



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 266 of 2008

EPHRAHIM WAITHAKA RUITHA.....1ST PLAINTIFF

GRACE WANGUI WAITHAKA.....2ND PLAINTIFF

ESLINE INVESTMENTS LIMITED.....3RD PLAINTIFF

VERSUS

NADIS SERVICES LIMITED.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

Introduction

1. The dispute in this case involves two parcels of land, that is to say Land Reference Number 209/10999 of which the 1st and 2nd Plaintiffs were registered as joint tenants on 20/12/2000 and Land Reference Number 209/11000 of which the 1st Plaintiff was registered as tenant on 22/10/2002. The Plaintiffs allege that on or about Friday 30/05/2008 at about 5.30 p.m., the 1st Defendant through its servants and/or agents numbering 50 people entered the said parcels of land (the properties) and commenced demolishing the existing boundary fence which the 1st and 2nd Plaintiffs had erected in or about the year 2003. The Plaintiffs also allege that the 1st Defendant further caused and directed its said servants and/or agents to start digging trenches and to erect a concrete wall along the boundary in what the Plaintiffs believe are preparatory acts for major construction work on the properties. The Plaintiffs allege that the 1st Defendants' actions have interfered with the Plaintiffs advanced plans of constructing 36 two bedroom flats on the properties. The Plaintiffs pray for judgment against the Defendants jointly and severally for:-

(a) An order of permanent injunction restraining the 1st Defendant by itself, its servants and/or agents or by anyone whomsoever from entering upon, constructing upon or in any way interfering with the Plaintiffs' quiet enjoyment possession and user of the parcels of land more particularly described as Land Reference Nos.205/10999 and 209/11000.

(b) General damages for trespass

(c) Costs of this suit

(d) Any other or further relief as this Honourable Court may deem fit to grant.

The Application and Opposition thereto

2. The application coming up is the Chamber Summons dated 4/06/2008 which was filed simultaneously with the plaint under Certificate of Urgency and expressed to be brought under Order XXXIX Rules 1(a), 2, 3 and 9 of the Civil Procedure Rules and Section 3A and 63(e) of the Civil Procedure Act seeking ORDERS:-

(a) THAT this application be heard exparte in the first instance for reason of its urgency.

(b) THAT the 1st Defendant be restrained either by itself, its servants and/or agents or by anyone whomsoever from entering upon, constructing upon or in any way interfering with the Plaintiff's quiet enjoyment possession and user of parcels of land more particularly described as Land Reference Nos. 209/10999 and 209/11000 until the hearing and determination of the suit.

(c) THAT costs of this application e awarded to the Plaintiffs.

3. The application is also supported by the 6 grounds on the face thereof, that is to say:-

1. *The 1st and 2nd Plaintiffs are the registered proprietors, as joint tenants, from the Government of Kenya in respect of Land Reference No.209/10999.*

2. *The 1st Plaintiff is the registered proprietor, as sole tenant from the Government of Kenya in respect of Land Reference No.209/11000.*

3. *The 1st Defendant has by itself, through its agents, servants and/or employees illegally and unlawfully trespassed into the aforesaid parcels of land and it has demolished existing structures put in place by the Plaintiffs.*

4. *The 1st Defendant continues by itself, through its agents, servants and/or employees to illegally and unlawfully trespass on the aforesaid parcels of land and has commenced construction on the said land thereby laying it to waste.*

5. *The 1st Defendant continues by itself through its agents, servants and/or employees to illegally and unlawfully interfere with the Plaintiff's quiet possession and enjoyment of the aforementioned parcels of land and continues to exclude the Plaintiffs from their said property through threat of violence.*

6. *The Plaintiffs will suffer irreparable loss unless the 1st Defendant is restrained from entering upon the aforesaid parcel of land or in any other way interfering with the Plaintiff's quiet possession and enjoyment of the suit premises.*

4. There is also the Supporting Affidavit sworn by Ephraim Waithaka Maina on 4/06/2008 and the annexures to the said affidavit. The deponent swears the affidavit on his own behalf and on behalf of the 2nd and 3rd Plaintiffs as per the authority granted to him which is marked "Exhibit 2" to the application. The averments contained in the Supporting Affidavit are made to fortify the Plaintiffs' contention that they are the registered owners of the properties on which they (Plaintiffs) are constructing 36 two-bedroomed flats. The deponent says that on 30.05.2009, the Defendant unlawfully entered the properties and caused wanton destruction thereon. The deponent says that the 1st Defendant's actions are not only unlawful and in contravention of the Plaintiffs' right of occupation and quiet possession of the properties but are also a hindrance to the Plaintiffs' construction work being undertaken on the properties.

