



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

Environmental & Land Case 606 of 2011

FESTUS MWANIKI LONZIPLAINTIFF

VERSUS

ROSELINE MUTHONI MUBURU..... DEFENDANT

RULING

1. The Plaintiff/applicant hereinafter referred as the applicant has filed a Notice of Motion dated 3/11/2011 brought under Order 40 rules 2, 3 and 9 of the Civil Procedure Rules and under section 3A of the Civil Procedure rule Act, Cap 21 of the Laws of Kenya seeking the following orders;

i. That a temporary injunction be issued restraining the defendant and/or her agent(s) and/or servant(s) and/or employee(s) and/or representative(s) from trespassing, developing, interfering and/or in any other way form dealing with the plaintiff's property known as L. R No. 9042/590 situated in the city of Nairobi pending the hearing and determination of this suit.

ii. That the costs of this application be borne by the defendants.

2. The application is based on the following grounds:

a) That the plaintiff is the registered owner of all that parcel of land known as L.R. No. 9042/590 situated in the city of Nairobi having purchased it from previous owner and grantee, George Ouko Nyakundi.

b) That the defendant has trespassed into the plaintiff's said property and started illegal activities therein, that is, developing it without the plaintiff's consent/authority.

c) That the defendant has exhibited deviance and unwillingness to stop the trespass and interference unless ordered so by this honorable court.

d) That it is in the interest of justice and all fairness that this application be allowed.

3. The applicant filed a supporting affidavit dated the 3rd of November 2011. In brief this is what the applicant depones; that he is the registered owner of land parcel known as L.R No. 9024/590. He purchased the said land from the previous owner and grantee George Ouko Nyakundi on the 28th of February 2011. That the defendant has trespassed into his property and started to develop it and his efforts to stop them has been fruitless and her interference with his property is unlawful and unjustified. That he will suffer prejudice and lose the property if the defendant is not stopped.

4. The defendant/ respondent filed a replying affidavit dated the 16th November 2011 and deponed as follows in brief; that she has been in occupation of the suit premises since the year 2006 and is rightful owner of the property; that the plot was allotted to her by the City Council of Nairobi Plot No. Block 9042/223 Nairobi after she paid City Council of Nairobi the sum of Kshs. 7,400/- the stand premium and ground rent; that she has even applied for the property to be surveyed and for issuance of a beacon certificates and she has paid all the required fees. That she is the rightful owner of the property and has been advised by his advocate that she cannot trespass upon property that rightfully belongs to her. That she has never entered, nor trespassed upon the plaintiffs property number 9042/590; that the plaintiffs property is very different from his and from the plaintiffs annexures it is apparent that he purchased the property in 2011, whereas she has quietly enjoyed use and possession of his property since before 2006. That the plaintiff is confusing the physical location of her property with hers and that this suit has been brought on the basis of the wrong facts as she is rightfully in possession of his property and not the plaintiff's. She prays that the Government Land surveyor be ordered to identify the physical location of the plaintiff's plot since she is rightfully in occupation. That the orders sought herein are unfair, unjust and would amount to unreasonable deprivation to the right of his property contrary to the provisions of the Constitution of Kenya, further the orders sought by the plaintiff will cause her unjustifiable hardship that cannot be compensated by costs if she is ordered cease from trespassing, developing, dealing or interfering with his very own property.

5. In the applicants' supplementary affidavit in response to the defendant's replying affidavit he depones that bought the suit property in vacant possession. It is and has been vacant to date and therefore the defendant is deponing to falsehoods when she states that she has been in occupation of the premises for many years. That the title to the suit property was issued on 11th October 1996 and therefore the property was not available to the city council of Nairobi or at all for allocation in the year 2006 as alleged. That the area where suit property is situated was not city council land but he Government's and the same was granted to various individual by the president of the Republic of Kenya. That further the area where the suit property is situated has not been and is not occupied by squatters and there is no scheme there and therefore any allocation done of such like place to the defendant must be elsewhere and not his property; that he brought a survey map and had it identified by a surveyor in addition to the original (seller) owner showing it to him; that it is the defendant who is confusing the physical location of her plot allocated by the city council under a squatter's scheme and not him.

6. Counsels made oral submissions in Court. I have carefully considered the said submissions together with the affidavits filed by the parties and I find as follows; the applicant seeks injunctive orders against the respondent. For the applicant to succeed he has to show that he fulfilled the principles in the celebrated case of Geilla vs. Cassman Brown E.A 1973, that,

- i) That he has a prima facie case with a probability of success
- ii) That he will suffer irreparable loss/ damage if the injunction is not granted
- iii) That the balance of convince tilts in his favor

The applicant claim is that the suit land is his. To support this he has attached a copy of title that bears his name. The respondent in her affidavit claims she has been occupying plot no. 9042/233 a different number from the applicants plot l.R. 9042/590, since 2006. It is the plaintiff case that the defendant has not been occupation since 2006 and that she recently trespassed into his land. From what is before me it is evident that that plaintiff has a title to plot no. 9042/590. Is this the same plot as the one the defendant claims is hers. The defendant has attached a letter of verification of squatters Tassia/Embakasi Scheme

that states that the committee appointed to verify the squatters recommended that she be regularized on plot No. Block/9042/223. This is a different plot number. This Court did not have the benefit of visiting the site to establish whether the parties are talking of the same plot. The applicant, however depones that he had the surveyor visit the site before he bought it and he has attached the title that shows that plot parcel 9042/590 was issued on the 15th October 1996 and was transferred to him on the 16th of May 2011. Under the provisions of section 23 of the Registration of Titles Act Cap 281 which the applicant's title fall under the applicant has conclusive evidence of proprietorship. Section 23 (1) states that;

“ The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

The applicant has established that he has a prima facie case with a probability of success as he has shown he has a title to the suit property. The defendant has trespassed into the said property. He shall suffer irreparable damages if the respondent continues to develop the plot. I find further that the balance of convenience tilts in favour of the applicant. I therefore grant an injunction against the respondent as prayed in prayer 3 of the application dated 3rd November 2011. Costs of the application shall be borne by the defendant. Orders accordingly.

Dated and delivered this 4th Day of May 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk