



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Environmental & Land Case 610 of 2011

THE PUBLIC TRUSTEEPLAINTIFF

(Suing as the administrator of the Estate of JACOB MANJICHI OMBONYA (DECEASED))

- VERSUS -

NICHOLAS KABUCHO MURIMI DEFENDANT

RULING

1. I have before me the plaintiff's notice of motion dated 4th November 2011. The plaintiff prays for an interlocutory injunction to restrain the defendant from trespassing upon, wasting alienating or dealing with a property known as Plot Q, Shauri Moyo, Nairobi. The application is expressed to be brought under order 40 of the Civil Procedure Rules 2010. There are annexed two affidavits sworn by Tom Ombori sworn on 24th October 2011 and 10th February 2012.

2. In a nutshell, the plaintiff avers that the property was bought by Jacob Manjichi Ombonya, now deceased. The property appears in the schedule of properties in the confirmed grant of letters of representation to the estate of the deceased. The plaintiff, as the administrator, avers that the defendant has trespassed onto the property, carried some developments and continues in illegal possession. The plaintiff avers that unless an injunction is granted, the estate will suffer irreparable harm.

3. The motion is contested by the defendant. The defendant avers that there have been previous proceedings between the parties. In those proceedings the suit property was not well identified. There was reference to "plot No Shauri Moyo shopping centre measuring 0.062 ha" or to a plot numbered "P & Q". The prayers now sought relate to a plot known as "Q" creating doubt on the true identity of the suit property. In any event, the defendant contends that he has developed a 5 storey building on the suit land as per the photographs exhibited in the replying affidavit sworn on 22nd November 2011. Accordingly, the defendant submitted that the prayers sought have been overtaken by events.

4. I have heard the rival arguments. The public trustee has brought these proceedings as the administrator of the estate of the deceased. When the plaintiff approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a

probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

5. The genesis of the plaintiff's claim is an agreement for lease marked "PT 1". That is a lease issued by the city council of Nairobi to one Thomas L. Mulamula for land known as "Shauri Moyo shopping centre" for the consideration of Kshs 36,360 and for a term of 99 years. At clause 1 on page 2 of that lease, the property is again identified as "Shauri Moyo shopping centre containing by measurement 0.062 of a hectare and Numbered P &" There is then an assignment of that lease annexed and marked "PT 2" from Thomas L. Mulamula to Jacob Ombonya (deceased) dated 16th June 1996 for "plot numbers P and Q" Shauri Moyo shopping centre for the consideration of Kshs 120,000. The identification of the suit land is not thus clear. I have also seen from the replying affidavit two different copies of the certificate of confirmation of grant. One is dated 4th November 2004 and does not include the suit property. The other one is dated 21st January 2011 and refers to "plot No Shauri Moyo shopping centre measuring 0.062 ha whole in trust for beneficiaries". It does not identify the plot by any number or letter. There is also a 3rd certificate of confirmation of grant that lists plot "P & Q" in the schedule and dated 19th December 2011 annexed to the supplementary affidavit of Tom Momanyi sworn on 10th February 2012. This was obtained after filing of the suit. That is critical because the administrator of the estate is proceeding upon powers bestowed by the grant. The explanation may be partly found in the 3rd certificate of confirmation of grant dated 19th December 2011. It was meant to rectify the grant to specify plot "P & Q" Shauri Moyo. But it is extracted as an ordinary certificate of confirmation with no reference to the rectification. The net effect is that there are now 3 certificates of confirmation of grant and the attendant confusion.

6. On the other hand, the defendant claims he bought the plot known as "Q" for Kshs 900,000 on 21st November 2007 from one Susan Waithira Mbugua. A sale agreement is exhibited marked "NKM 3". On the same day, the city council transferred the allotment letter dated 18th November 1993 in favour of the vendor to the defendant. Annexure "NKM 4" is a copy of the letter of allotment and payment of Kshs 57,000 to the city council. The local authority approved building plans and the defendant has put up a 5 storey commercial building on plot "Q" as per annexures and photographs marked "NKM 6". The defendant thus asserts ownership and denies encroaching upon or trespassing on the plaintiff's property.

7. I also note that there is duplicity in this cause of action. Annexure "NKM 1" shows other proceedings in HCCC 523 of 2010 Hilary Ombonya as administrator of the estate of Jacob Manjichi Ombonya Vs Mr. Murimi. It is not clear why there are two administrators to the estate. The plaintiff in that suit and the public trustees in this one and which fact is not borne out by the confirmed grant. But that is another matter. From the annexed plaint, that suit relates to plot "P & Q" Shauri Moyo Nairobi. That is the same property in this suit. The plaintiff has neither controverted that fact nor offered an explanation of the status of that suit. The defendant in that suit is said to be Mr. Murimi. That is the only name given for the defendant there. I do note that the present defendant is Nicholas Kabucho Murimi. It is not clear whether it is the same defendant. In the circumstances, the present suit offends the clear provisions of section 6 of the Civil Procedure Act. The plaint here does not even acknowledge the existence or pendency of such proceedings in violation of the declarations required by order 4 rule 1 (1) (f) and (2) of the Civil Procedure Rules. All this does not augur well in the eyes of equity for the plaintiff who seeks a discretionary remedy.

8. Granted those circumstances I find that the plaintiff has not established a strong *prima facie* case with a probability of success. In view of the construction of the 5 storey commercial building by the defendant, the order of injunction to restrain the defendant from building, wasting, trespassing or dealing with the property has been overtaken by events. I am not saying that the defendant owns the property or that the plaintiff does not own it. Those will be matters within the province of the trial court on tested evidence. I am saying that at this interlocutory stage, the plaintiff has not shown, by cogent and unequivocal evidence, that the estate of the deceased is entitled to the plot number "Q". And I am of the view that the

court cannot grant orders in vain in the face of the development by the defendant of the commercial building on the plot.

9. For the same reason, I am of the opinion that the value of plot “Q” is ascertainable. In the final analysis, and if the plaintiff prevails at the trial, he can be compensated in damages. Certainly, the defendant, who has developed the plot would be in a position to meet those damages. I have not seen any evidence in rebuttal of that proposition.

10. Even if I were to be in doubt, and I am not, of the failure by the plaintiff to meet the threshold of the first two principles of *Giella's* case, I am of the view that the balance of convenience tilts in favour of the defendant. The defendant is in possession. He has put up a 5 storey commercial property. The claim by the plaintiff is not clear cut. It seems then clear to me that even the balance of convenience tilts more towards the rights of the defendant at this stage. And, finally, I found duplicity in the cause of action offending section 6 of the Civil Procedure Act.

11. For all the above reasons I order that the plaintiff's notice of motion dated 4th November 2011 be and is hereby dismissed. As the public trustee is acting in a fiduciary capacity of administrator to the estate of the deceased, I shall not make any order on costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 5th day of June 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Ingutya for the Plaintiff.

Mr. Wachira Nderitu for the Defendant.