



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 498 OF 2011

MWANGI GITAU1ST DEFENDANT

VERSUS

EMBAKASI RANCHING COMPANY LIMITED1ST DEFENDANT

JULIA KAMUIRU2ND DEFENDANT

RULING

1. By a Notice of Motion dated the 20/9/2011 the plaintiff/applicant Mwangi Gitau is seeking orders against the 1st Embakasi Ranching Company Limited and 2nd defendant Julia Kamuiru as follows;

- i. That the defendants by themselves their employees or agents be barred by an injunction order for from disposing, transferring, alienating, charging or selling the plot reference number P2524 and P2525 at Embakasi Ranching Co. Ltd till the case is heard and finally disposed off.
- ii. That the officer in charge Ruai Police station do ensure compliance of the orders sought herein.
- iii. That costs be in the cause.

The application is based on the ground that the 2nd defendant is in the process of constructing a stone house or houses on the stated property despite demands.

- i. That the property belongs to the plaintiff after due allocation from the 1st defendant.
- ii. The plaintiff has been a shareholder of the 1st defendant since 1978.

The plaintiff filed a supporting affidavit in support of his application dated the 20/9/2011. He also filed a supporting affidavits by one Joseph Kamau Mbugua dated the 28/10/2011 and Thou Githuku dated 28/10/2011 and a supplementary affidavit dated the 7/12/2011.

The 1st defendant filed a replying affidavit dated the 6/10/11 sworn by Daniel Kimani Mukiri the property manager of the 1st defendant together with a supplementary affidavit sworn by Jack Kamau Wachie a surveyor working with Embakasi Ranching Company Ltd the 1st defendant.

The 2nd defendant filed a replying affidavit dated 3/10/11 plus a further affidavit dated the 18/11/11.

2. I have read all the affidavits filed together with annexures attached to the said affidavits. The plaintiff/applicant avers as follows; in the year 1970 he joined the 1st defendant company and purchased 2 acres that transacted 2 plots No. P2524 and P2525. He was also issued with a share certificate No. 7614 and a letter of allocation. The 1st defendant representative one Mr. Samuel took him to the ground and physically showed him the plots and he fenced them. That on the 20/8/11 the 2nd defendant pulled down his fence and began constructing on the said plots. On the 23/8/11 he raised the matter with the 1st defendant and he was advised to pay for the site visit for the surveyor to confirm the allegation. The surveyor did confirm the allegations and wrote his comments at the back of the receipt. The comments were confirmed on Map 6NW. Thereafter he filed a formal complaint with the 1st defendant on the 1st of September 2011. The 2nd defendant could not give a satisfactory answer and from there he lodged a complaint at Ruai Police Station where he learnt that the 2nd defendant had bought the suit plots for the 1st defendant. The plaintiff avers further that the plots No. P2524 and P2525 were described in the share certificate as C1407 and C1408 and Map 'C' includes the plot allocated in the geographical area where the 2nd defendant is currently occupying and that the plots in Map 6NW being P2524B and D2525B are bonus plots which were allocated to him in 1993 upon payment of the bonus fees. That they were in a different location from the original site. That the 2nd defendant's plots do not belong to the geographical area of Map 'C' as the plots therein were allocated to initial shareholders and not purchasers. That the purported purchase by the 2nd defendant must be through fraud as she is not the original shareholder yet the plot is located where only original shareholders got plots and he was not consulted when the transfer was effected. That there is collusion by the defendants to deprive him of his rightful plots since the area is in a prime area.

3. The affidavits of Joseph Kamau Mbugua and Thuo Githuku both state that they were present when land P2524 and P2525 were allocated to the plaintiff by the 1st defendant surveyor Mr. Mahindi. They are both original shareholders. That they can point out the location of the suit plots, that they believe that a new person 2nd defendant being one such person cannot acquire a parcel of land from that of the defendant within the area since all the surrounding land were disposed off and allocated to the original shareholders individually. That the 2nd defendant ownership of the suit plots is false and misleading since the same was allocated to the plaintiff and the 2nd defendant's claim to have acquired the land in 2005 is false and is meant to disentitle the plaintiff his rightful share.

4. Mr. Daniel. K. Mukiri the 1st defendant's property manager averred that the 1st defendant is the registered owner of the L.R No. 10904/2 which was subdivided into ¼ plots and were offered to the public for sale. That the plaintiff and the 2nd defendants are shareholders by virtue of 2 shares each being share certificate 7614 for plaintiff and share certificates No. 009072 and 009073 for the 2nd defendant. That from the back of the plaintiffs share certificate the plaintiff was allocated plots No. P2524 and P2525 on Map 6NW and the 2nd defendant was allocated 2 plots being plots No. V4223 and V4224 also known as plot No. 40 and 41 Map 227 119 in the year 2005. That the said plots were located at different locations of not less than 3kilometers apart and the allocations were done by different surveyors as the 1st defendants plots were subdivided into blocks of 500 Plots. That the plaintiff did not show evidence of payment for the bonus plots, and that the plaintiff's claim that he fenced the suit plots in 1993 is not true as there was bush and uninhabited. That the plaintiff made a complaint the 2nd defendant was called and the parties share certificate were examined and they confirmed that the 2nd defendant was the rightfully developing her plots being plots No. V4223 and V4224 situated in Map 227/9. That the plaintiff was told to pay 5000/- to be shown his plot and at a site visit of 8/9/11 the surveyor Mr. Kanotha identified the plaintiffs plots on Map 6 NW as shown in the plaintiff's receipt dated 23/8/11. That there has been no

