



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND CASE 223 OF 2011

HAROLD GERALRURIGI.....PLAINTIFF

-VERSUS-

1. GETHSEMANE MINISTRY

2. PHILIMA LIMITED

3. CITY COUNCIL NAIROBI.....DEFENDANTS

RULING

Harold Gerald Rurigi hereinafter referred to as the Plaintiff/applicant has filed a Notice of Motion dated the 21st May 2011 under section 3A CPA and Order 40 Rule 1 & 2 and 51 Rule (1) of the CPR. He has sued 3 Defendants namely:- Gethsemane Ministry- 1st Defendant, Philima Limited-2nd Defendant and City Council of Nairobi- 3rd Defendant.

The Plaintiff is seeking the following Orders:-

1. That pending *inter partes* hearing the 1st and 2nd Defendants, their servants and agents be restrained by injunction from undertaking building works upon LR. NO. NAIROBI/BLOCK 107/1/1128,
2. That pending the hearing and determination of this suit, the 1st and 2nd Defendants, their servants and agents be restrained by injunction from undertaking building works upon LR. NO. NAIROBI/BLOCK 107/1/1128.
3. That the cost of this application be in the cause.

The plaintiff has stated the following grounds on the face of the application that;

I. The plaintiff is the bona fide owner of the L.R. no. Nairobi/Block 107/1/1128 situated in the Umoja II/Donholm location in the City of Nairobi.

II. The 1st and 2nd defendants hold fraudulent and illegal Certificate of Lease of a non-existent parcel of land L.R. No. Nairobi/Block 107/1/1128 which they have used to trespass upon and commit acts of waste upon the plaintiff's parcel of land.

III. Notwithstanding complaints made to the 3rd Defendant in its capacity as the Policing Agent under the Physical Planning Act and the Building Code, the 3rd Defendant has failed, neglected

and refused to stop the development under L.R. No. Nairobi/Block 107/1/1128 by issuing a work Stop order or Enforcement Notice.

IV. The development being undertaken by the 1st and 2nd Defendants upon the plaintiffs' parcel of land constitute trespass and acts of waste and subjecting the plaintiff to loss and damage.

The application is supported by the Plaintiff's supporting affidavit dated 21st May 2011. The application was opposed by the defendants. Philema Chamwendo Otiende, a trustee of the 1st Defendant and director of the 2nd Defendant filed a replying affidavit dated 6th July 2011. Parties filed written submissions .

This is the Plaintiff's case in brief; he is the bona fide owner of L.R. NO NAIROBI/BLOCK/107/1/1128 situated at Umoja 11 Donholm. At paragraph 2 and 3 of his affidavit he states how he acquired the plot, that after he took possession of it, he fenced it with a view of developing it; that in 2009 he learnt that someone had in his possession a title for a plot described as NAIROBI/BLOCK 107/1128. Thereafter he wrote to the Land Registrar in Nairobi and through a letter dated 8/10/2009, the Acting Director of Legal Affairs confirmed that he is the legal owner of NAIROBI/BLOCK 107/1/1128 and that there is no double allocation; that in March 2011, he found persons erecting a stone wall around his plot and when he challenged them, they showed him a certificate of lease – 'HGR6' in favour of Gethsemane Ministry, the land in the said certificate is described as NAIROBI/BLOCK/107/1128 which is distinct from his parcel of land Nairobi/ Block/107/1/1128. Later he confirmed from the 3rd Defendant that it had not granted development permission to the owner of L.R NAIROBI/BLOCK107//1128. He stated that has requested the 3rd Defendant to stop the development but the 3rd Defendant has done nothing and therefore in order to preserve the property L.R.Nairobi/Block 170/1/1128 it is necessary to get an order of injunction restraining the 1st and 2nd Defendants from continuing to effect development or the 3rd Defendant to be directed by a mandatory injunction to issue the 1st and 2nd Defendants work stop order or an enforcement notice.

The Respondent filed a replying affidavit dated the 6th July 2011, Notice of Preliminary Objection dated 31/5/2011 and grounds of opposition dated 2/6/2011.

The Respondent's case is that they hold a title for the land parcel number NAIROBI/BLOCK107/1/1128 –see "PCO1" that the Plaintiff has not taken possession of the property and fenced it as alleged. That they have confirmed with the Director of Surveyor that the title by description NAIROBI/BLOCK107/1/1128 does not exist. They have built a perimeter wall in respect of the property namely NAIROBI/BLOCK 107/1/1128 because of individuals who have been trying to occupy the property and subdivide it, that as a result they filed High Court Case No.25/2010 and they were given protective orders on the 9th March 2011. At paragraphs 18 to 21 the respondents states how they acquired the plot.

Parties filed written submissions which I have carefully read and considered. They also highlighted them in court.

On the preliminary objection raised I do agree with the 1st defendant submissions that the 1st defendant is not an incorporated body and cannot be sued in its own name. The provisions of order 30 rule 9 of the CPR cannot apply in this case. On the issue of the affidavits that were file I find that the ones in the court file are properly commissioned, it could be an oversight that the plaintiff served the respondents with those that were commissioned. I therefore find that the proceedings in order.

On the injunctive orders sought I find as follows the plaintiff claims that he owns parcel no. 107/1/1128 and the Defendants claims they own L.R. NO. NAIROBI/BLOCK107/1128. Each claim ownership of the respective parcels of land. From what is submitted it is would appear that the two titles refer different parcels of land. It has not been established that the parcels are one and the same parcel on the ground. This I find can only be established by way of *viva voce* evidence and perhaps a visit to the site.

The plaintiff has a duty now that he is seeking an injunction to prove that;

- i) He has a prima facie case with a probability of success,
- ii) He will suffer irreparable damage in case the orders are not granted
- iii) That the balance of convenience tilts in his favour.

The plaintiff has stated that the parcel of land that he owns is L.R. No. Nairobi/Block 107/1/1128 and not 107/1128. It is evident that he is not in occupation from what the defendant had deponed which has not been challenged by him. In the annexures attached there are two letters the plaintiff relies on that is "HGR4" and "HGR5". HGR4 a letter from the District Land Registrar states that he holds a title of land title no. 107/1/1128 and the defendants 107/1128. In the said letter Mr. Mule was requesting the Director of Legal Affairs to clarify the issue of double allocation. "HGR5" seems to be response to the letter dated the 22nd of July 2001. It refers to Nairobi / Block 107/1128 and states that the plaintiff was allotted the said plot and that there is no issue of double allocation. Parcel no. 107/1128 is not the plaintiff so which one is his plot. His title refers to parcel no. 107/1/1128. Prima facie I find that the plaintiff has failed that the parcel of land that the defendants are occupying is the one that belongs to him. I also find that he has failed to show the irreparable loss he will incur. He failed to rebut the facts deponed by the defendant on what is on the parcel of land now. The balance of convenience does not tilt in the plaintiff. I therefore dismiss the plaintiff's application dated the 21st May 2011 with costs to the defendants.

Dated and delivered this 3rd Day of February 2012

R. OUGO
JUDGE

In the Presence of:-

Mr. Amolo For the Applicant

Mr. Mwaura For the Respondent

Sheila Court Clerk