



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION

ELC SUIT NO. 112 OF 2012

GEOFFREY MURIUKI MANENE.....PLAINTIFF

VERSUS

NJOROGE NDUNGU.....DEFENDANT

RULING

The application before the court for determination is a Notice of Motion dated 5th March 2012, brought by the Plaintiff under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff is seeking an order that the Defendant, his servants and/or employees be restrained from claiming interests, rights or in any way dealing with or trespassing onto or continuing further trespass on all that parcel of land known as L.R. No. Dagoretti/Thogoto/1115 (hereinafter referred to as the suit property) pending the hearing and determination of this suit.

The application is supported by the Plaintiff's affidavit deposed to on 5th March 2012. The main ground for the application is that the Plaintiff is the registered owner of the suit property measuring approximately 0.1 hectares, having bought the same from Kimani Gathogo alias Kimani Thogo after undertaking due diligence by conducting an official search from the lands registry. The Plaintiff has annexed evidence of a sale agreement for the purchase of the suit property between him and Kimani Thogo dated 2nd December 2010, a title deed with respect to the suit property issued in his name on 5th May 2012, a title deed in the name of Kimani Gathogo dated 19th August 1993 as well as a certificate of official search dated 6th September 2010.

The Plaintiff seeks the orders prayed for because the Defendant has encroached on the suit property and has refused and/or declined to give vacant possession despite demand being made. In a further affidavit sworn on 16th April 2012, the Plaintiff admitted that the issue of ownership of the suit property has been the subject of determination in numerous suits, and contended that it is fraudulent for the Defendant and his siblings to have erected permanent structures on the property which is not theirs. The Plaintiff annexed copies of proceedings in Kiambu SRMCC No. 60 of 1984 and Nairobi HCCA No. 214 of 1985 as well as a withdrawal notice in Kikuyu SRMCC No. 316 of 2009.

The Plaintiff further stated that the registration and/or transfer documents for the suit property had to be signed by the Executive Officer of Kiambu Court, and he refuted the Defendant's allegations that there were deceased persons were buried on the suit property. He maintained that the graves of the deceased were on plot number Dagoretti/Thogoto/1114. The Plaintiff annexed as evidence photographs showing that the graves were on undeveloped property, and stated that the Defendant had the option to have had

the property registered in his name over the years, rather than wait for the previous owner to sell to an innocent buyer and lodge a caution.

The Plaintiff disputed the Defendant's allegations that the houses erected on the suit property are worth 10 million and urged the court to make a site visit and/or give directions for a competent valuer to make a proper finding on the same. He annexed as evidence photographs of the said houses.

The Defendant responded to the application in a replying affidavit sworn on 23rd March 2012. He annexed evidence of Letters of Administration *Ad Colligenda Bona* in respect of the estate of Ndung'u Kimani Johana issued to him on 9th June 2011. While admitting that the Plaintiff bought the suit property from Kimani Gathogo, the Defendant stated that the sale was intended to circumvent the cause of justice since there are pending cases involving the suit property namely, Kikuyu SRMCC No. 316 of 2009, Nairobi ELC No. 189 of 2011, Nairobi Succ. Cause No. 1081 of 2011 in addition to the suit herein.

The Defendant claims that the suit property and LR No Dagoretti/Thogoto/1114 are subdivisions of LR No. Dagoretti/Thogoto/372 previously registered in the name of his late father, Ndung'u Kimani Johana, and further that the subdivision was effected pursuant to a court order issued in a court process between Kimani Gathogo and the late Ndung'u Kimani Johana. The Defendant contended that after the subdivision, an error was made in that although Kimani Gathogo and the late Ndung'u Kimani Johana were registered as the owners of LR No Dagoretti/Thogoto/1115 and LR No Dagoretti/Thogoto/1114 respectively, each was occupying the opposite land on the ground.

According to the Defendant, although both parcels are of the same size, Kimani Gathogo has never occupied L.R. No. Dagoretti/Thogoto/1115 (the suit property) wherein the late Ndung'u Kimani Johana together with the Defendant and his family have been living for more than 28 years and have built permanent stone houses thereon. In addition, the Defendant has stated that the suit property is the place of burial for his parents and brother, and that the value of the suit property together with the developments is in excess of Kshs.10 million. The Defendant has averred that no developments have been carried out on L.R. No. Darogetti/Thogoto/1114 whose current open market value is Kshs 1.5 million, and the Defendant maintains that the Plaintiff would be getting the proper/correct value for his money by taking LR No. Dagoretti/Thogoto/1114.

