



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Environmental & Land Case 137 of 2012

TERESIA KAGURE
KAGITI.....PLAINTIFF

VERSUS

PETER MUTUA
MUSEE.....DEFENDANT

RULING

The plaintiff/applicant hereinafter referred to as the applicant has filed a Notice of Motion 20/3/2012 under order 40 rules 1,2,3 of the Civil Procedure Rules and Section 3A of the Civil procedure Act and all other enabling provisions of the law, seeking the following orders

- i. That a temporary injunction do issue restraining the defendant by himself or by his agents and or servants or howsoever from subdividing, selling and/or interfering with possession of Title No. Nairobi/Block 113/99 in any way until the hearing and determination of this suit.
- ii. That the costs of this application be provided for.

The application is based on the following grounds

- a) The defendant on the 16th day of January 2012 wrote to the plaintiff giving her notice to give vacant possession of title No. Nairobi/Block 113/98 which alleges the plaintiff occupies contrary to the averments of the plaintiff that she only occupies her plot being Title No. Nairobi/block 113/99.
- b) The respondent /defendant has also issued the plaintiffs tenants with oral vacation notices alleging they occupy Title No.Nairobi/Block 113/98 and even hired a surveyor to subdivide Title No. Nairobi/Block 113/99 alleging half of it belongs to the defendant.
- c) The plaintiff stands to suffer irreparable harm should the orders sought not be granted.

d) The plaintiff is ready to abide by any condition that this Honourable Court may impose upon granting the orders sought herein.

e) No prejudice shall be occasioned upon the defendant should the orders sought herein be granted.

The applicant file a supporting affidavit dated the 20/3/2012 and depones as follows in brief; She is the owner of Title No. Nairobi/Block 113/99. That on or about 1977 being a member/shareholder and one of the officials of Lucky Summer Estate Limited she bought one share and against that share she was allocated a plot number 99 by way of balloting containing by measurement 80X60 feet and subsequently she paid a purchase price of Kshs. 10,000/- for the said plot. That having been allocated such plot, she immediately proceeded to occupy the said property and thereafter developed the same by erecting both permanent and semi permanent structures thereon. That on or about 15th August 200, the Commissioner of land ratified her allocation after she formally applied that the demise plot be registered in her name. That subsequently on the 14th November 2000 she was issued with a certificate of lease of Title No. Nairobi/Block 113/09. That on or about the 9th day of January 2012, the defendant wrote a letter to her alleging that she was wrongfully occupying his land. That the defendant after issuing her with the notice has issued verbal vacation notices to my tenants and further hired the services of a surveyor who came and indicated that half of her Title No. Nairobi/Block 113/99 was the purported Title No. Nairobi/Block 113/98. That despite pleading with the defendant to stop trespassing and/or interfering with her peaceful enjoyment/stay in Title No. Nairobi/Block 113/99 the defendant has persisted in the said trespass and continues to intimidate her with eviction. That she has suffered loss and damage as her tenants are threatening to give vacant possession unless situation is corrected and she fears of eviction at any time.

The respondent filed grounds of objection dated 16/4/2012 as follows;

a) That the plaintiff/applicant has under section 27(b) and 28 of the Registered Land Act Chapter 300 Laws of Kenya has no legal interest in Title No. Nairobi/ Block 113/98 and neither can the defendant's interest in the said title No. Nairobi/Block 113/98 be defeated in view of the said provisions of the law.

b) The plaintiff's application is unmeritorious filed in Court as an afterthought and in bad faith, misconceived, incompetent, frivolous & vexatious and is an abuse of the process of the Court.

c) The defendant/respondent has no interest whatsoever in Title No. Nairobi/Block 113/99 registered in the name of Plaintiff/applicant.

d) That save that Title No. Nairobi/Block 113/98 & title No. Nairobi/Block 113/99 are adjacent the two (2) are separate properties with different certificate of lease.

e) The plaintiff there is no allegation or any evidence of fraud that has been annexed in the application against the defendant/respondent in the matter of acquisition of Title No. Nairobi/Block 13/98.

f) The plaintiff/applicant has not established a prima facie to warrant the exercise of the Court's discretion in favour of the plaintiff/applicant.

g) The plaintiff did not suffer any loss or damage as the defendant/respondent has not interfered with the plaintiff's title No. Nairobi/Block 113/99 and does not intend to interfere with it in any manner.

