



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 70 of 2006

FRANCIS NDUNGU NJUGUNA.....PLAINTIFF

VERSUS

SAMUEL K. KANYORO.....1ST RESPONDENT

A.G. sued on behalf of COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

The plaintiff, Francis Ndungu Njuguna, filed suit seeking, *inter alia*, to be declared the lawful allottee of plot No.100 **Business Jewathu Site** (*hereinafter referred to as the suit land*) and further sought an order of the court to compel the 2nd defendant by mandatory injunction to cancel title No.**Njoro Township Block 1/1144** issued to Samuel Kanyoro, the 1st defendant in respect of the land claimed by the plaintiff. Contemporaneous with the filing the suit, the plaintiff filed an application under the provisions of **Order XXXIX Rules 1 and 2** of the **Civil Procedure Rules** seeking an order of this court to restrain the defendants by means of an interlocutory injunction from trespassing, interfering or otherwise dealing with the suit land pending the hearing and determination of the suit.

The grounds in support thereof are on the face of the application. The plaintiff contends that he is the lawful owner of plot No.100 Jewathu Njoro. He stated that he had invested immensely on the suit plot and was now solely deriving his livelihood from the same. He further stated that the 1st defendant had himself unlawfully registered as the owner of the suit land and had expressed desire to occupy the same. He contended that he had a prima facie case with high chances of success. The plaintiff swore an affidavit in support of his application.

When the 1st defendant was served with the application, he duly entered an appearance. He filed a defence and counterclaimed for the suit land. He swore a replying affidavit in opposition to the application. In the said affidavit, the 1st defendant deponed that he had purchased the suit land from one Francis Marindany, who had been allocated the same by the Commissioner of Lands. He deponed that after the purchase of the suit land, the same was transferred to him. He was subsequently issued with a title in respect of the same. He swore that the parcel of land which was allocated to the plaintiff was different from the parcel of land which the plaintiff is now claiming. He stated that Plot No.100 Njoro Township was not the same as Plot No.100 Jewathu site.

Francis Marindany, the person who sold the suit land to the 1st defendant swore an affidavit in support of the facts deponed to by the 1st defendant. He deponed that he was allocated the suit land by the Commissioner of Lands after which he transferred the same to the 1st defendant. He deponed that he was

the legal allottee of the suit land. This fact was confirmed by the Clerk to Council of the County Council of Nakuru. He deponed that the parcel of land which was allocated to the person who sold the land to the plaintiff was not the same as the parcel of land which the plaintiff was currently in occupation. The 1st defendant urged the court to find the application unmeritorious and dismiss the same.

At the hearing of the application, this court heard the rival submission made by Miss Njagua for the plaintiff and Mr. Musembi for the 1st defendant. Miss Njagua and Mr. Musembi basically reiterated the contents of the pleadings and affidavits filed by their respective clients. Prior to this court hearing the present application, the plaintiff and the 1st defendant had agreed by consent for the Nakuru District Surveyor to visit parcel No. Commercial Plot No.100, Njoro Township and plot No.100, Jawatho Site & service Scheme to determine the actual position on the ground of the said parcels of land. The said District Surveyor duly filed his report in court. I shall refer to the same at the later part of this ruling.

The issue for determination by this court is whether the plaintiff established a case as to entitle him to the order of interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an application for interlocutory injunction are well settled. In **Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] 1 EA 86** at page 89, the Court of Appeal held that;

“The sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretion will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and thirdly where the court is in doubt it will decide the application on a balance of convenience.”

In the present application, the plaintiff is claiming that he is the owner of plot No.100 Business Jewathu in Njoro Township. It was the plaintiff’s case that the parcel of land which he is currently in occupation is the same parcel of land as plot No.100 Business Jewathu at Njoro Township. On the other hand, the 1st defendant contends that the parcel of land which the plaintiff is currently in occupation of is parcel number Njoro Township Block 1/1144 which he purchased from one Francis Marindany, who was allocated the same by the Commissioner of Lands. The 1st defendant annexed a copy of the title in respect of the said parcel No.Njoro Township Block 1/1144 in support of his contention that he was the registered owner of the suit land. When this application was first listed for hearing before this court, this court realized that the issue in dispute between the plaintiff and the 1st defendant could not be resolved unless a surveyor determined the actual location of the said two parcels of land on the ground. The Nakuru District Surveyor, SM Mwangi filed his report in court on the 23rd May 2007. His report is dated the 4th April, 2007. In the said report, the Surveyor noted that the two parcels of land were separated by approximately 1.5 kilometres. Parcel No.100 Jewatho Site & Service Scheme was now registered as parcel No.Njoro Township/Block 1/453 whilst Commercial plot No.100 Njoro as Township/Block 1/1144. He observed that the parcel of land which the plaintiff claims is actually commercial plot No.100 Njoro Township and not parcel No.100 Jewatho Site and Service Scheme. The registered owner of the said parcel of land currently occupied by the plaintiff is the 1st defendant. The said parcel of land is registered as Njoro Township/Block 1/1144.

It was therefore clear from the foregoing that the plaintiff failed to establish that he is the legal owner of the suit land. The plaintiff annexed letters of allotment from the County Council of Nakuru in support of his claim of ownership of the suit land. On his part, the 1st defendant annexed a title in respect of the suit land. The 1st defendant established that he is the registered owner of the suit land. This court is being called upon to make a determination between the rights of a registered owner *vis a vis* the rights of a person with a letter of allotment. In **Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & others CA Civil Appeal No.11 of 2002 (Nrb) (unreported)**, the Court of Appeal held at page 8 of its judgment as follows;

“It would be a violent affront to our land tenure systems, with all their perceived imperfections, unless there is a lawful challenge to an existing title or a policy – charge by parliament, to uphold the rights

of a temporary allottee of land or trespasser, over those of a registered proprietor. This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it. – See Ackman vs Muchoki [1984] KLR 353, Kamau Mukha vs The Ripples Lts (App.Nai 186/92 (U.R)).”

The plaintiff has failed to establish that he had a legal right on the said parcel of land that is superior to that of the 1st defendant, who is the registered owner of the same. The plaintiff took occupation of the suit parcel of land mistakenly assuming that it was the parcel of land which he had purchased from Ben Olube. The plaintiff was aware, even at the time he filed the present suit, that the registered owner of the suit land was the 1st defendant. (See *paragraph 6 of the plaintiff*). In the circumstances therefore, the plaintiff has failed to establish a prima facie case. He has failed to cross the first hurdle in his bid to establish a case so that he can be granted interlocutory orders of injunction.

The plaintiff’s application lacks merit. It is hereby dismissed with costs to the 1st defendant.

DATED at NAKURU this 5th day of December 2007

L. KIMARU

JUDGE