



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 73 of 2006

PAUL KURIA WAINAINA.....PLAINTIFF

VERSUS

NYANDARUA PROGRESSIVE AGENCIES LIMITED.....DEFENDANT

RULING

The plaintiff/applicant filed this application by way of Chamber Summons under Order XXXIX and section 3A of the Civil Procedure Rules and Act respectively seeking for restraining orders against the defendant/respondent from interfering with plots Number 1252 and 1258 situated at Solai.

The application is premised on the grounds that the plaintiff is the legal, lawful and rightful owner of the land known as Nyandarua Progressive Agencies Plot Number 1252 and 1258. The applicant claims that he has been in quiet undisturbed occupation of the parcels of land since 1980 and the respondent has instructed a surveyor to re-survey and subdivide the plots into one (1) acre plots with the intention of selling.

Thus the applicant received a letter dated 22nd March, 2006 from the respondent which letter purports to dispossess him of the plots Nos. 1252 and 1258.

These grounds upon which this application is predicated are further explained in the matters deposed to in the applicant's supporting affidavit sworn on 27th March, 2006. The gist of the matters deposed to can be summarized as follows:-

The applicant contends that he was a shareholder of the respondent Company where he claims he bought shares in consideration of which he was allocated plots. The applicant said that he subsequently became a Director of the respondent Company in 1980 and purchased a further (240) shares which entitled him to plots Nos. 1258 and 1252 which plots had been rejected by the original allottees and he thus paid Kshs.10,000/= as per the receipt issued to him on 22nd August, 1980.

The applicant contended that he was officially certified as the legal owner of the plots on 16th May 1987 pursuant to a verification exercise whereby it was noted that he was the owner of plot number 1233, 1258, 1237 and 1252 all measuring 4 acres as endorsed on the ballot card.

The applicant has been in occupation of the plots and deriving benefits therefrom until on the 20th March, 2006 when he complained that the respondent sent surveyors to subdivide the plots ostensibly with the intention of selling them to other people. Thus the applicant sought for the interim orders of injunction

pending the hearing of the main suit.

This application was opposed by the respondents who filed a replying affidavit. Counsel for the respondent submitted that the applicant has not demonstrated that they have a prima facie case with a probability of success. Firstly the applicant was blamed for failing to make a full disclosure of facts which is necessary in an application for injunction and secondly for misrepresenting facts on oath.

The plots belong to the respondent who is still the registered proprietor and these plots the subject matter of this suit were repossessed by the Company in 1987.

Moreover the respondent company instituted a probe committee into the affairs of their company especially when the applicant was in office as a Director and the Committee found out that the applicant together with our Directors had irregularly allocated themselves plots, and misused their powers as directors for their own benefits. It was found out that there were no shares that were issued in 1987 and by the time the applicant said he paid Kshs.10,000/= he was indeed out of the country a fact that was discovered by the probe committee.

In this regard, counsel for the respondent urged this court to disallow the application for injunction.

The principles for granting an interlocutory order of injunction have long been settled. The first consideration being that the applicant must show a prima facie case with a probability of success.

In this case, the respondents are the registered proprietors of the suit premises which they have subdivided to allocate to their shareholders. The applicant claims to have been allocated plots No. 1252 and 1258 as per a copy of a ballot paper.

On the part of the respondents, they have denied the allocation of the two plots to the applicant and more so the authenticity of the of the ballot paper is challenged. It is not endorsed by the Company nor is it indicated on the share certificate the plots that were issued to the applicant when he paid for 240 additional shares. I am therefore not satisfied that the applicant has established the ownership or/proprietorship of the two plots in order to persuade me to grant the orders sought.

It was held in the case of **MIRAO LTD. -VS- FIRST AMERICAN BANK OF KENYA LTD. & 20 OTHERS [2003] KLR.**

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case, it is a case which on the material presented to a court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the letter.”

The respondent claims that they are the registered proprietors of the subject plots and they have denied and given reasons why the plots cannot be the applicant's, I am of the view that on the face of the matter, the applicant has not satisfied the first condition for granting of the orders sought.

In the case of **Kenya Commercial Finance Co. Ltd. -VS- African Education Society & others Civil Appeal No. 142 of 1999** the conditions of granting an injunction were stated that if a party failed to prove the first condition, the second condition need not be addressed.

“These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third one is addressed”

Since the applicant has not satisfied the first condition the application is dismissed with costs to the respondent.

It is so ordered.

Ruling read and signed on 14th July, 2006.

MARTHA KOOME

JUDGE