5. The application is opposed vide a Replying Affidavit sworn by Naima Mohamed on 17/06/2008. The Replying Affidavit sets out the circumstances under which the 1st Defendant came into possession of the

properties and says that it is the registered owner thereof. The deponent of the Replying Affidavits says that there is another pending suit, that that is to say Nairobi ELC No.262 of 2008 filed by the 1st Defendant herein, Nadis Services Limited involving L.R. No.209/10999, in which Nadis Services Limited has sued the person that the Plaintiff's herein bought the property from.

The Plaintiff's Submissions

6. The Plaintiff filed submissions on 03/07/2009. The Plaintiff's position is that they are the registered owners of the properties. They say that the 1st Plaintiff purchased LR No.209/10999 from Kenya Fire Appliances Limited jointly with the 2nd Plaintiff on 20/12/2000 (Exhibit 3(a) and 3(b)) for Kshs.800,000/=. The Plaintiffs also aver that The Kenya Fire Appliances Limited had earlier on on 10/12/1996 bought the suit property from the original Grantee, Mr. Francis Kahure Kimathi for the sum of Kshs.600,000/=. That Mr. Francis Kahure Kimathi had been allocated the said property on 31/05/1993 after paying the sum of Kshs.29,000/= as stand premium.

7. With regard to LR No.209/11000, the Plaintiffs allege that the same was registered as tenant from the Government on 30/09/2002 pursuant to a surrender registered as I.R.49033/7. The Plaintiffs also aver that by a letter dated 11/07/2008, the Commissioner of Lands informed the 1st Plaintiff that LR No.209/10999 was erroneously allocated to **Nadis Services Limited** (1st Defendant herein) and that M/s Nadis Services had been asked to surrender the Grant I.R.110337 for the purpose of cancellation.

8. On the basis of the above facts and as buttressed by the provisions of ss 20, 22 (3) and 23(1) of the Registration of Titles Act (the RTA) Cap 281 Laws of Kenya, the Plaintiffs submit that the purported transfer of the properties to the 1st Defendant is void and of no effect. The Plaintiff's argue that it is only the 1st and 2nd Plaintiffs' titles which are valid. The Plaintiffs argue that their title to LR No. 209/10999 is conclusive evidence that they are the absolute proprietors of the land and that their title is indefeasible and that it is not subject to challenge, unless the Defendants can show that the title was obtained through fraud or misrepresentation. The Plaintiffs urge the court to find and to hold that, they have established a prima facie case with a probability of success. They also urge the court to find and to hold that the damage they are likely to suffer if their property is taken away from them by the Defendants cannot reasonably be compensated by way of damages. The Plaintiffs also contend that even if the court was to consider their case on a balance of convenience, it should make a finding that the scale of convenience tilts in favour of the Plaintiffs.

The 1st Defendant's Submission

9. The Defendants' position is that the Plaintiff's suit as drawn and filed, together with the application is bad in law and incurably defective for failure to comply with Section 13 of the Government Proceedings Act. The 1st Defendant argues that the ownership of the properties remains a mystery. The 1st Defendant however submits that the title documents held by it are genuine and that the question of double allocation alluded to by the Plaintiffs is a very remote possibility.

10. As to whether or not the Plaintiffs have demonstrated a prima facie case with the probability of success, the 1st Defendant contends that the Plaintiffs have failed to do so on the basis that the Plaintiffs have not shown who between them and the 1st Defendant is the rightful owner of the properties. The 1st Defendant also contends that the Plaintiffs have not shown what damage, if any, they are likely to suffer if the orders sought are not granted. In its view, damages would be adequate compensation and as such, no interlocutory injunction should be granted. The 1st Defendant also says that the balance of convenience tilts in its favour for reasons that the Plaintiffs are in breach of the law in their acquisition of the suit properties and secondly that the 1st Defendant acquired the suit property through the correct legal procedures. The 1st Defendant prays that the orders sought should not be granted as a matter of public interest.

