



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. 18 OF 2011

MUNICIPAL COUNCIL OF GARISSAPLAINTIFF

VERSUS

AHMED SIAD MOHAMED.....1ST DEFENDANT
COMMISSIONER OF LANDS.....2ND DEFENDANT

R U L I N G

By motion dated 24th February 2011 brought under Order 40 rules 1 & 2 Civil Procedure Rules and Sections 1A, 1B 3A and 63 of the Civil Procedure Act the Plaintiff seeks a temporary injunction to restrain the 1st Defendant, whether by himself, his agents, servants, employees, and all those acting under him, from developing, alienating, selling, transferring, wasting, mortgaging, leasing, letting or in any other way dealing with parcel No. GARISSA/BLOCK 111/59 pending the hearing and determination of the suit.

The 1st Defendant has a registered lease over the suit property. He produced it together with a certificate of lease issued 20th April 2005. His case is that he was allocated the suit property on 15th October 1998 by the 2nd Defendant. There is no dispute that the suit property was trust land vested in the Plaintiff, and that the 2nd Defendant could allocate such land on its behalf and on its recommendation.

Erastus Sifunjo Karani is the Town Clerk of the Plaintiff's Council. In the supporting affidavit he stated that the suit property was allocated to Mohamed Hussein Haji (now deceased) by the resolution of the Plot Allocation Committee at its meeting of 18th February 1991. ("ESK"). The resolution was presented to the Council which issued a letter (together with the minutes) to the 2nd Defendant to issue a letter of allotment to the deceased. It is the Plaintiff's case that the allocation of the suit property to the 1st Defendant did not have its blessings, and neither did the Plot Allocation Committee deliberate on the matter or sanction it. The 2nd Defendant agrees. He states that according to his records the suit property was allocated to the deceased, and that the allocation to the 1st Defendant and the subsequent lease are both fraudulent as they were not recommended by the Plaintiff and do not have the support of any Part Development Plan (PDP).

It would appear that following the death of the deceased, the allocation was issued in the name of Mrs. Halima Haji Aden (herein after referred to as "Halima") in respect of whom a PDP had been

prepared and forwarded to the 2nd Defendant. The allocation was on 5th March 1999. The 1st Defendant contests this allocation which he states that, in any case, is in reference to un-surveyed plot No. 326/97/55 GARISSA when his allocation was for residential plot No.T.16(BLOCK 111/59) GARRISA. This is the plot in respect of which he got the lease. The Plaintiff and the 2nd Defendant contend that the two numbers refer to the suit property. The 1st Defendant then produced a letter dated 18th March 1998 from the Town Clerk one Hajji of the Plaintiff to the 2nd Defendant indicating that the Council had received and accepted his application for the plot. The Plaintiff claims the letter is a forgery and states that by this time the suit property had already been committed to Halima.

The other issue raised by the 1st Defendant was that the meeting of the Plot Allocation Committee of 15th February 1991 was not to allocate new plots but only to ratify existing developed plots in various parts of the town and therefore cannot be the basis of the alleged allocation to the deceased.

It is not in dispute that the 1st Defendant has developed a petrol station and a commercial building in the suit property. The value of the suit property is now KShs. 15 million. In the supplementary affidavit sworn in **HC MISC. CIVIL APPLICATION NO. 55 OF 2010 at Embu (JR)**, the 1st Defendant stated, and produced evidence to show, that this was formerly a residential plot in respect of which he subsequently received an approval from the Plaintiff to change its user to a petrol and service station and a supermarket block. This approval of change of user by the Plaintiff was not controverted by the Plaintiff. The Judicial Review Application was filed by the 1st Defendant to prohibit the Plaintiff and the 2nd Defendant from revoking the lease to it. Such revocation had been threatened. There was also **CMCC 100 of 2009 at Garissa** filed by one Brigadier Bashir Haji Yusuf against the 1st Defendant over the plot. Yusuf was challenging the lease to the 1st Defendant. He was saying that he had purchased the suit property from Halima. The court declined to hear the case on account of want of pecuniary jurisdiction. Yusuf has appealed that decision to the High Court in Nairobi in **Civil Appeal No. 145 of 2010**. In the Appeal he applied for a temporary injunction. The application was dismissed on 27th July 2010 by Justice Sitati who found that no *prima facie* case had been shown in view of the fact that the 1st Defendant was the registered proprietor of the suit property who was protected by Section 27 of the Registered Land Act (Cap 300). It is because of this observation by the Judge that forms the basis of the 1st Defendant's contention that the matter is *res judicata*. In my view, however, when a court is deciding whether or not an applicant has demonstrated a *prima facie* case for the purpose of a temporary injunction, it is only taking a preliminary view of the material placed before it. It is not making any conclusive findings as that is left to the court that will ultimately try the case. The plea of *res judicata* at this stage appears misplaced.

