



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 115 OF 2012

ROSE N. MBUNZA.....1ST
PLAINTIFF

PATRICK N. MBUNZA.....2ND
PLAINTIFF

VERSUS

FREDRICK NJERU NDUKU.....1ST
DEFENDANT

RULING

1. Rose N. Mbunza and Patrick K. Mbunza are the 1st and 2nd plaintiff respectively. They filed suit against the defendant on the 7/3/12. On the same day they filed a notice of motion dated 7/3/12 which is brought under order 40 rules 1,2 and 4(1) of the Civil Procedure Rules, Section 3A of the Civil procedure Act and all other enabling provisions of the law.

The applicants are seeking the following orders;

- a) That a temporary injunction restraining the defendant, his employee’s servants and or agents from either evicting the plaintiffs, charging, leasing, advertising for sale, offering for sale, selling and or disposing or in any other manner whatsoever interfering with Land Reference Number 209/11022 situated at Imara Daima within Nairobi Area pending the hearing and determination of this suit.
- b) That the OCPD Embakasi Division do ensure compliance of these orders
- c) That the costs of this application be provided for.

The application is grounded on the application of the 2nd plaintiff and the grounds stated on the face of the application that;

- a) At all materials times, the plaintiffs’ are the bonafide and legal owners of all that property known as L.R No. 209/1122 situated at Imara Daima within Nairobi Area (hereinafter referred to as “ the suit property”) by virtue of a letter of allotment dated 7th July 1998.

- b) The plaintiffs vide an agreement dated 18th February 2011 purchased in writing the suit property from Abdulah Jirow Koribisa who was the allottee and owner of the said L.R. No. 209/11022 situated in Embakasi at a sum of Kenya Shillings One Million five Hundred Thousand(Kshs.1,500,000/-
- c) The plaintiffs pursuant to the sale agreement paid a sum of Kenya Shillings One Million One Hundred Thousand (Kshs.1.100,000/-) to Abdulah Jirow Koribisa and immediately took possession of the same where they have been running a church and a music recording studio.
- d) On 1st March 2012, the defendant with hired goons trespassed onto the suit property without any justification whatsoever and caused demolition of part the permanent structures and looted music recording equipment at 2. Am in the morning. The plaintiff's fears that the defendant and his hired goons may come back and demolish the rest of the permanent structures thereby causing loss and damage to the plaintiffs' property.
- e) The plaintiff has made various reports at Embakasi Police Station concerning the malicious destruction of property, trespass and theft or equipment. The police are still conducting their investigations.
- f) The plaintiffs' aver that despite seeking the assistance of the police the defendant may invade the property at ungodly hours thereby causing irreparable loss and damage on the suit property notwithstanding that the plaintiffs are the bona fide and legal owners to that property.
- g) That unless the defendant is restrained from further destruction of the plaintiffs' property the plaintiffs stand to suffer irreparable damage and loss.

2.The application was opposed. Mr. Fredrick Njeru Nduku the defendant herein filed a replying affidavit dated the 27/3/12.

The plaintiffs in their affidavits deponed similar facts. They aver that they are the legal and bonafide owners of L.R No. 209/11022 situated at Imara Daima Nairobi Area. That vide an agreement dated 18/2/11 they purchased the suit property from Abdulah Jirow Koribisa who was the allottee and owner of the suit property for Ksh.1.5 Million. That on the 1/3/12 the defendant trespassed onto the suit property without justification and caused demolition of part of the permanent structures and looted music recording equipment at 2.00am. That they fear that the defendant could return to demolish the permanent structure. They have reported to the police but they seek the Court's assistance as the defendant could invade the property damage the property and cause irreparable loss. They therefore seek the injunctive orders.

The respondent in his affidavit avers that he is the lawfully registered owner of L.R. No. 209/11022 the suit property having bought from Josy Wangechi Munyi who was the first registered and proprietor. That he has a lawful title grant No. 1.R 47695 first registered on the 20th July 1989 and transferred to him on the 8th December 2009. That the plaintiff has an alleged letter of allotment only dated 7/7/1998 which was issued nine (9) year later after his grant was registered. That the said title of allotment is illegal, null and void. That he is in the process of developing his property and that is why he has been removing the squatters and trespassers with the help of police having obtained Court orders of his Curt in ELC 169/2010. FNN2 and FNN3 are copies of orders of the Court issued on the 28th January and 25th November 2011 respectively. That the plaintiff's suit has no merit and should be dismissed

3. Counsel made oral submissions in Court. I have read the affidavits filed by the parties together with the annexed exhibits. The plaintiffs have a duty to show that they have a prima facie case with a probability of success. That they will suffer irreparable damages and if the Court is in doubt then it will decide in (Geilla Vs. Cassman Brown Ltd 1973 E.A).The plaintiffs claim of ownership of the suit property L.R. No. 209/11022 is through the letter of allotment dated 7/7/98 and the agreement signed by them RM2 between themselves and the seller one Abdulah Jirow Koribisa. The defendant avers that he is the legal proprietor having bought the said parcel of land and gotten a lawful title grant No. 1.R.47695 which was

registered on the 20/7/89. It is interesting to note that the plaintiff though they claim to have bought that suit property on the 18/2/11 they have no title. The letter of allotment attached is dated 7/7/98. It is not a title but a letter of allotment where the government on behalf of county council was offering to Abdulah Jirow Koribisa the land L.R. 209/11022. The applicants have not exhibited any title. The defendant has exhibited a title that was issued on the said parcel of land in 1987 on the 1/11/87. Counsel for the plaintiffs alleges that is not genuine. I note that their counsel's allegations of fraud are not pleaded in the plaint nor did the plaintiffs respond to the defendants statements in his affidavit on the said title. The issue here is that the plaintiff has established a prima facie case. I also agree with Mr. Wanyama that the defendant has shown that he has a superior claim over the plot as he has exhibited a title that has not been said to be a forgery, over the same suit property. The title was registered in 1987 and yet the letter of allotment was issued in 1998. I find that the plaintiff on the facts deponed by the defendant and title exhibited which has not been challenged, have failed to show that they have a prima facie case with a probability of success. It appears that the plaintiff was sold a property that belongs to the defendant. Under the Registration of Titles Act Section 23 (1) a certificate of title shall be held as conclusive evidence of proprietorship, that the proprietor of the land is the absolute and indefeasible owner, which the defendant has done in this case. Section 24 deals with issues of fraud. I find that the plaintiff's application has no merit. They have also failed to demonstrate the irreparable loss they will suffer. The balance of convenience tilts in favor of the defendant who has a title over the property. The applications dated the 7/3/12 is therefore dismissed with costs to the defendant.

Orders accordingly.

Dated, signed and delivered this 22nd day of June 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicants

..... For the Respondent

Kabiru

Court Clerk