



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 119 of 2012

HOTTENSIAH WANJIRU PLAINTIFF

VERSUS

MESHACK NGOMO DEFENDANT

RULING

The Plaintiff filed an application dated 6th March 2012 in which orders were sought from this Court to restrain the Defendant, either by himself his agents and/or servants and assigns, from interfering, dealing in any way, constructing and erecting structures and/or in any other way interfering with the Plaintiff's quiet possession of Plot Number 33 within Title number L.R. 209/11046 in Mukuru Kwa Njenga Embakasi (hereinafter referred to as the suit property), pending the hearing and determination of this application. Orders were also sought that the Defendant be evicted and/or ejected from the suit premises.

The grounds for the application are that the Plaintiff is the *bona fide* owner of the suit property, and that the Defendant through himself, his agents, servants and/or assigns trespassed onto the suit property and was harassing and blocking the Plaintiff from accessing the said property. Further, that the Defendant was restrained by the lower Court in **CMCC No. 8191 of 2007- Hottensiah Wanjiru v Meshack Ngomo** from 2nd November 2007 upto when the said suit was withdrawn on 6th March 2012 due to lack of jurisdiction on the part of the lower Court. There is therefore eminent danger that the Defendant will resume the trespass, construction, and/or harassment in which event the Plaintiff will suffer irreparable loss and damages. The grounds for the application are detailed in the supporting affidavit sworn by the Plaintiff on 6th March 2012.

A preliminary objection was raised and upheld that the suit in the lower court was still subsisting. The Plaintiff was ordered to tender proof of proper withdrawal of the said suit, and she subsequently filed a court order from the lower court given on 23rd March 2012 withdrawing the suit.

The Plaintiff's application is supported by a affidavit she swore on 6th March 2012, and a supplementary affidavit sworn on 4th June 2011. She explains therein that she bought the disputed plot No 33 from on Hussein Adan on 18th September 2006, and attached the sale agreement as evidence. She also attached a copy of the title of L.R. 209/11046 which was issued to KENPCO Limited on 4th April 2002, and transferred to Parkview Villas Limited on 15th December 2005. The Plaintiff alleges that none of the plots hived off from the parent title has its own title, and the process of obtaining consent and Individual sub-titles is underway. She also stated that she took possession of the plot 33 after the sale and started developing the same, and that the Defendant trespassed on to the said property by erecting a structure thereon in September 2007.

The Defendant opposed the application in a Replying Affidavit sworn on 11th April 2012. He stated that he has been in occupation of the suit premises since August 2007 with the full knowledge and consent of the registered owner of the said premises being KENPCO Limited. Further, that the plaintiff has not shown any certificate of title issued in her name. The Defendant also averred and that the entire transaction relating to the sale of plot 33 to the Plaintiff is null and void as the said sale agreement has not been registered, and no consent to subdivide or proposal for subdivision approved by the Director of Surveys has been annexed.

The above arguments were reiterated by the Counsel for the parties at the hearing of the application on 1st October 2012. Counsel for the Plaintiff also relied on the authorities of **John Rimoi Njau vs Samuel Njau Wanaina (2005) eKLR** for the position that the Defendant had not exhibited any evidence to support his contention. He also relied on the ruling **Elijah Kariuki Kuria vs Kenneth Obae, HCC ELC No. 532 of 2009** where an injunction was issued in an application similar to the one herein.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. I am required at this stage to 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 and to determine if the orders of eviction can issue. The requirements to be met for the grant of a temporary injunction 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 with respect to the said plot. No evidence of payment of the consideration of Kshs 350,000/= has been provided, or of the vendor's entitlement to the suit property. To this extent I find that the Plaintiff has not established a *prima facie* case. This Court cannot also grant eviction orders for this reason, as such orders are in the nature of a mandatory injunction and can only be granted in the clearest of cases.

This notwithstanding, I also note that the Defendant has also not provided any evidence of his claim to entitlement to the suit property. In the premises, and in the light of the Plaintiff's evidence I am of the opinion that the suit property needs to be preserved pending the hearing and determination of the suit herein. I therefore hereby order as follows pursuant to sections 3A and 63(e) of the Civil Procedure Act:

1. That the *status quo* shall be maintained as follows:
 - a) Neither the Plaintiff nor the Defendant, either by themselves, their agents and/or servants and assigns shall undertake any further construction on and/or erect structures on Plot Number 33 within Title number L.R. 209/11046 in Mukuru Kwa Njenga pending the hearing and determination of this application, or until further orders.
 - b) The Plaintiff shall not interfere with the Defendant's possession, structures and property on the suit premises pending the hearing and determination of this application, or until further orders.
 - c) The Defendant shall not demolish or interfere with any structures or property belonging to the Plaintiff situated on the suit property pending the hearing and determination of this application, or until further orders.
2. The costs of this application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____7th____ day of ____November____, 2012.

P. NYAMWEYA

JUDGE