I received submissions on the application from Ms. Amina for the Plaintiff, Mr. Mwangi for the 1st Defendant and Ms. Munyi for the 2nd Defendant. A serious issue regarding the capacity of the Plaintiff to bring this suit and application was raised by Mr. Mwangi. The issue had been raised in paragraph 9 of the defence and in ground 1 of the notice of preliminary objection. The contention by the 1st Defendant is that, now that the Plaintiff says it allocated the suit property to the deceased on 18th February 1991 it retained no right under the Trust Land Act (Cap 288) that could form the basis of bringing the suit. Secondly, following the death of the deceased, any party wishing to make a claim on behalf of his estate should have letters of administration issued under the Law of Succession Act (Cap 160). The Plaintiff did not exhibit any such letters and therefore it was submitted that it lacked the *locus standi* to bring the suit. The response by Ms. Amina was that the allocation to the deceased did not confer any rights to him; that, in any case, following his death the suit property reverted to the Plaintiff as the custodian of the trust land.

Both in the plaint and in the amended plaint the Plaintiff pleaded that it was the custodian of trust land and was legally mandated to allocate the same to residents of the area. This is how on 18th February 1991 it allocated the suit property to the deceased. Following the deceased's death, the property went to Halima to whom the 2nd Defendant issued a letter of allotment on 5th March 1999. On 9th February 2011 Cyrus Kiogora Mburugu of the Office of the 2nd Defendant swore an affidavit to say that Halima

accepted the allocation and paid the requisite fees. In **CMCC No. 100 of 2009 at Garissa Yusuf** was in fact claiming that following the allocation to Halima he bought the suit property from her and therefore he has since become the owner. From this evidence, after the Plaintiff recommended the deceased to be allocated the suit the later died before the letter of allotment had been issued to him. The letter was subsequently issued in the name of Halima who paid for the same and was waiting for the lease. Since the recommended allocation to the deceased was not effected, the allocation went to Halima. She is the one who can complain about the alleged fraudulent lease to the 1st Defendant. Alternatively, now that the 2nd Defendant claims that the allocation and lease to the 1st Defendant was not supported by an documents in his office he can sue the 1st Defendant to have the lease cancelled or revoked. Otherwise, my preliminary view is that the rights of the Plaintiff were extinguished once there was allocation of the suit property to Halima and after she accepted and paid for the same. The issue of letters of administration does not arise, but the Plaintiff appears not to have any further legal interest in the suit property to be able to bring this claim against the 1st Defendant.

The 1st Defendant challenged the suit on another ground:

that the rights of the Plaintiff to bring the suit to recover the suit property has been caught up by Section 7 of the Limitation of Actions Act (Cap 22). His contention is that if the allocation to the deceased was on 18th February 1991, the last time the suit should have been brought was on 17th February 2003. The response by Ms. Amina for the Plaintiff was that time can only begin to run from 20th April 2005 when the lease was issued and therefore the suit is not time-barred. All that I want to say at this stage is that the 1st Defendant was allegedly allocated the suit property on 15th October 1999. This was an adverse allocation as the suit property had allegedly been set aside for the deceased. It would appear that that is the time when the cause of action accrued. If that is the case, 12 years end on 14th October 2010. It therefore appears that the plea by the 1st Defendant has merit.

I hope I have said enough to show that, at this stage, the Plaintiff has not demonstrated that he has a *prima facie* case that will probably succeed in terms of the decision in **GIELLA VS CASSMAN BROWN & COMPANY LIMITED [1973] EA 358**. The 1st Defendant has title which is *prima facie* protected by Section 27 of the Registered Land Act. Against that, Halima for whom the Plaintiff has purportedly bought the suit has only a letter of allotment. The 1st Defendant has certainly a better claim. There is no dispute that he is in possession of the suit property. It will be unusual for a court to injunct such an owner.

In conclusion, the application for temporary injunction is dismissed with costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 27TH DAY OF JULY 2011.

**A. O. MUCHELULE
JUDGE**