



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Environmental & Land Case 124 of 2010

ROBERT KENNEDY OTIENO.....PLAINTIFF

VERSUS

PAUL OTIENDE1ST DEFENDANT

HARRY KABECHE.....2ND DEFENDANT

RULING

1. Robert Kennedy Otieno is the plaintiff in this suit. The defendants are Paul Otiende, the 1st defendant and Harry Kabeche is the 2nd defendant. The plaintiff has filed suit against the defendants through a plaint dated the 9/3/12. In the said plaint filed in Court on the 13/3/12 the plaintiff is seeking orders for vacant possession, permanent injunction, a mandatory injunction and order for general damages for trespass. Simultaneous with the plaint the plaintiff filed a Notice of Motion dated 9/3/12. The application is brought under order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rule, Section 3A, and 63(e) of the Civil Procedure Act seeking the following orders.

i. That the Court issues an order of injunction restraining the defendants whether by themselves, their servants, agents employees or anybody claiming under them or otherwise howsoever from constructing or trespassing on the plaintiff's property being L.R No. Nairobi/Block/162/1245 situate in Kibera Nairobi pending the hearing and final determination of the suit.

ii. That an order of mandatory injunction do issue directing the defendants jointly and severally to remove the illegal mabati structures That they have unlawfully constructed on the suit property within 21 days of the order failing to which the plaintiff be at liberty to remove them at the defendants costs.

iii. That the OCS, Langata police station or officers deputed by him do supervise the demolition and/or removal of the said illegal structures to ensure public pace and order

iv. That the costs of this application be provided for.

The application is premised on seven (7) grounds stated on the face of the application. The plaintiff/applicant filed a supporting affidavit dated the 9/3/12 plus a supplementary affidavit dated the

9/5/12.

In brief this is what the plaintiff depones in support of his application; he is the proprietor of L.R Nairobi/Block/62/1245 which he brought from Andrew Masinde Wanjala in February 2010 for 650,000/-. That in the month of February 2012 the defendants entered his property, have taken possession of it, trespassed, they have constructed same mabati, shanties on his plot and they have intentions of remaining there unless restrained. That the structures are a nuisance and they should be removed.

2. The plaintiff avers that the defendants' illegal conduct has denied him a chance to develop the suit property and he has lost and continues to lose on a daily basis valuable investment opportunity. On the defendants allegations that he has blocked a passage to their plots the plaintiff states that the suit land is private land and has been so, that he owns the property and that he has never tried to protect his property unlawful as alleged that he took a group of 40 youths who demolished the Mabati Structure.

3. The 1st Respondent filed a replying affidavit in which he gives a background that the plaintiff's suit property is adjacent to his house unit 54 at Fort Jesus in Kibera. That their plot has 6 houses and the plot the suit property is on space between the 4 plots 52, 53, 54 and 72 and it acts as an access entry point to the said units. That in January 2010 when the previous owner Andrew Wanjala attempted to construct in the said plot, they wrote to the D.C and later City Council issued enforcement notice to him and he did not build. That in February 2012 the other person went for the plot too and started to construct, the residents complained again to City Council and they were assured that the applicant would be served with an enforcement notice. The 1st defendant averred that he did not construct the mabati structure that the plot the suit land is the main sewage line and the main water pipe and is also an access to the 4 units. That he is a tenant and he has no interest in the ownership of the said land nor has he taken possession. Lastly he claims that the plaintiff went to the plot on the 22/2/12 and with 40 armed youth he demolished the mabati structures and that they went to the area chief who told them that Otieno the applicant not to construct on the plot as he had no title by then.

4. Counsels for the parties made oral submissions in Court. I have considered what is deponed in the affidavits, the annexures and the oral submission. The 2nd defendant though served did not respond to the application. Counsel retaliated what is deponed and added the following; Mr. Mungla argued that the City Counsel rate statements and clearance certificate confirm that the plaintiff's land is private property and the certificate of lease too confirms that and that the 2 documents dispel the contention that the place is an access road, that the defendants are busy bodies and have no proprietary interest and should be restrained and asked to remove the offending structures and if they have to remove them they will do it at their costs. Counsel argued that the sanctity of the title should be respected.

