



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 307 OF 2009

JOSEPH WAMBUI MULUSYA.....1ST PLAINTIFF

**MULUSIAH LAND CONSULTANTS LTD.....2ND
PLAINTIFF**

**EAGLE SUPERMARKED LTD.....3RD
PLAINTIFF**

VERSUS

IDB CAPITAL LTD.....1ST DEFENDANT

**JAMES KINIYA GACHIRI.....2ND
DEFENDANT**

P.V.R. RAO.....3RD DEFENDANT

**KOLLURI VENKATA SUBBARAYA KAMA SASTRY.....4TH
DEFENDANT**

RULING

1. The 1st Plaintiff/Applicant has filed a Notice of Motion dated 29/1/2010, seeking orders that the 1st plaintiff be reinstated into possession and the user of the un-surveyed plot Nairobi/Block 75/1036 (suit plot) in accordance with the Commissioner of Lands letter dated 16th July, 1985 pending further orders of the Court. That the 2nd defendant be restrained from entering and re-entering the suit plot, and costs of the application to be met by the 2nd Defendant. The application is premised on the grounds that the Applicants have received letters originating from the Commissioner of Lands and the City Council of Nairobi that state that the lease to the suit plot is fake/false/fraudulent yet the 2nd Defendant has previously thrown out the Applicants and has resisted their re-entry on the basis of the fake/false/forged lease. The Applicants were granted possession and user of the suit plot in 1985 and have developed and used it up to the time when the 2nd Defendant evicted them using the fake/false/fraudulent lease. That the 2nd Defendant is in possession of suit plot on the basis of fake/false/forged documents and a Court of Equity should not countenance criminal actions. That the Applicants are desirous to re-entering the suit plot in order to continue with quiet possession as against any other person, subject to the Commissioner of Lands granting a genuine lease to any other party, and that the 1st Applicant is entitled to possess and use suit plot by virtue of his letter from the Commissioner of lands in 1985.

2. The 1st Applicant swore lengthy affidavits in support of this application wherein he addresses the issue of ownership of the suit plot (Nairobi/Block 75/1036) between himself and the 2nd Defendant. The 1st Applicant admits that Peter Gatheca Gachiri holds a lease from the Government of Kenya in respect of the suit plot since 1/1/1984, but that he (the 1st Applicant) has been in possession of the suit plot under the authority of the commissioner of lands since 1985, and that he has never seen Peter Gatheca Gachiri on the suit plot. The 1st Applicant alleges that the said title is a forgery and has reported the same to the CID Police. He continues to say that the 2nd Defendant herein is now in occupation of the property having leased the same from Peter Gatheca Gachiri, who has a forged certificate of lease.

3. The application was opposed by the 2nd Defendant. He filed a Preliminary Objection dated 30/1/2012 to the said application on grounds that the application as drawn is incompetent, premature and violates the provisions of the law. That the orders sought affect third parties not party to these proceedings and not the 2nd Defendant who is not the registered proprietor of the suit property, and therefore the orders cannot issue against the 2nd Defendant. That the suit against the 2nd Defendant is frivolous, vexatious and ought to be struck out as he is non-suited, and that the Applicants have no legal rights over the suit property by dint of Section 143(1) of the Registered Land Act. The 2nd Defendant filed the following authorities in support of his objection to the application; **Andrew Peter Ngirichi – Vs – Cooperative Bank of Kenya Limited & Another Civil Case No. 405 of 2004, and Ambale – Vs – Masolia Civil Case No. 759 of 1971**, which I have read and considered which this Court also takes as a response to the applicant's application.

4. I have carefully considered all the affidavits filed together with the annexure thereto, and the oral submissions made in court which reiterated whatever has been deponed in the affidavits. The Applicant's main issue is the 2nd Defendant's occupation of the suit plot Block 75/ 1036, which is referred to as the adjoining plot. The Applicant's claim is that he has been in occupation for over 20 years. He relies on the letter dated 16/7/1985 which was addressed to him by the Commissioner of Lands over the additional site for parking purposes adjoining Block 75/1031 – Buruburu. In the said letter, the commissioner of lands states that the parking site cannot be allocated to the Applicant, but that he can develop the same for use by his clients and the public to the satisfaction of the Nairobi City Commission. This letter does not state the block number of the adjoining plot. A plot number has been hand written as "Now Nairobi Block 75/1036. This court cannot tell whether the said was written by the author of the letter. It is not in dispute from the affidavits that Peter Gatheca Gachiri holds a title to the suit plot 1036. The said Peter G. Gachiri is not a party to this suit, yet there are allegations of fraud on his part. The Applicant states that he should be enjoined to this suit, but has taken no steps to do so. The orders as sought if granted will definitely affect the said Peter G. Gachiri who is not a party herein. Further, from what is deponed, the Applicant seems to be pleading adverse possession in addition to alleging that Peter G. Gachiri has a fraudulent title.

5. Prayer 3 seeks to have the Applicant reinstated into possession of Block 75/1036 on the basis of the letter dated 16/7/1985 which does not specify the title number of the adjoining block. In the absence of that clarification, from the commissioner of lands, I decline to grant this order. There is ample authority that a mandatory injunction can only be granted on the clearest of cases or where there are special circumstances. Further, in my view, the issue of ownership ought to be addressed at a full hearing before this court can issue such orders. The court is of the view that this is not a straight forward case.

See **Halsbury's Laws of England Vol. 24 (4th ed) Par 848** where it was stated that;

"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the Plaintiff, or such as where on receipt of notice that an injunction is about to be applied for, the Defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

This case is not a clear one nor are there special circumstances to warrant a mandatory injunction at this interlocutory stage.

In prayer 4, the applicant seeks to restrain the 2nd Defendant from entering the said suit plot. In any application for injunction, the applicant must prove that he has a *prima facie* case with a probability of success, that in the absence of an the injunction he is likely to suffer irreparable loss which cannot be compensated by way of damages, and that the case tilts in his favour on a balance of convenience. ***Giella v Cassman Brown (1973) EA***. The Applicant has not demonstrated that he owns the suit Plot Block75/1036. The letter he relies on does not demonstrate that he owns the plot and therefore he has failed to show that he has a *prima facie* case nor has he demonstrated what he is likely to suffer in the event that injunction is not granted. The balance of convenience does not tilt in his favour. I therefore decline to grant the orders as prayed. On the preliminary objection raised, I agree that the orders sought cannot be granted against the 2nd Defendant who is not the registered proprietor of the suit plot, and that the orders sought affect 3rd parties who are not parties to this suit. On point no. 4 the 2nd Defendant can file a formal application for determination by this court. On point no. 5, it is important that the Applicant shows that he has a legal right over the suit plot. I find no merit in the applicant's application and dismiss it with costs to the 2nd Defendant. I also note that the 1st Applicant had filed an application dated 26/6/2009 which has neither been prosecuted nor withdrawn to date. The Applicant needs to settle this matter for hearing so that the issues therein can be determined.

Orders accordingly

Dated and delivered **19th** day of **September** 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicants

..... For the 2nd Defendant

..... Court Clerk