It is the Defendant's case that no order of injunction can be granted since the court is enjoined to consider the order of eviction sought viz –a – viz the claim of every person in practical terms since the law does not operate in a vacuum. The Defendant annexed evidence of a certificate of official search dated 20th March 2012 indicating he had lodged a caution on the suit property as well as a ruling delivered in ELC No. 189 of 2011. The Defendant contended that the balance of convenience does not tilt in favour of the Plaintiff who was not in actual occupation of the land.

The parties filed written submissions in which they reiterated the facts hereinabove. The Plaintiff's counsel in submissions dated 30th April, 2012 argued that under sections 23 and 30 of the Registered Land Act, the Plaintiff's claim to enjoy, possess and own the suit property is indefeasible. It was further submitted for the Plaintiff that the allegation of interchange of the land cannot confer any rights to the Defendant and further, that no amount of development on another person's land can bestow or confer on such a person proprietorship interest in the land.

Counsel for the Plaintiff stated that failure to exercise sufficient caution cannot be enlisted as a defence when and land is restored to its rightful owner and use, and reiterated that the Plaintiff as the registered owner has legal, statutory and equitable rights to possess, enjoy and even transfer the suit property. Lastly, the Plaintiff submitted through his advocate that he has satisfied the principles laid out in the case of **Giella -vs- Cassman Brown & Co. Ltd (1973)EA 358**. Counsel also relied on the case of **David Njogu Gachanja -vs- The People Ltd & 2 others, Nairobi HCCC No. 692 of 2004**.

The Defendant's counsel filed written submissions dated 7th May 2012 wherein he relied on the case of **Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358** to argue that the Plaintiff does not have a *prima*

facie case with a probability of success. He argued in this respect that the Letters of Administration issued in Succession Cause No. 1081 of 2011 made the Defendant as the personal representative of the estate of Ndung'u Kimani Johana and he cannot be evicted from the suit property. Further, it was submitted that the Plaintiff lacks a *prima facie* case since despite having a title, the Plaintiff has never been in occupation of the suit property just like Kimani Gathogo from whom he bought the land.

While submitting that the Plaintiff does not stand to suffer any irreparable damage, the Defendant submitted that the Plaintiff's suffering was self-inflicted having bought the land without being diligent and checking on the ground what he bought. It was argued for the Defendant that the value of the land where they have been living together with the development is in excess of 10 million shillings and further, that the Defendant is ready to transfer the undeveloped portion LR No. Dagoretti/Thogoto/1114 to the Plaintiff. Lastly, the Defendant through his advocate submitted that the balance of convenience tilts against the Plaintiff as an injunction cannot issue to restrain what happened more than 50 years ago.

I have read and carefully considered the pleadings, evidence and written submissions by the parties. I will proceed to determine the Notices of Motion before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and also to determine if the Plaintiff has in addition shown any special circumstances to entitle them to the mandatory injunction sought. I find that the Plaintiff has established a *prima facie* case by producing evidence of ownership and acquisition of the suit property. However as the Plaintiff in his prayer is essentially seeking for the Defendant's eviction, it is my view this is not a clear case for such a mandatory injunction to issue.

The test whether to grant a mandatory injunction or not at the interlocutory stage was set out by the Court of Appeal in the case of **Kenya Breweries Ltd & another -vs- Washington Okeyo (2002) 1 E.A. 109**, where it was held that there must be special circumstances and further, that the injunction issues only in clear cases where the court thinks that the matter ought to be decided at once.

The Defendant has stated that since the original parcel LR No. Dagoretti/Thogoto/372 was subdivided in 1993, he and his family have been in occupation of the suit property, wherein they have constructed permanent structures. Whether the Defendant has acquired any rights in the suit property by virtue of this occupation can however only be determined after examination of evidence in a full trial.

In light of the findings hereinabove I order as follows:

1. That pending the hearing and determination of the suit filed herein or until further orders, the *status quo* to be maintained as follows:
 - a. The Plaintiff and Defendant by themselves or through their representatives, agents or servants shall not sell, transfer, lease, charge or in any other manner alienate or dispose of the parcel of land known as L.R. No. Dagoretti/Thogoto/1115.
 - b. The Plaintiff either by himself or through his representatives, agents or servants is restrained from interfering in any manner with the Defendant's occupation and possession of land known as known as L.R. No. Dagoretti/Thogoto/1115.
2. The costs of the Plaintiff's Notice of Motion dated 5th March 2012 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this _____1st_____ day of _____August_____, 2013.

P. NYAMWEYA

JUDGE