5. Mr. Rakaro for the respondent agreed that it's true the 1st defendant has no proprietary right and that the 1st defendant has not put up the structure exhibited in the photos attached. That the 1st defendant is the wrong party as far as the plaintiff's complaint is concerned and that it should be against the landlord. That City Council did issue an enforcement letter to Mr. Wanjala where City Council stated it was an access road and a sewer line and that the 1st defendant being the chairman of the tenants of of the adjoining plots are concerned that any construction in the property will interfere with access to their quarters and sewer line. That that is their concern and that neither the applicant nor the previous owners have responded to the enforcement notices and that 1st defendant is not in possession nor has he constructed any structures and that the orders as sought against the defendant are wrong and offend his personal rights.

Mr. Mungla stated that the enforcement letter referred to is not signed and that it is alleged to be signed by Sarangombe Ward which is not a Public body and that the said document without the survey plan cannot support the defendants allegations and it cannot stand against the title documents they have exhibited. Lastly counsel argued that the 1st defendant is a proper party.

6. In application where an applicant seeks an injunction the applicant has to establish that he has a prima facie case with a probability of success. That he will suffer irreparable damages and if the Court cannot decide it will decide the matter on a balance of convenience (Geilla Vs. Cassman Brown Ltd E.A

1973) the plaintiff has exhibited title to plot L.R No. Nairobi Block 62/1245. The 1st defendant's claim is that the plot does not exist. The documents exhibited by the plaintiff are prima facie genuine, without evidence from the commissioner of land to rebut the same I find that they are genuine documents. The property as exhibited on the certificate of lease attached RK02 shows it is on private property and is recognized by the government of Kenya. One would have to get the evidence from the Commissioner of land to show that the said plot does not exist. I therefore find that defendant has failed to show that the plot is a space which they saw as public utility land. The plaintiff has shown that he has a prima facie case with a probability of success. Further I find that the 1st defendant's allegation that the access road will be blocked has not been proved. It is interesting to note that the enforcement notice the 1st defendant has attached is from Sarangombe Ward. The said notice is addressed to Andrew Wanjala Wanjala of Fort/Ayany Estate. The title of the property's is not mentioned, it refers to reasons for building access road, the road is not named nor the area. It is evident that the 1st defendant has raised concerns over illegal development of open spaces as shown in the letter dated the 23/2/12. I note that the said letter addresses the issue of a planned illegal development on L.R 62/1245 and it states the plot lies in a sewer line and that it will interfere with the 7 plots. There is no response attached to this letter. Counsel for the applicant was right in stating that what is alleged could have been demonstrated by a survey plan none is attached.

7. The 1st respondent does not deny what is stated that anyone who has attempted to build in the said plot has found the grounds hostile. I can only interpret this to mean the person has met hostility. The applicant has not been served with any enforcement notice. He has a prima facie case. If indeed the plaintiff is on grabbed land then the 1st respondent and 2nd respondent should have the relevant officers concerned within City Council and Commissioner of land involved to take action against the person in breach. I therefore find that the plaintiff has proved that he has a prima facie case with a probability of success. I find that the defendants are properly sued as they are the persons' the plaintiff has complained against as causing the threat of interfering with his quiet possession. However the 1st defendant has denied he put up the mabati structures and that he has trespassed on the plaintiff's plot. Could this be true yet he has stated that anyone who has attempted to build on the suit land has found the ground hostile. Indeed the photographs have no nexus with the 1st defendant but they were the plot. The plaintiff feels threatened and to secure peace in the area until the hearing and determination of this suit I grant an injunction as follows; that the defendants whether by themselves, their servants, agents, employees or anybody claiming under them are restrained from trespassing and interfering in the plaintiffs property L.R No. Nairobi Block 62/1245 situate at Kibera pending the hearing and determination of the suit. I decline to grant prayers No. 2 for the mandatory injunction as the defendants state they did not put up the mabati structures. Order 5 is not granted either. Costs of the application shall be in the cause.

Orders accordingly.

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

R. OUGO

JUDGE

In the Presence of:-

..... For the Plaintiff
..... For the Defendants

..... Court Clerk