



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

ELC NO. 952 OF 2012

FAST TRACK

JOSEPH MBUGUA KUNG'U.....PLAINTIFF

-VERSUS-

STEPHEN MACHARIA MWNAGI.....DEFENDANT

RULING

The plaintiff filed this suit vide a plaint dated 6th December, 2012 and contemporaneously with the plaint also filed a Notice of Motion of even date seeking inter alia the following orders:

1. That pending the hearing and determination of this suit the Defendant whether by himself his agents/servants, workmen, agents or any of them jointly or severally or otherwise howsoever be restrained by way of temporary injunction from selling alienating further construction and/or erecting any structures on the plaintiff's property known as No. 3/37 situated at Soweto Scheme, Kayole.
2. That the defendant and/or his agents, servants and workmen or any of them jointly and severally be compelled to pull down all structures erected on the suit land known as Plot No. 3/37 Soweto Scheme at the Defendant's costs and in default the plaintiff be allowed to pull down the said structures at the Defendants costs under the supervision of the officer commanding (OCS) Kayole Soweto Police Station.

The Plaintiff's application is supported on the following grounds set out on the face of the application:

- a. That the plaintiff is the lawful proprietor of the suit property.
- b. That the Defendant claims to own plot No. 3/37A which plot does not exist in the schemes records or anywhere.
- c. That the defendant erected structures on the suit property despite warning from the plaintiff and the provincial Administration i.e. Area Chief and has defied orders of demolition of the said structures from the City Council.
- d. That he Defendant is a trespasser in the plaintiffs plot hence he should be ordered to move out of it forthwith to allow the plaintiff develop his plot.

The plaintiff has sworn an affidavit and a further affidavit in support of the application and counsel for the plaintiff has filed written submissions articulating the plaintiff's position in support of the application.

For the part of the Defendant the Defendant has sworn a replying affidavit in opposition to the plaintiff's application dated 27th December, 2012 and the Counsel for the Defendant has filed written submissions in support of the Defendant's position.

The brief summary of the facts in this matter are that the plaintiff claims to be the legal owner of Plot No. 3/37 Soweto Scheme Kayole having purchased the same from one Martha Wanjiku Murimi and a transfer of the same having been effected to him on 20th January, 2010. The plaintiff has annexed various documents to his supporting affidavit sworn on 6th December, 2012 evidencing the transfer of the subject plot from Martha Wanjiku Murimi to himself and payment of various charges to the City Council of Nairobi. Additionally there is documentation from the City Council indicating that the subject plot belongs to the plaintiff.

The plaintiff avers that when he attempted to enter into possession to effect development he found the Defendant had moved on to the plot and put up structures which he has refused to demolish claiming that the plot belongs to him stating the plot is plot No. 3/37A and that it was allocated to him.

The Defendant vide his replying affidavit sworn on 27th December, 2012 has annexed various documents in support of his assertion that he was allotted plot No. 3/37A including a letter of allotment dated 4th March, 1992 marked "SM1" and a plot card issued by the City Council and payment receipts also from the City Council in respect of Plot No. 3/37A Soweto. The Defendant claims to have been shown the plot in 1992 following the allocation and that he has occupied the plot ever since. The plaintiff claims the documents held by the defendant are not genuine and likewise the defendant claims the plaintiff's documents are not genuine.

The court in the premises is faced with a situation where each party is claiming ownership of the suit property and each party is backing their claims with documents that they claim to have been validly issued by the allocating authority the city council. The court does not have the benefit of a ground survey map showing the layout of the plots on the ground. Indeed at this stage it is not possible to determine whether plot No. 3/37A and 3/37 are one and the same plot and/or whether both of them actually exist as separate and distinct plots.

The court is of the view that such a determination can only be made after further investigation by hearing the parties at a full trial where the parties will adduce evidence in support of their respective claims. In the circumstances therefore I am not persuaded that the plaintiff has established a prima facie case with a probability of success to enable the court to grant an order of injunction in the terms sought.

The plaintiff has sought what in my view amounts to a mandatory injunction in that he has sought an order compelling the Defendant to remove and/or demolish the structures that he has put up in the suit property. A court would only be entitled to grant a mandatory injunction in plain and clear cases where there is hardly any doubt as to what the final outcome would be. I am not in the present case able to hold that this is a clear and obvious case and I cannot also say any special circumstances exist that would invite the court to grant a mandatory injunction.

To the contrary the issue of ownership of the suit property is contested and each party is staking claim to ownership on the basis of documents that each party claim to entitle them to ownership. Further inquiry and investigation by the court is called for to enable the court to make a determination and hence this cannot be a suitable case for an order of a mandatory injunction.

Having regard to all the evidence tendered by the parties and the circumstances of this matter the court is of the view that the order that commends itself to enable the ends of justice to be met is that the parties be required to maintain the obtaining status quo where no party will dispose or alienate by way of transfer and/or effect any further developments on the disputed plot until this suit is heard and determined. To facilitate the finalisation of the matter the court directs that the parties make compliance with order 11 of the Civil Procedure Rules within the next 30 days from the date of this ruling and that the suit be fixed for a pretrial conference within 60 days of the date of this ruling.

The costs for this application will be in the cause.

Orders accordingly.

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

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant