



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 652 of 2012

NAFUU HOUSING LIMITED.....PLAINTIFF

- VERSUS -

NICHOLAS GEORGE MWAI MWANGI.....DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 1st October 2012. The plaintiff prays for an interlocutory prohibitive injunction to restrain the defendant from trespassing onto, charging, alienating or dealing with the property known as LR 209/4401/708. The property is situated at Hamza, Makadara, Nairobi. The plaintiff also prays that the Officer Commanding Police Station, Jogoo Road station, do enforce the order of the court.
2. From the outset, I hold the view that orders granted by the High Court should, in the first instance, be enforced by the Court Bailiff of this court. It would be for the Court Bailiff, for sufficient grounds, to seek further orders for police assistance. The prayer by the plaintiff for police assistance is thus premature and on a quicksand. It is dismissed.
3. I return to the remainder of the motion. It is expressed to be brought under order 40 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. In a nutshell, the plaintiff's case is that it is the registered proprietor of the suit land. A copy of a lease dated 9th July 2000 between it and the City Council of Nairobi is annexed. It is deponed that the defendant, without any colour of right, has unlawfully entered the land and started constructing buildings on it. This has deprived the plaintiff of its quiet possession and use of the land.
4. The motion is contested. In a replying affidavit sworn on 17th October 2012, the defendant asserts that he is the rightful owner of the property. He avers that he purchased the same from the original allottee, Beth Wambui Machira. He got a beacon certificate from the City Council. He is putting up some permanent structures on the land. His case is that in the year 2009, the plaintiff fraudulently obtained a deed plan for the land and transferred it to itself. He reported the matter to the police. He challenges the genuineness of the lease held by the plaintiff. His submission is that granted all the circumstances and evidence, the plaintiff has not reached the threshold for grant of a temporary prohibitive injunction.
5. I have heard the rival arguments. At the heart of the suit is a dispute over ownership of the suit land. The disputants have laid claim to it. The determination of the legal owner is the true province of the trial court on tested evidence. However, I must at this stage, on a preponderance of the evidence available, determine whether the plaintiff has a *prima facie* case. When a litigant 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 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

6. I have to delve into the respective documents submitted by the disputants to determine priority of ownership or superiority of the claims. I do so with trepidation because, at this stage, I am not fully seized of all the evidence. See Col. (Rtd) James Peter Gichuhi and another Vs Kahawa Sukari Ltd and 3 others Nairobi, High Court ELC No 705 of 2011 [2012] e KLR.

7. The plaintiff relies on a lease dated 9th July 2000. From the stamps placed on its cover page, it seems to have been presented for registration at the Lands Department, Central Registry, on 14th February 2012. There are stamps by the collector of stamp duty dating back to 22nd July 2010. The last page of the lease has a registration stamp dated 14th February 2012. The lease is drawn by John Ombogi who is stated to be an advocate at City Hall. There is an attestation signature by Winfred Gitao advocate, presumably for the purchaser's signatures. The defendant takes umbrage at the lease as a fraud. The plaintiff does not state how he became the lessee or for what consideration. The preamble of the lease says the consideration was the rent and other covenants. That however is a matter within the province of the trial court. What troubles me is that on 22nd September 1992, plot number 806, Residential Plot, Makadara Infills was allocated by the Nairobi City Commission to Beth Wambui Machira. That is clear from the document marked "NGMM 2" and is not controverted by the plaintiff. That was 8 years before the plaintiff executed a lease with the City Council. That plot was transferred to the defendant. There is then a beacon certificate dated 11th August 2008. It is not clear how the defendant became the owner of two other plots numbered 805 and 807.

8. From a legal standpoint, a letter of allotment is not a title to property. It is a transient and often conditional right or offer to take the property. See Wreck Motor Enterprises Vs. Commissioner of Lands and others Nairobi Civil Appeal 71 of 1997 (unreported), Jaj Super Power Cash & Carry Limited Vs Nairobi City Council and others Nairobi, Civil Appeal 111 of 2002, Court of Appeal, (unreported). What is clear is that the defendant sought to process a formal title with the Ministry of Lands. From the document marked "NGMM 9" the City Council of Nairobi confirms that their enquiries revealed that one of the deed plans for the suit land was irregularly registered in favour of Nafuu Limited, the plaintiff as I.R No 136951. The plaintiff has kept mum about its acquisition of the deed plans annexed to the supporting affidavit. Its learned counsel submitted that the plaintiff has faithfully followed all legal procedures. That is not borne out clearly by the supporting deposition. Allegations of fraud have also been made.

9. I am well alive to the high standard of proof required for fraud. Koinange Vs Koinange [1986] KLR 23, Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E.A. 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR. In the present case, fraud is alleged on both sides of the suit. The plaintiff's assertions that it has followed all the requisite procedures to gain a title may be true. But if fraud were to be proved, the title would not be indefeasible. Section 158 of the Land Act 2012 is express that a title procured irregularly by fraud or corruption shall be void. Under section 26 of the Land Registration Act 2012, a proprietor's title is deemed absolute and indefeasible except where there has been fraud, misrepresentation, corruption or other illegality. It is only the trial court, on tested evidence, that will disentangle the truth about the allegations by both parties.

10. The City Council seems to have approved building plans for the land by the defendant. From the photographs annexed, a one-storey permanent structure is in the process of construction. From an evidential and historical fact, the defendant seems to have the older claim to the property. The less I say about that the better. There are serious allegations of fraud. The documents of ownership by both parties

are contested. Granted those circumstances, I cannot say that the plaintiff has established a clear cut case on title. The defendant has not done so either. But the net result is that the plaintiff has not established a strong *prima facie* case.

11. I have said the defendant is in possession and has put up permanent buildings on the land. Possession is an important component of claim to title. The balance of convenience would then tilt a little more in favour of the defendant. The defendant depones at paragraph 18 that he has expended Kshs 10 million in the construction. If the plaintiff were to prevail, I am of the view that the values of the suit property can be ascertained. To my mind then, damages would be recoverable. In the end I have found that the plaintiff has not met the threshold for grant of an interlocutory prohibitive injunction.

12. In the result, the plaintiff's notice of motion dated 1st October 2012 is hereby dismissed. As the question of ownership of the suit land remains alive, I order that costs shall abide by the final judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 29th day of November 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Mr. Mureithi for Mr. Kingori for the Defendant.