



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

ELC CASE NO. 749 OF 2012

GEOFFREY GITHENYA MBUTHIA.....PLAINTIFF

VERSUS

MOSES IRUNGU MBUI1ST DEFENDANT

MAHIIRA HOUSING COMPANY LTD.....2ND DEFENDANT

RULING

In the amended Notice of Motion dated 9th May, 2013 the applicant herein Geoffrey Githenya Mbutia has sought for various orders. The Applicant has brought the application under Order 40 Rules 1,2 and 8 of the Civil Procedure Rules Section 1A,1B, 3 and 3A of the Civil procedure Act and all other enabling provisions of the law. The Applicant sought for these orders:-

1. Spent
2. Spent
3. That the Court do issue a temporary injunction against the 1st Respondent thereby restraining him, his agents and/or servants from entering cultivating and/or constructing on plot No. 653 in Githurai Mwhoko in Mahiira Housing Company Limited and or in any other way from interfering with the plaintiff's occupation over the same pending the hearing and determination of this suit
4. THAT the court to do issue temporary injunction restraining the 1st defendant his servants and or agents from transferring alienating, selling plot No. 653 in Mahirra Housing Company Limited now land Ref. No. Ruiru/Kiu/Block 10 (Mahiira/791) pending the hearing and determination of this suit.
5. That costs of this application to the plaintiff

The application is based on the grounds set out on the face of the application and on the supporting Affidavit of Geoffrey Githenya Mbutia.

The grounds for the application are notably as follows:-

- a. That the Plaintiff is the proprietor of plot No. 653 at Mahiira Housing company Ltd vide a share certificate issued on 7th January, 1988 by the 2nd Defendant herein as the Land buying company.

- b. **That the 1st Defendant is alleging to be the owner of the Plaintiff's plot and has interfered with the Plaintiff's plot and has interfered with the Plaintiff's occupation by demolishing a temporary house that had been constructed by the Plaintiff.**
- c. **That the Plaintiff has a prima-facie case.**
- d. **That unless the order as sought herein is granted the 1st Defendant will continue interfering with the Plaintiff's quiet possession and thereby causing the Plaintiff to suffer irreparable harm and loss.**

The applicant in his supporting affidavit averred that he is the owner of a plot from Mahiira Housing Company Ltd which he bought in 1987 and fully paid the full purchase price of 6500/= and also paid the surveyor's fees of Kshs.1600/= as per the annexure GGM1. He received certificate No. 653 in January, 1988 and on 13th August, 1990 he received a letter from the 2nd Defendant requesting him to make payments towards water connection as per annexure GGM2. That now the 1st Defendant has trespassed on the said plot by purporting to fence it off and the 2nd Defendant has not been of any assistance to the plaintiff. That Defendant allegedly acquired the plot on 31st January, 2012 as per GGM3. He further averred that he has not sold the plot transferred it or surrendered it to anybody including the 1st Defendant and the same was not available for allocation to the 1st Defendant.

The application was opposed. The 2nd Defendant through one Peter Githaka, filed a Replying Affidavit and stated that the property in question is duly registered under the Registered Land Act Cap 300 Laws of Kenya in the names of Moses Irungu Mbui. That title to Landed property comes into existence after issuance of a letter of allotment. That the property referred by the plaintiff is LR No. Ruiru / Kiu/Block/10/Mahiira /791 and not plot No. 653 in Githurai Mwioko. That there were resolutions governing the farms at LR No 10901/36 and LR No. 10901/37 at Mahiira, Housing passed by the company on 5th November, 1986 and among them was that any purchaser and/or member who purchased a plot in either of the properties and failed to pay the purchase price in full and/or remain indebted from the date of purchase such person shall lose the plot and the purchase, price refunded in full.

The parties herein canvassed the application through written submissions. The court has now considered the pleadings herein, the annexures and the written submissions and the court makes these findings.