Peter Mutua Musee the respondent filed a replying affidavit dated 16/4/2012. He depones as follows in brief; That he has no interest in the plot known as Nairobi/Block 113/99 registered in the name of plaintiff/applicant. That he is the registered owner of the property known as Nairobi/Block 113/98 which he acquired through a sale from its previous registered owner Peter Mugambi Muchee in the year 2011. That he is aware that Nairobi/Block 113/3 to Nairobi/Block 113/525 belongs to Lucy Summer Estate Company Limited a land buying company in which he was a shareholder and Director Vice Chairman and the plaintiff was also a shareholder. That plot No. Nairobi/Block 113/98 was originally allocated to one Shaphan Wachira Maina of P O box 322 Webuye and the same has never been the property of the plaintiff/Applicant. That accordingly that it is not true that Nairobi/Block 113/98 was at any time

allocated to plaintiff/applicant nor she allocated any other plot other than Nairobi/Block 113/99. That the original allottee for the plot No. Nairobi/Block 113/98 the said Shaphan Wachira Maina transferred the plot to one Rose Wangari Marwanga of P O Box 48231 Nairobi and in 1999 the said Rose Wangari Marwanga transferred the plot to Peter Mugambi Muchee who in turn transferred the said property to him in the year 2011. That under section 27(b) & section 28 of the Registered Land Act Cap 300 his interest in Title No. Nairobi/Block 113/98 cannot be defeated in the manner pleaded in the plaintiff's application and in the plaint filed in Court as he acquired title No. Nairobi/Block 113/98 for valuable consideration. That there is no fraud pleaded against him, the previous owners of the said property or any fraud as against the allocating company Lucky Summer Estate Company Limited. That he is also aware that the immediately previous owner Peter Mugambi Muchee on 6th September 2011 through his advocate on record wrote to the plaintiff/applicant informing her that the L.R. No. Nairobi/Block 113/98 was in the process of being sold to himself. Further his advocate on record on 9th January 2012 wrote to the plaintiff/applicant on his behalf requiring the plaintiff/applicant to vacate from the plot by 31st January 2012. That accordingly as early as September 2011 the plaintiff/applicant was aware of his interest in Nairobi/Block 113/98 and she did not oppose the transaction despite her being aware of the impending sale of the property to himself. In the month of January & February, 2012 the plaintiff/applicant had offered to buy the said Nairobi/Block 113/98 from him but she did not pursue the proposed sale. That accordingly the plaintiff/applicant has no interest in Nairobi/Block 113/98 capable of being protected by order of injunction by this Honourable Court and the balance of convenience is not in her favour and the application should be dismissed with costs.

Counsels made oral submissions on this application. In an application for injunction an applicant is required to prove that he has a prima facie case with a probability of success, that he will suffer irreparable loss and lastly if the court is in doubt it will decide the case on a probability of success-Geilla vs. Cassaman Brown E.A 1973. There is no dispute that the plaintiff is the owner of plot no. 113/99 and the defendant plot no. 113/98. The plaintiff claims to be in occupation of the said suit plot since 1977. Her counsel submitted that the issue between the parties is one of boundaries and that the evidence of a surveyor is required and that can only be done at a full hearing. The plaintiff sought the prayers in her application so that she is not disposed.

The respondent counsel argued that the injunction application is in relation to plot No. 113/99 of which the plaintiff is the owner. That the defendant has explained in his affidavit how he came into possession of his plot, that in the plaint filed there is no issue of fraud, corruption, or un-procedural acquisition raised on the defendant's part or Lucky Company who sold the plots to them. That under sections 27 of the repealed RLA Cap. 300 now section 24 (b) in the new Land Registration Act (LRA) their clients interest cannot be defeated. That on the issue of boundary disputes there is none and if there is any then section 21 of the repealed RLA Cap. 300 and now section 19 of the new Land Registration Act takes care of that as it gives the procedure on how a boundary dispute should be dealt with. That the applicant application has no merit as the applicant was informed of their intentions as early as September 2011. I have already stated the principles the plaintiff has to prove. From what is before it is clear that the defendant has no interest in plot 99. From the letters attached dated the 6th September 2011 and 9th January 2012 the applicant was being made aware by the defendant of his intentions to dispose of Block 113/98, having been given a notice to vacate plot 98.

The issue is not of boundaries but it's apparent that the applicant is in a plot that is not hers. The respondent has an indefeasible title as provided in the new Land Registration Act, section 26 and his title is absolute. The applicant choose not to respond to the letters attached.

I find that the applicant has failed to establish a prima facie case with a probability of success. The respondent is not interfering with possession of her title no. Nairobi/Block/113/99. She has failed to show the irreparable loss she will suffer. The balance of convenience tilts in favour of the respondent. I find no merit in the application dated the 20th March 2012 and I dismiss with costs to the respondent.

Orders accordingly.

Dated, signed and delivered this 26th day of July 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the plaintiffs
..... For the defendants
..... Court Clerk