



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1296 of 2006

BENSON MUNGAI KIMANI & ANOTHER PLAINTFIF

VERSUS

PROF. JAMES OCHANDA DEFENDANT

RULING

I: BACKGROUND

1. The Nairobi City Council, Housing Department allocated to the residence of Nairobi residential plot to be developed. In this case the plot are situated in the Kayole area of Nairobi.

2. One Jason N. M’Muthuri (not party to this suit) was originally allocated plot No. B6-337 on 7 May 1987 under a loan scheme in a joint project of the World bank and the City council. In 1999 he was unable to pay and fell into arrears. The Nairobi City Council housing department held a meeting and resolved that all the allottee who were in arrears should have their premises repossessed. As a result, an advertisement in the Kenya Times Newspapers was made asking the defaulters to pay up. They, including Jamson N. M’Muthuri failed to pay. The property plot in question was repossessed (Council meeting of the housing development committee for 15.11.00). The plot in question was allocated to Norbert O. Oduori. He was issued with a allotment letter. He then sold the premises to the present/respondent/defendant in this case who was also issued with the letter of allotment.

3. Jason N. M’Muthuri sold the land to one Jane Muthoni Kiarie whom he gave “a power of Attorney” to have all dealing with the plot in question. He also paid, through Jane Kiarie a lump sum towards the arrears he had allegedly, in March 2000. (by now the property had already been allocated to the defendant).

4. Jane Muthoni Kiarie then sold the plot to the 1st and 2nd plaintiff. They took possession and began to construct. The defendant demolished and stopped further construction. He reported them to the police where they 1st plaintiff and Jane Muthoni were arrested for trespass and arrayed before the Makandara Court in criminal Case No.6037/06 (File not read by this court) that is the still pending.

5. Jason Njeru M’Muthuri filed a suit in the magistrates court to agitate his rights over the said piece of plot. He then filed a injunction seeking orders to restrain the defendants from dealing with the said property. The trial magistrate concluded that there was an issue of double allotment. This was not the case. The said Jason Njeru M’Muthuri held no title or allotment letter from the City Council after 1999.

6. The trial magistrate do not have powers to deal with the land issue as to the title and ownership. It does not therefore give them power to deal with an injunction on the grounds that an injunction does not deal with land but an injunction. The application for an injunction deals with land and as such the magistrates lacks jurisdiction to deal and the matters of land. The exception may perhaps be that of trespass and or nuisance that does not touch on the issue of ownership.

7. In the magistrate court case it transpired that after orders were issued, the said Jason Njeru M'Muthuri had failed to issue summons to enter appearance to the defendant after a lapse of 24 months. The defendant in this case who was also the defendant in the said case applied to have the suit dismissed. The trial magistrate accordingly dismissed the suit. This was not before the defendant appealed to the High Court in Civil appeal 503/00 challenging the magistrates earlier orders. As the suit had been dismissed this civil appeal 503/00 (not read by this court) is accordingly of no consequences and fails to be an issue of appeal.

8. Jason Njeru M'Muthuri returned to the same court with an application for a review of the magistrates order. This too was dismissed.

9. The present plaintiff 1 and 2 who were in effect, the second buyers to Jason Njeru M'Muthuri then filed this present suit and sort for an injunction to restrain the defendant in having any dealing with the said plot. This was temporary granted ex parte (duty judge K. Kariuki j) on 5.12.06. The inter-parties hearing was referred to me on 24 January 2006. On hearing the parties, I am requested to determine whether I should confirm the temporary stay pending the hearing of the main suit.

II: Argument by plaintiff/applicant

11. That the plaintiff 1 and 2 are the rightful owners of the property in question having bought the same from one Jane Muthoni. An injunction should therefore issue restraining the defendant from constructing his premises and demolishing the plaintiff construction of the property.

II: Argument by defendant/respondent

11. The original premises plot was repossessed. It was sold to one N. Oduor who in turn sold to the defendant. An allocation letter issued to him together with the minutes of the Housing Committee of the City Council of Nairobi reflects this is their annexure.

IV) Should an injunction orders be confirmed herein?

12. From the defendants/respondents submission it is quite clear that Jason Njeru M'Muthuri (not party to this application) held ownership of the premises between 1987 to 1999. He lost his ownership for failure to pay his arrears. He then went to the said City Council and paid up his arrears in 2000 March through the new owners Jane Muthoni who later sold the premises to plaintiff 1 and 2. This was of no effect as the property had already been sold to the defendant by the Council.

13. Perhaps the party require to test this evidence in a full trial. The fact remains that the applicant has failed to show that they hold title to the land and are legal owners. I accordingly decline to issue an injunction.

14. In summary

Land

Injunction application under certificate of urgency

Inter parties hearing

Held: - application for injunction be and is hereby rejected. The applicants 1 and 2 have no legal

right to the premises.

Hearing of main suit to be set down for hearing.

15. I award the costs of this application to the defendant respondent.

Dated this 31st day of January 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

M.M. Kinyanjui for Kantai & Co. Advocates for the plaintiff

P.N. Nyagoh for J.M. Njenga & Co. Advocates for the defendant