



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 96 OF 2010

MAJOR KAHUGU

KAREBE.....PLAINTIFF

V E R S U S

COUNCILOR ROSE ADHIAMBO

OGONDA.....DEFENDANT

R U L I N G

On 4th December, 1987 the Commissioner of Lands wrote a letter (“MKK1”) to the Plaintiff informing him that the Government was allocating him an unsurveyed plot No. 1 – Villa Franca Nairobi measuring about 0.18 Hectares. The Plaintiff was asked to accept the offer and pay KShs. 56,670/= for the plot in 30 days. On 18th February, 1988 he accepted the offer and agreed to make payment. The Defendant seeks to make the fact that the acceptance and payment were not done in 30 days an issue. However, on 12th September, 2006 the Plaintiff’s grant (“MKK2”) was registered. The land now measured 0.0562 Hectares and is described as L.R. No. 209/10910 Villa Franca Nairobi. The Defendant complained about the discrepancy in the measurement, but the Plaintiff responded that what was allocated was an estimated quantity and that the grant has a certain measurement.

The Plaintiff filed this suit on 5th March, 2010 complaining that the Defendant had since 2002 trespassed on the land and remained thereon and had not heeded the various requests to vacate. The suit was for a declaration that the Plaintiff was the legal and rightful owner of the parcel and a permanent injunction to restrain the Defendant and her servants or agents from entering, remaining in, occupying and trespassing on the land. With the suit was filed an application for a temporary injunction to restrain the Defendant by herself, servant or agent from entering, remaining in, occupying or trespassing on the suit land. The application was opposed by the Defendant who stated that she came to the land in 1984 and was allowed by the area Chief to put up a temporary house here as the land was vacant. This was government land. She has lived on the land and in the house since. She recalled that in 1990 the Plaintiff came claiming the land. She asked him to produce ownership documents. He left saying he would bring them, but did not return until 2005 when he came and unsuccessfully tried to use the Chief to evict her. Her case

is that the allocation of the land to the Plaintiff was irregular and did not follow the procedure laid out in the **Government Lands Act (Cap. 280)**. She stated that as the person in possession she ought to have been given the first priority in allocation. She counterclaimed for the land by seeking that the allocation to the Plaintiff be found to be irregular, unlawful, null and void. She asked for a declaration that she was entitled to be given a chance to bid for the land. Lastly, she asked for a permanent injunction against the Plaintiff. She alleged that the Plaintiff had not accepted the offer within 30 days, had failed to pay stand premium and other dues in 30 days and had failed to develop the land within the prescribed time.

Mr. Kimani presented the application on behalf of the Plaintiff. The Defendant was represented by Mr. Gichigi.

The principles governing the grant of an interlocutory injunction were settled by the decision in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The Applicant has to show that he has a *prima facie* case with a probability of success. Secondly, he has to demonstrate that if the application is not granted he is likely to suffer such loss or injury that damages may not appropriately compensate. If the court is in doubt, it will decide the matter on the balance of convenience.

The Plaintiff is the registered proprietor of the suit land and has annexed the grant document. Under **section 23(1) of the Registration of Titles Act (Cap. 281)** he has an absolute and indefeasible claim to the land which cannot be challenged except on the ground of fraud or misrepresentation to which he is proved to be a party. Under **section 24**, if any fraud or error were to be proved in the issue of the grant to the Plaintiff the claimant can only be paid damages. On whether the Defendant can challenge the allocation of the suit land to the Plaintiff and the consequent grant, the court has in mind the decision of the Court of Appeal in **Michael Githinji Kimotho –Vs- Nicholas Muratha Mugo, Civil Appeal No. 53 of 1995** in which it was held:-

“The issue whether the allocation of the land to the respondent was erroneous or not can only be an issue between the Commissioner of Lands and the respondent. The protected rights of a proprietor under section 28 of the Registered Land Act cannot be defeated except as provided in that Act, and certainly not at the instance of the appellant.”

The court was dealing with proprietorship under the **Registered Land Act**, but the same principle would be applicable to land registered under the Registration of Titles Act. The Defendant can only challenge the Commissioner of Lands on the alleged irregularity in allocation, but cannot challenge the Plaintiff's title.

There is no claim for adverse possession. On the material available the Plaintiff has demonstrated a *prima facie* case. A registered proprietor is entitled to possession, occupation, use and quiet enjoyment of his land. On the face the Defendant is a trespasser who has refused requests to vacate. She is engaged in continuing trespass and that has to be restrained. To allow the trespass to continue would be tantamount to appropriating the Plaintiff's land without compensation. Damages would not appropriately compensate him.

On balance of convenience, I find that it would be better for a trespasser to be inconvenienced than for a registered proprietor to be kept out of his land. These are the reasons why I allow the application dated 4th March, 2010 with costs.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2010

**A. O. MUCHELULE
J U D G E**