



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 300 of 2011

MICHEAL JOHN MWAURA..... PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT/RESPONDENT

G. M. WANJAU.....2ND DEFENDANT/RESPONDENT

DICKSON MWAURA HUNJA.....3RD DEFENDANT/RESPONDENT

RULING

The application before the Court for determination is a Notice of Motion by the Plaintiff dated 20th June 2012. The application is brought under the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules, and is supported by an affidavit sworn by the Plaintiff on the same date and a further affidavit sworn on 26th September 2011. The Plaintiff is seeking an order from this Court that a temporary injunction be issued to restrain the Defendants whether by themselves, their servants and/or agents or otherwise whoever from re-planning, re-allocating to anybody else other than the Plaintiff or in any way interfering with the Plaintiff's possession of plot B2-248 Kayole (hereinafter referred to as the suit property), together with the building and improvements erected and being thereon until the hearing and determination of this application and/or further orders in this suit.

The Plaintiff claims that he is the lawful owner of the suit property having bought the same from Mary Waithira Wangari who was the widow of Mwangi Njoroge (deceased). The Plaintiff further deposes that he has been utilizing the land and has paid all the City Council rates and ground rent whose receipts he annexed. It is the Plaintiff's contention that around June 2011, the 2nd Defendant without any permission trespassed into the suit property and started fencing off and building thereon.

The Plaintiff further averred that when he bought the suit property from Mary Waithira Wangari on 2nd July 1997, there were no outstanding arrears owing to the 1st Defendant. He contended that arrears in respect of the suit property were settled on 26th June 1997, before the 1st Defendant published a 30 days' notice through the media on 21st July 1997, and he annexed a copy of a receipt evidencing payment of Kshs 10,549/= on 2/06/97. The Plaintiff states that payment was made pursuant to a notice issued to Mwangi Njoroge by the 1st Defendant's Director of Housing Development Management, G. N. Wanjau dated 2nd June 1997, and insists that between 2nd July 1997 and 26th June 1997 when the arrears were settled, 30 days had not elapsed. The Plaintiff alleged that the 1st Defendant's purported reallocation of the suit property on 15th December 1997 to G. N. Wanjau was therefore fraudulent and illegal, as the said

property was not available for reallocation. The Plaintiff also annexed a letter dated 20th June 2001 from the 1st Defendant confirming that Mwangi Njoroge had paid rates arrears for the suit property in full.

The application is opposed, and the 1st Defendant filed a replying affidavit sworn on 19th September 2011 by Aduma J. Owuor, its Acting Director of Legal Affairs and filed on 20th September 2011. The deponent stated that the suit property was originally allotted to Mwangi Njoroge, and that during a meeting of the council on 9th April 1997, it was reported that the said allottee had defaulted in payment of rent arrears of upto Kshs 9,590/-. Further, that it is in the said meeting where it was resolved that Mwangi Njoroge alongside other defaulters be given a 30 days notice requiring them to pay the outstanding rates failing which the plots would be repossessed. Following the endorsement of the resolution by the Housing Development and Management Committee on 23rd April 1997, the 1st Defendant wrote to Mwangi Njoroge on 2nd June 1997 notifying him of his default and requiring him to clear the rates arrears within 30 days, failing which the plot would be repossessed and re-allotted or sold without further reference to him. The letter was annexed as evidence.

It is further deponed that the Mwangi Njoroge did not respond to the notice neither did he clear the rent arrears as demanded, prompting the 1st defendant to repossess the plot and re-allot it to Geoffrey Njogu Wanjau, which allotment letter dated 15th December 1997 was annexed. The 1st Defendant contended that as at 2nd July 1997 when the Plaintiff purported to enter into an agreement for the sale of the suit property, it had already repossessed the property. The Plaintiff did not therefore acquire a good title out of the agreement or power of attorney granted to him by Mary Waithera Wangari. The 1st Defendant also averred that the Plaintiff had not availed any proof of allotment from the 1st Defendant.

The 3rd Defendant filed a replying affidavit dated 14th September 2011 wherein he deponed that he purchased the suit property from Eliud Kiringa Goko on 3rd July 2009 and has annexed the agreement for sale, specific power of attorney and deposit slips for payment of the purchase price as evidence of the same. The 3rd Defendant states that he took possession of the suit property immediately after the said purchase, and that he has been in occupation since then and had obtained approvals for construction thereon from the 1st Defendant which he annexed. The 3rd Defendant gives the history of ownership of the suit property as first having been purchased from Geoffrey Njogu Wanjau on 14th August 2011 by one Veronica Njeri Kamau, who then sold it to Eliud Kiringa Goko on 21st February 2006. The 3rd Defendant acknowledged that the suit property was initially owned by Mwangi Njoroge before it was repossessed by the 1st Defendant and allotted to Geoffrey Njogu Wanjau on 15th December 1997.