The Issues and Findings

11. The main issue for determination is whether, in light of the principles in *Giella –vs- Cassman Brown & Co. Ltd.* [1973] EA 358, the orders sought by the Plaintiffs should be granted. These principles are that

(a) *The Applicants herein must show that they have a prima facie case with probability of success;*

(b) *An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which shall not be otherwise adequately compensated by an award of damages.*

(c) *If the court is in doubt, it will decide the application on a balance of convenience.*

12. On the basis of the law and the facts that have been placed by parties before the court, this application for injunction must succeed. It is admitted by both parties to the tangle and confirmed by the 2nd Defendant's letter of 11/07/2008 that this is a case of double allocation. In a period of about 15 years, the title changed hands four times, with the full knowledge of the parties that the provisions of the RTA prohibited the subsequent dealings after 1993. Unfortunately for the Plaintiffs and the 1st Defendant, the 2nd Defendant did not file any replies to the Plaintiffs' application, so that the court is left only with the information that is placed before it by the Plaintiffs and the 1st Defendant.

13. From the information before the court, I find and hold that there is more to this dispute than meets the eye. Matters of land have in the recent past become so emotive and sentimental that they have ceased to be mere disputes between two warring parties. These disputes now pity the individual against the public. In the instant case, and without in anyway, delving into the issues for the court that will eventually hear the case, one wonders how and why the double allocation took place. One also wonders whether in the circumstances of this case, either the Plaintiffs or the 1st Defendant can stand up and say honestly ***"I got this piece of property in an open, transparent and honest way"***. Such questions dictate that the 1st Defendant herein must be restrained as prayed in the application until this suit is heard and determined. As rightly stated by the Plaintiffs, ***"the consequences of this dispute go beyond the mere question of who is entitled or not entitled to the suit properties."*** As far as this court is concerned this is a matter of public interest, regardless of who owns or will be eventually declared owner of the properties.

14. For the reasons that this is a matter of public interest, payment of damages cannot adequately compensate the Plaintiffs. As a matter of public interest, it is important that the truth concerning this double allocation is unearthed so that appropriate orders as to ownership of the properties are made. Contrary to what the 1st Defendant alleges the fact of double allocation is the more reason why the injunction should be granted in favour of the Plaintiffs whose title is, as far as can be seen from the documents availed to the court, protected by the provisions of the RTA, and in particular sections 20, 22(3) and 23(1) of the RTA. For these same reasons too, the court finds and holds that the balance of convenience tilts in favour of the Plaintiffs.

15. Before I conclude this ruling, there is a technical point that was raised by the 1st Defendants in opposition to the application. The 1st Defendant contended that the application is incurably and fatally defective, and that for this reason the application should be struck out. Section 1A of the Civil Procedure Act, Cap 21, (the Act) provides that –

1A (1) The overriding objectives of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

16. In light of the above, and under the provisions of Section 1B of the Act, the duty of this court is to

determine this dispute justly as between the parties. That means that each party ought to be heard fully, the technicality noted by the 1st Defendant notwithstanding. To that end, the 2nd Defendant who did not answer the application is under a duty to assist the court in getting to the bottom of this dispute. The said party shall be served with a copy of this ruling, and be required to file a defence to the suit.

Conclusion

17. In conclusion, the court is satisfied that the Plaintiff's application dated 4/06/2008 has merit. The same is allowed in the following terms.

(a) The 1st Defendant be and is hereby restrained by itself, its servants and/or agents or by anyone whomsoever from entering upon, constructing upon or in anyway interfering with the Plaintiffs' quiet enjoyment possession and user of parcels of land more particularly described as Land Reference Nos. 209/10999 and 209/11000 until this suit is heard and determined.

(b) The costs of this application shall abide the outcome of the main suit.

It is so ordered.

DATED and Delivered at NAIROBI this 9th day of October, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Nderitu (present) for the Plaintiffs

Miss Maari holding brief for Ombeta for the Defendants

Weche - court clerk