



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 285 OF 2012

VIRGINIA NJOKA.....PLAINTIFF

VERSUS

JOEL NATHAN OUMA & ANOTHER.....DEFENDANT

RULING

The Plaintiff's amended notice of motion dated 12th April 2013 inter alia seeks the following orders:-

1. That a temporary injunction do issue to restrain the 1st Defendant by himself, his servants, workmen or agents or otherwise from constructing or continuing to construct any structures on plot **No. B1-202 Kayole** or trespassing on the same or interfering with the quiet and peaceful enjoyment of the same by the Plaintiff pending the hearing and determination of this application or the suit herein or until further orders of the court.
2. A mandatory injunction do issue to compel the 1st Defendant to forth with pull down and remove the said buildings, structures or materials placed on plot **B1-202 Kayole**.
3. That the costs of the application be provided for.

The Plaintiff's application is grounded on the supporting affidavit sworn by the Plaintiff on 23rd May, 2012. The Plaintiff in the supporting affidavit avers that she is the **widow and the administratrix** of the estate of the late **Elias Njage Njoka** who died on 17th February 2004.

It is contended that the deceased was the allottee by the 2nd Defendant of plot No. **B1-202 Kayole**, the suit plot which it is claimed he made an outright purchase for on 18th September 1997 as per letter from the 2nd Defendant annexed and marked "VNI." The Plaintiff claims to have been paying all rates for the plot but avers that she found the 1st Defendant's agents and/or workers illegally constructing a foundation on the piece of land and that the 1st Defendant had been dumping waste on the parcel land (time unspecified). The Plaintiff states she lodged a complaint with the **Housing Development Department** of the 2nd Defendant vide a letter dated 12th April 2012 that there was illegal construction being carried on the plot. That although the **Provincial Administration** directed the 1st Defendant to halt construction he did not do so which prompted the institution of the instant suit.

Both the 1st and 2nd Defendant oppose the Plaintiffs application and have each filed replying affidavits in opposition. The 1st Defendant by a replying affidavit dated 6th June 2012 avers that the suit plot was allocated to him by the 2nd Defendant after payment of all the requisite dues. The 1st Defendant has annexed the plot card for plot No. **B1-202 Kayole** and a statement of account by the 2nd Defendant marked "JNO-1" to "JNO-3. The 1st Defendant contends that to the extent the orders the Plaintiff is seeking through the application are final in nature the same are untenable and not deserved.

The 2nd Defendant after withdrawing the replying affidavits sworn on 31st July 2012 and 30th August 2012 respectively by **Aduma Joshua Owuor, Director Legal Affairs** of the 2nd Defendant filed a replying affidavit sworn on 23rd October 2012 by **Karisa Ila, Director Legal Affairs Department** of the 2nd Defendant. By the replying affidavit the 2nd Defendant avers that one **Elias Njage Njoka** was allocated the suit plot on 2nd July 1992 after the same had been repossessed from one **Pauline N. Kamau** for failure to take possession and /or meet the 2nd Defendant's terms of allocation. The 2nd Defendant avers that the said **Elias Njage Njoka** paid all dues outstanding up to and till 10th August 1992 but then failed to pay the rates and ground rent from 1992 to 1997 leading to the repossession of the plot by the 2nd Defendant. The 2nd Defendant avers that following the repossession of the suit plot from the said **Elias Njage Njoka**, the same was reallocated to the 1st Defendant who paid the outstanding dues and was issued the plot card for **Kayole plot B1-202**.

From the pleadings on record, it is unclear who in fact is the lawful owner of the suit property claimed by both the Plaintiff and the 1st Defendant. The stance taken by the 2nd Defendant who is the allocating authority does not help matters. The replying affidavit by **Karisa Ila** of 23rd October 2012 raises doubts rather than provide answers as it acknowledges the late husband of the Plaintiff had been allocated the suit property in July 1992 but further states that as the said **Elias Njage Njoka** failed to pay the requisite rates and land rent the plot was repossessed and was reallocated to the 1st Defendant. He does not state when this happened and/or whether any notification was issued to the allottee before repossession.

