



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 737 of 2011

DIPHATHA MAINA MBUIPLAINTIFF/APPLICANT

VERSUS

DIANA MUTHONI WAKABA1ST DEFENDANT

NJOROGE WAKABA2ND DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED.....3RD DEFENDANT

RULING

1. Diphatha Maina Mbui the plaintiff/applicant hereinafter referred to as the applicant has filed a Notice of Motion dated 21st December 2011. It is brought under section 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40 rules 1&2, Order 51 rule 1 of the Civil procedure rules 2010 and all other enabling provisions of law seeking the following orders

1. That pending the inter-partes hearing and determination of this suit, the defendants/respondents either by themselves, their agents, servants or in any manner however be restrained from constructing on, trespassing and/or interfering with the plaintiff's quiet possession, occupation, enjoyment, ownership, legal, contractual and equitable rights and interest on all that parcels of land known as Plot No. P 5198 and Plot No. P5198B.

2. That the costs of this application be paid by the defendants/respondents.

The application is based on the following grounds;-

a) The plaintiff is under the 3rd defendant's records the proprietor and/or beneficial to all that parcels of

land known as plot No. 5198 and Plot No. P5198 B(the Plots)

b) The plaintiff avers that 2007 to date his occupation, use and enjoyment for the plots has been peaceful until on or about 17th December 2011 when the 1st and 2nd defendants accompanied by their agents, servants and hirelings descended on the plots and started to demolish the plaintiff's structures thereon and putting up a different perimeter wall thereon.

c) The plaintiff avers that upon seeking to restrain and stop the 1st and 2nd defendants who claimed that he was not the owner of the plots despite the foregoing.

d) The 1st & 2nd defendant further claimed that they owned the plots, however when they were summoned by the police who had to intervene to preserve law and order they did not produce any ownership documents.

e) Unless the defendants are restrained the plaintiff who has a prima facie case will suffer irreparable loss whilst the defendants will suffer no prejudice as the plaintiff has fulfilled all his obligations to purchase the plots.

The application is supported by the affidavits of Diphatha Maina Mbui dated 21st December 201 and 9th March 2012 and the affidavit of Teri Gina Walker filed on the 9th March 2012. The application was opposed by the 1st and 2nd respondent. Diana Muthoni Wakaba 1st defendant filed a replying affidavit dated 9/3/2012.

2. I have read the affidavits filed by the parties, this is the applicant's case in brief; he acquired the plots No. P5198 and Plot No. P5198B pursuant to a sale agreement and transfer of shares duly entered into between him and Terry Gina Walker on 13th November 2007, that he is under the 3rd defendant's records the proprietor and beneficial to all that parcels of land. He acquired the plots upon the 3rd defendant warranting and assuring him that the said Terry Gina Walker from whom he bought the plots was the bona fide beneficial owner and proprietor of the plots and thereafter he fulfilled all his obligations and made all the requisite payments upon which the 3rd defendant noted him as the owner of the plots and issued to him certificate No. 2046 being the plot ownership certificate. He has been in peaceful occupation of the plots until on or about 17th December 2011 when the 1st and 2nd defendants accompanied by their agents, descended on the plots and started to demolish his structures thereon and putting up a different perimeter wall thereon, that upon seeking to stop destruction of his property he was confronted by the 1st & 2nd defendants who claimed that they were the owners of the plots. The 1st & 2nd defendant further claimed that they owned the plots, however when they were summoned by the police who had to intervene to preserve law and order they did not produce any ownership documents. That the 3rd defendant confirmed that their records and ownership records it is only his name which appears and thus he is the owner of the plots. That despite his legal and equitable interest to enter into possession and develop, obtain title documents to the plots, the defendants have engaged in actions and in actions of dispossessing and disenfranchising him of the plots. That under the terms of the Sale Agreement and the Share certificate the 3rd defendant is under legal, equitable and contractual obligation to oversee and procure issue of title deed to him as the owner and proprietor of the plot. That the 1st and 2nd defendants trespass on the plots and actions of destruction of his property thereon has occasioned to him loss, damages and a deprivation of use and quiet enjoyment of the plots.

3. Terry Gina Walker in her affidavits she states as follows, she had acquired the plots vide transmission upon the death of her son George Kipkoech Walker who died in 1991, that her son had a share certificate no 8707 which he dealt with to make additional payments which were all receipted, that she discovered that there was double allocation for the initial plot which led to her being allocated alternative plots which were free and never allocated previously and the allocation for the plots was accompanied with a bonus allocation, for which she paid purchase price for bonus share. That from the date of the allocation neither the defendants nor anyone else claimed to own the plots. That after sometime she decided to sell the plots to the plaintiff.

Diana Muthoni Wakaba the 2nd defendant deponed as follows in her replying affidavit, that the 2nd defendant is her son and he is the original owner of plot number P5198 and P51988, that the plaintiff's affidavit contains falsehoods as she has enjoyed quiet possession of the suit property until 14th January 2012 when the plaintiff demolished perimeter wall on her plots. That she is informed the police and the plaintiff were arrested and charged for causing malicious damage to her plot in Criminal Case number 311 of 2012 and it is then that she realized the existence of this civil matter as no papers had been served upon her. That she recalls in the year 2009 the plaintiff with the assistance of the D.O and chief Ruai location visited the suit premises and informed her that her property had been sold to one Mr. Maina, and she instructed her advocates M/s Perez Odero & Co. Advocates to pursue the matter and demand letter was written to them. That the plaintiff has never been on the plots since 1978 when she was allocated the plots.

4. Counsels made oral submissions in Court. I have carefully considered them together with their affidavits and annexures attached. The plaintiff and the 1st and 2nd respondent each claim ownership of the suit plots number P5198 and P5198B. According to the plaintiff he has been in occupation after purchasing the plots in 2007. His claim of proof of the purchase of the suit plots is supported by Terry Gina Walker's affidavit. According to the 1st defendant they have been in occupation, they put up a perimeter wall and the same was demolished by the plaintiff who was later charged. The plaintiff explained in his further affidavit the circumstances that lead to this arrest. Each party in this suit has filed documents which they claim came from the 3rd defendant the land buying company who was selling the said plots. Although Embakasi Ranching Company Limited is the 3rd defendant/respondent in this suit, there was no affidavit from its officials to shed light on the document attached by the parties which each has used to claim ownership. It is hard to tell who was allotted these plots originally, whether the documents attached came from the 3rd defendant and how they were allotted to the parties. The plaintiff has a duty to establish the following, that he has a prima facie case with a probability of success, that he will suffer irreparable loss if the orders are not granted (*Geilla vs. Cassman Brown Limited EA. 1973*). If the Court is in doubt it will decide the case on a balance of convenience. As already stated it is hard to tell to whom these plots were allotted in the absence of an affidavit from the 3rd defendant the original owner. The plaintiff is in occupation for now. I note that the issue of ownership of the two plots can only be determined at a full hearing. On a balance of convenience I find that the order is necessary to help maintain the status quo before the suit is heard and determined. I therefore order that the plaintiff/applicant shall remain in occupation pending hearing and determination of this suit. The plaintiff nor the defendant nor their agents or servant shall do nothing detrimental to, construct or dispose of the two plots P5198 and P5198B. The parties shall comply with the provisions of order 11 of the CPR within 45 days and fix the matter for hearing once it is ready for hearing. The suit to be fixed for hearing within the year. Since I have allowed the plaintiff to remain in occupation the plaintiff shall give an undertaking as to damages forthwith. Cost of this application shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 13th day of June 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondents

..... Court Clerk