



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 168 of 2012

JOHNSON KAMAU MACHARIA.....PLAINTIFF

VERSUS

ALICE BOMET & 3 OTHERS.....1ST DEFENDANT

RULING

The Notice of Motion dated 11/5/2012, is brought by Johnson Kamau Macharia, the plaintiff/applicant, who seeks orders of injunction against the defendants/respondents, Alice Bomet, Magdaline Chelimo and Ruth Cheptarus. The prayers sought are as follows:-

(3) That pending hearing and determination of this suit, the respondents by themselves and/or their servants, assigns, tenants and all who claim under as through them be restrained by way of temporary injunction from entering, occupying, using, accessing, trespassing onto or in any way whosoever interfering with the plaintiff's/applicant's peaceful uninterrupted and exclusive use, enjoyment and possession of the property known as Nakuru Municipality Block 21/469;

(4) That pending hearing and determination of this suit, the respondents by themselves, their servants and assigns and all who claim under as through them be restrained by way of temporary injunction from using the Certificate of Lease as appearing as the registered proprietors on the land parcel known as Nakuru Municipality Block 21/469.

The applicant claim to be the rightful owner of parcel Nakuru Municipality Block 21/469 which he acquired in 1966 and was issued with an allotment letter in 1999 (JKM1). He was surprised to learn that Maendeleo Ya Wanawake to claiming ownership and has obtained a certificate of lease (JKM2); that whereas his land on which he has put up permanent structures measures 0.7142 Ha, the certificate of lease indicates that the respondent's land measures 0.52 Ha; that the holders of the certificate is Maendeleo Ya Wanawake whereas the trustee of KANU Maendeleo Ya Wanawake Nakuru are a different organization; that rates were paid for the KANU Maendeleo Ya Wanawake organization on 31/3/2012 (JKN3) which is not the same as Maendeleo Ya Wanawake; that the respondent's intent to come and demolish his developments on the land and he fears that if an order of injunction is not granted, they will go ahead and he will suffer loss. He attached photographs of the structures on the plot.

The application was opposed and Alice Bomet, the 1st defendant/respondent, swore a replying affidavit in which she deponed that she is the chairperson of Maendeleo Ya Wanawake Nakuru District; that they received an allotment letter on 30/1/2002 (ABI) complied with all the conditions therein vide receipt AB2, were issued with certificate of lease on 20/5/2005 (AB3) which was accompanied by the Commissioners letter before release of title; that they have paid all dues to the Government as required (AB5) and this being the first registration, they have an indefeasible title to the land; that the Municipal

Council of Nakuru is aware that KANU Maendeleo Ya Wanawake Organisation is the owner as the land as it made a demand for rates from the organisation (AB7) on 30/1/2012 and they made payment on 11/4/2012; that the photographs exhibited by the applicant do not refer to the plot in question and she invited the court to visit the plot to confirm. It is the respondent's contention that the applicant has lied to the court and has not come to the court with clean hands and is not entitled to the equitable remedy of injunction. Mr. Kipkoech, counsel for the respondent urged that the respondent has demonstrated that they have a certificate; that they have had it for seven years and if the order of injunction is granted, it is the respondents who will suffer irreparable loss. Counsel relied on the Court of Appeal decision in **Joseph Muchina Kamau v National Housing Corporation Ltd, CA 171/1994**.

Having considered both the rival affidavits, and submissions by counsel, the only issue for consideration is whether the court can exercise its discretion and grant the order sought based on the decision in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. The principles to consider are, whether the applicant has a prima facie case with a probability of success; whether if the order is not granted the applicant will suffer irreparable injury and lastly, if the court is in doubt, it will decide the application on a balance of convenience.

In the instant case, though the applicant claims to have been on the suit land since 1966, he has nothing to show for it. He has exhibited an allotment letter issued on 5/1/1999. However, there is no evidence that the applicant complied with any of the conditions in the allotment letter. There is no evidence that the applicant accepted the offer and paid up the dues specified in the allotment letter. An allotment letter is not evidence of ownership but an offer which if complied with conditions therein, a certificate or title is issued. On the other hand, the respondent has demonstrated that they were issued with an allotment letter on 30/1/02, they complied and made the required payments by 21/2/2002 and were issued with the certificate of lease, forwarded to them by the Commissioner of Lands by letter dated 2/3/2011, the Municipal Council of Nakuru made a demand for rates vide its Demand Notice of 30/1/02, and the same were paid on 11/4/2012. The applicant has not demonstrated that he has ever paid rates, has been recognized as owner of the suit land by the Commissioner of Lands. Photographs per se are not evidence of ownership or possession. They can be obtained from anywhere. In any event, the applicant has not given any explanation how he entered the land in 1966 without permission or why from 1999 when the letter of allotment was purportedly issued to him, he has never procured a lease certificate. From the evidence on record the applicant has not demonstrated that he has a prima facie case with a probability of success or that he will suffer any loss if an order of injunction is not granted. If anything, the certificate holder is likely to suffer irreparable harm if an order of injunction is granted. Even on a balance of probability, it would tilt in favour of the respondent.

In the end, I find that the applicant has not satisfied the conditions for granting an order of temporary injunction. The same is declined and the application is dismissed with costs abiding the main suit.

DATED and DELIVERED this 9th day of November, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Tombe holding brief for Onkoba for the plaintiff

Mr. Kipkoech for the defendant

Kennedy – Court Clerk