The Plaintiff, 1st Defendant and 3rd Defendant filed submissions on 18th October 2011, 8th December 2011 and 25th November 2011 respectively. The Plaintiff also filed further submissions on 13th January 2012. Counsel for the Plaintiff submitted that the principle of *Nemo dat quod non habet* applies in this suit, since the sale of the suit property by G. N. Wanjohi to Veronica Njeri Kamau was fraudulent. Counsel further submitted that the 3rd Defendant has not come to court with clean hands for failing to disclose that Mwangi Njoroge and Mary Waithira Wangari were the original allottees of the suit property. It was submitted on behalf of the Plaintiff that a *prima facie* case with overwhelming success has been established and counsel relied on the case of **Giella -vs- Cassman Brown & Co. Ltd, (1973) EA 358.**

In response to the contention that an injunction cannot issue against the 1st Defendant, counsel for the Plaintiff distinguished the case of **Amrital -vs- City Council of Nairobi, CA. No. 47 of 1981** by submitting that the court declined to issue an injunction against the City Council because the order was incapable of enforcement. Counsel for the applicant also submitted that under section 41(3) of the Local Government Act, the 1st Defendant was a body corporate capable of suing and being sued.

Counsel for the 1st Defendant submitted that no *prima facie* case with a chance of success had been made out, and relied on the cases of **Wreck Motor Enterprises -vs- Commissioner of Lands & 2 Others, (1997) eKLR** and **Harold Gerald Rugiri -vs- Joseph Ougo & 11 Others, (2008) eKLR** for the

proposition that a letter of allotment is merely an intent by the government to allocate land and does not confer a title. It was submitted on behalf of the 1st Defendant that the allotment sought to be relied on by the applicant was merely a conditional offer which cannot form a basis to claim title. Further, counsel for the 1st Defendant submitted that Mary Waithira Wangari had no interest capable of being transferred in the suit property which was allotted to Mwangi Njoroge, since no letters of administration in her favour were tendered to lend credence to the sale transaction. It was also submitted that an injunction cannot issue against the 1st Defendant and Counsel relied on the cases of **Ali and 3 others -vs- City Council Nairobi, HCCC No. 820 of 2003** and **Morioson Holdings -vs- City Council of Nairobi, HCCC No. 432 of 2008** .

Counsel for the 3rd Defendant submitted that the Plaintiff's supporting affidavit sworn on 20th September 2011 contained information whose source was not disclosed, and was in breach of the mandatory terms of Order 19 Rule 3 of the Civil Procedure Rules. It was further submitted that the particulars of fraud and illegality alleged by the Plaintiff have not been pleaded in breach of Order 2 of the Civil Procedure Rules, and that a *prima facie* case has not been established. The counsel also submitted that the Plaintiff has not alleged that he would suffer irreparable damage, and is therefore not entitled to the orders sought. With regard to the balance of convenience, it was submitted for the 3rd Defendant that he has invested heavily in the suit property by putting up a building thereon using his savings, and that he has been in occupation of the premises.

The parties wholly adopted their written submissions and requested for a ruling based on the same at the hearing of the application on 9th October 2012. I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. At this stage all I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of a sale agreement entered into with respect to the suit property with Mary Waithera Mwangi on 2nd July 1997, and payments made to the 1st Defendant. The 1st Defendant has provided evidence of a notice of repossession and disposal issued to Mwangi Njoroge on 2/6/1997 and an allotment of the suit property to G.N. Wanjau on 15th December 1997. The 3rd Defendant relies on a sale agreement entered into on 3rd July 2009 with one Eliud Kiriga Goko, to purchase the suit property. He provided evidence of the history of purchases of the suit property going back to the original allottee, one G.N. Wanjau. It is my finding that since the Plaintiff has not established a *prima facie* case with a probability of success, because he has not shown any proof of allotment of the suit property to either Mary Waithera Mwangi or Mwangi Njoroge, and the Defendants have brought evidence of their entitlement by such an allotment.

This finding notwithstanding, this Court is alive to the fact that none of the parties herein have produced a title to the suit property, and also of the evidence by the 1st Defendant and the Plaintiff that points to an allotment of the suit property at one point in time to Mwangi Njoroge, and of payments made by him in this respect. It is therefore in the interests of justice that the suit property be preserved pending the hearing and determination of the Plaintiff's suit. I therefore order as follows pursuant to the provisions of sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act:-

1. That the *status quo* be maintained as follows with regard to the suit property known as plot B2-248 Kayole:-
 - a) The Defendants are restrained jointly and severally and whether by themselves or by their servants, agents or otherwise howsoever from further allocating, selling, and/or continuing with the construction of any structures on the suit property pending the hearing and determination of the suit herein or until further orders.

b) The Plaintiff shall not interfere with the 3rd Defendant's quiet possession and/or occupation of the suit property pending the hearing and determination of the suit herein or until further orders.

2. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____16th____ day of ____November____, 2012.

P. NYAMWEYA

JUDGE