collusion to illegally allocated the plots to the 2nd defendant and that if the plaintiff is entitled to the plots which they deny the 1st defendant is willing to allocate the plaintiff other plots. Mr. Jack Kamau Wachira a surveyor working with the 1st defendant avert that he allocated the 2nd defendant plot no. V4223 and V4224 also known as plots No. 40 and 41 on Map 227/9 in the year 2005 which is also known as map C Nyika area. At that time of the said allocation the said area had been subdivided and was full of sisal plants and was bushy. That the plaintiff has failed to submit evidence of allocation. That the plaintiff's share certificates and the allotment letter confirm that the plaintiff was allocated plots No. P2524 and P2525 on Map 6NW an area different from the 2nd defendant's plots.

5. The 2nd defendant averred as follows: she is a shareholder with the 1st defendant and holds a share certificate No. 009072 and 009073 which she purchased on about the 30/7/05 for 6400/- each. That by virtue of the said share certificates she was allocated plots No. V4223 and V4224 also known as plots No. 40 and 41 Map 227/9 in December 2005. Her plots were pointed out by the 1st defendant's agent Mr. Baraza and were signed by the 2nd defendant surveyor Jack Kamau. That the plaintiff's plots are No. P2524 and P2525 on Map 6NW. That she has cultivated her plots since 2005. That she cleared the bush and sisal plants and planted trees. That the plaintiff cut down the said trees and she reported the plaintiff's invasion to the police at Ruai Police on the 29/8/11. That she has been in active occupation of the plots for the last six years and has constructed a site house, toilet and is in the process of constructing permanent house. That she was called to the 1st defendant's office over the said plots and the 1st defendant confirmed the plots are hers. That she has looked at some of the plaintiff's annexures "MG-1" at the back which clearly states 'to be allocated' dated 20/09/2005 while the second one reads "new allocation dated 4/08/2011 all which confirm that the plaintiff seems to have had problems with his allocation since the year 2005 and is now attempting to covert his plots. The 2nd defendant denied the averments made by Mr. Joseph Kamau Mbugua and Thuo Githuku.

6. Counsels for the parties filed written submissions which I have read and considered together with the affidavits attached and the annexures. The plaintiff cited two cases ***Civil Case No. 14 of 2006 (OS) David Muturi Migwi Vs. Sally Jemeli Korir and another***, where an injunction was granted on the basis that the applicant was the 1st registered owner and held an indefeasible title which was not challenged under section 27(a) of the Registered of Lands Act Cap 300 and ***Civil Suit No. 37 of 2006 Alexander Ngabu Muthee Vs. Esther Muthoni***, where an injunction was granted to the applicant in view of the developments and long occupation and damages were not adequate remedy. The balance of convenience in that said case tilted in favour of the applicant. There is no dispute that the plaintiff's plots are number No. P2524 and P2525 and the defendant's plots are number V4223 and V4224. The issue is whether the plaintiff has established a prima facie case to warrant the injunction sought. Each of the parties have exhibited documents which was given to them by the 1st defendant. The 1st defendant is the best placed party having owned the land previously to know who owns each plots as it also did the allocations. From the affidavits filed by the 1st defendant, it is evident that after the plaintiff paid for his two plots he was allocated plot No. P2524 and P2525 which the 1st defendant claims it is at different location from the 2nd defendant. What is not clear from the plaintiff's case is on what he claims to the bonus plots for his own receipt show that after the survey was done on the 23rd August 2011 the surveyor confirmed that his plots were on Map 6NW. It appears from what is before that the plaintiff did not know the actual location of his plot and had to be shown after he paid for the site visit. The 2nd defendant's averments that she is in possession of her rightful plots is supported by the averments of the 1st defendant property manager and the surveyor. I find that the plaintiff has failed to establish a prima facie case with the probability of success (*Geilla Vs. Cassman Brown LTD 1973 E.A.*). The 2nd defendant is in occupation and has been for quite some time since 2005 and has had no interference since then. The plaintiff has also failed to establish the irreparable loss he will suffer as he has been shown plots that are his within the area. The 1st defendant has also averred that they are ready to compensate him if need be with a different allocation within the area. The balance of convenience tilts in favor of the 2nd defendant who is in possession and occupation. The issues of fraud and collusion that are alleged by the plaintiff can only be determined at a full hearing. I find no merit in the application dated 20th September 2011 and dismiss it with costs to the defendants.

Orders accordingly.

Dated, signed and delivered this 20th day of June 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the 1st Respondent

..... For the 2nd Respondent

..... Court Clerk