The Applicant herein has sought for interlocutory injunction. The principles for issuing such relief were well settled in the case of **GIELLA V CASSMAN BROWN CO. LTD (1973) EA 358**. The Applicant must demonstrate that he has

- i. **A prima facie case with high probability of success.**
- ii. **That Applicant stands to suffer irreparable loss which cannot be compensated by way of damages if orders not granted in his favour.**
- iii. **That if the court in doubt to decide on a balance of convenience.**

The applicant herein must therefore demonstrate that he has a prima facie case with a high probability of success. In the case of in **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR** the Court held, among other things, that a prima facie case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant's case at the trial. It states that:-

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

The applicant in his effort to establish that he has a prima facie case, alleged that he bought plot No. 653 at Mahiira Housing Company Ltd in 1987 for Kshs. 6,500/= as evidenced by annexure GGM1. That he further received certificate No. 653 on 7th January, 1998 as per annexure GGMII. It is also evident that

on 20th January, 1992, Applicant received a letter from Mahiira Housing Company Ltd requesting him to pay Kshs.2200/= as Title Deed fee. There is no evidence as to whether he paid the said fees for the issuance off the Title Deed.

The Respondent on their part, alleged that there is no plot No. 653 as the property in reference is LR No. Ruiru/Kiu Block 10(Mahiira) 791 duly registered in the name of Moses Irungu Mbui. The Defendants alleged that the Plaintiff did not adhere to the resolutions passed on 5th November, 1986 governing LR No. 10901/36 and LR No. 10901/37 which resolutions stated that

“(a) That any purchaser and/or member who purchase a plot in either of the properties and fail to pay the purchase price in full and or remain in debt for a period of four (4) years from the date of purchase, such a person or persons shall lose the plot and the purchase price refunded in full.

(b) If any purchase purchasing a plot does not occupy or develop the same within a period of 8 (eight) years from the date of purchase, then the purchaser shall have no claim.”

The Defendants further submitted that even if the Applicant had purchased the plot, he failed to adhere to the resolutions laid down and therefore he has no claim. It is no longer indeed clear that the suit land is in the names of Moses Irungu Mbui the 1st Defendant. It is no plot No 653 but LR No. Ruiru/Kiu/Block 10/ Mahiira 791. The plaintiff does not have a Title Deed of the said suit property. The court cannot hold that he has a prima facie case with high probability of success. I will borrow from the authority quoted by the Defendants; **DR. N. K. ARAP NGOK V JUSTICE MOIJO OLE KEIWUA & 4 OTHERS, NAIROBI COURT OF APPEAL NO. 60 OF 1997 (unreported)** where it was Observed that;

“Title to landed property normally comes into existence after issuance of a letter of allotment meeting the conditions stated in such a letter and actual issuance thereafter as the title pursuant to provisions held.”

The applicant herein has a share certificates for Plot No. 653 but not LR No. Ruiru/Kiu/Block/10/Mahiira 791.It was averred by the Defendants that 1st Defendant Moses Irungu Mbui, is the registered owner of the suit land.The plaintiff therefore has no prima facie case against a proprietor of the suit land who is duly registered.

The Applicant also needed to demonstrate that he will suffer irreparable loss which cannot be compensated by damages. The applicant stated that he bought the land is 1987. No evidence that he has put up any structure on the suit land. Applicant will not suffer any irreparable damages if the injunction sought is not granted.

It is not in doubt that the 1st Defendant was issued with certificate No. 653 on 31st January, 2012 and later Title Deed on 20th October, 2012.The 1st Defendant has already been issued with a Title Deed, the balance of convenience will therefore tilt in favour of the Title Deed holder.

Finally, will also concur with the Defendants’ submissions that the issues raised by the plaintiff cannot be resolved through affidavit evidence. The issues herein need to be interrogated through a full trial.

Having now carefully considered all the pleadings and the rival submissions the court finds that the applicant’s application must fail at this stage.Consequently the court dismisses the applicant’s Notice of Motion dated 25th October, 2012. Cost in the cause.

The Plaintiff to set the main suit for hearing expeditiously so that the disputed issues can be resolved.

It is so ordered

Dated, signed and delivered at Nairobi this 20th day of August, 2013

L. N. GACHERU,

JUDGE

20.8.2013

20. 8.2013

Before: Gacheru, J

Anne - Court clerk

Omondi for 1st and 2nd Defendant

Gachuhi for Plaintiff/Applicant

L. N. GACHERU,

JUDGE

20.8.2013

Court

Ruling read in open Court.

L. N. GACHERU,

JUDGE

20.8.2013