The parties filed written submissions reiterating their stated positions and the issue that stands to be determined is whether on the facts and circumstances of this case the Plaintiff is entitled to the orders of injunction sought at this interlocutory stage. The principles upon which the court will grant an injunction are well settled and were well articulated in the case of **GIELLA –VS-CASSMAN BROWN & CO LTD(1973) EA 358**. A party needs to show that they have a prima facie case with a probability of success; that they stand to suffer irreparable damage that cannot be compensated by an award in damages and that in the event of any doubt in regard to the above two conditions that the balance of convenience having regard to the circumstances of the matter tilts in favour of the applicant.

In view of the doubts created by the 2nd Defendant as regards the purported allocation and repossession and reallocation of the suit plot I am not able to hold that the Plaintiff has established that she has a prima facie case with a probability of success. In my view, this is a matter that would require further interrogation of the parties' evidence by way of oral evidence by the parties at the trial so that the parties are subjected to cross examination to test the credibility of the evidence tendered.

The Plaintiff seeks under prayer(3) of the notice of motion a mandatory injunction that the 1st Defendant be compelled to forth with pull down and remove the building, structures or materials placed on **plot No. B1-202 Kayole**. As observed above, it is doubtful who the true owner of the suit plot is owing to the conflicting claims of ownerships by the Plaintiff and the 1st Defendant. In the face of the disputed ownership of the suit property the court cannot grant a mandatory injunction as sought by the Plaintiff. The standard of proofs required in an application for a mandatory injunction is higher than for a prohibitive injunction and in that regard a mandatory injunction cannot issue in a case like the present one where the facts and issues are in dispute. A court will only grant a mandatory injunction in plain clear and obvious cases where the facts are not disputed or where it is clear that the party against whom the injunction is sought is clearly the wrongdoer.

In the English case **LOCABAIL INTERNATIONAL FINANCE LTD- VS- AGRO EXPORT AND ANOTHER (1986) ALL ER 901** the court set out the principles applicable in cases of mandatory injunction and it stated thus:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory order.”

Our court of Appeal and the courts in Kenya have consistently applied these principles and in the case of **KAMAU MUCUHA –VS- THE RIPPLES LTD [1990-1994] EA 388** the court of Appeal referred to the **LOCABAIL CASE**(supra) with approval with Cockar,JA observing thus:-

“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or influence a decision thereon, I am of the view that the order of the learned judge, granting a prohibitory and mandatory injunctions ought not to be disturbed at this stage.”

The court of Appeal yet again in the case of **KENYA BREWERIES LTD & ANR –VS- WASHINGTON OKEYO (2002) IEA 109** considered the principles that govern the granting of mandatory injunction where they held that the test was correctly stated **I Vol. 24 Hulsburg Laws of England 4th Edition para 948** that provides thus:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing. But in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the Plaintiff, a mandatory injunction will be granted on an interlocutory application.”

Applying the principles upon which a mandatory injunction may be granted to the present case I find that there are no exceptional or special circumstances to propel the grant of a mandatory injunction and neither is the case plain and clear in the light of the disputed ownerships of the suit property and the unclear ownership documents that the parties have tendered. In the circumstances, I decline to grant a mandatory injunction as sought by the Plaintiff.

As I have held that owing to the disputed facts it is not possible at this interlocutory stage to say who the real owner of the suit property is as between the Plaintiff and the 1st Defendant I am of the view that it is necessary and in the interest of justice to conserve the property to await the determination of the suit and in that regard I make an order that the parties maintain the present status quo such that no party shall alienate, dispose, transfer and/or continue with any further construction or development of the plot until the suit is heard and finally determined.

I therefore order the exparte order of injunction granted on 25th May 2012 vacated and in its place make and order for the maintenance of status quo in the terms set out herein above. I further order that the costs of the application shall be in the cause.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 31st day of October 2013

J. M. MUTUNGI

JUDGE

In presence of

.....Plaintiff

.....1st Defendant

.....2nd Defendant