, no instrument chargeable with stamp duty shall be received in evidence in civil proceedings unless it is stamped.

The case cited in support by the 1st Defendant in this regard is distinguished as it involved the production of an assignment in evidence, which assignment was held to be an instrument that attracts stamp duty under the Stamp Duty Act. An assignment is defined by the **Black's Law Dictionary Ninth Edition** on page 136 as the "transfer of rights or property". A transfer of land attracts stamp duty under the schedule to the Stamp Duty Act that provides the list of instruments chargeable with stamp duty. A sale agreement of land does not entail such a transfer of land, and the conveyance processes must be complete before such a transfer is affected.

The schedule to the Stamp Duty Act also specifically states that the conveyance and transfer are the instruments chargeable with stamp duty. In addition agreements for the sale of an interest or estate in land are specifically excluded from the payment of ad valorem duty under section 49 of the Stamp Duty Act.

For these reasons section 19 of the Stamp Duty Act does not apply with regard to the receipt of a sale agreement of land in evidence as it is not one of the instruments that attracts stamp duty.

The 1st Defendant on the other hand has produced in evidence a share certificate showing that she has one ordinary share in the 2nd Defendant company. However, there is no indication thereon as to which land the share relates to, and she did not bring evidence of the alleged allotment to her of plot P4225 also known as C1579.

I therefore find that the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, as he has shown that he has a *prima facie* case. This court cannot consider the issue of whether damages would be an adequate remedy to the Plaintiff, as the Defendant has not brought any evidence of her entitlement to the suit property.

I accordingly allow the Plaintiff's Notice of Motion dated 4th September 2012 and hereby order as follows:

1. The Defendants by themselves, their agents, servants, employees, proxies and/or any person claiming under them be and are hereby restrained from trespassing on, alienating, selling, transferring, and/or interfering in any manner with Plot No. V5463 also known as C1579 situated within the Embakasi Ranch Company Limited pending the hearing and determination of the suit herein or until further orders.
2. The Officer in Charge of Ruai Police Station assists in the supervision and enforcement of the order given herein
3. The costs of the Plaintiff's Notice of Motion dated 4th September 2012 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____16th__ day of ____July____, 2013.

P. NYAMWEYA

JUDGE