

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 1127 OF 2003

ESAU MUMIA BUNYIHWIA PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI AND 3 OTHERS ...DEFENDANT

RULING

This application was argued before me on 22nd January and 5th February 2004. It is made by way of a Chamber Summons dated 3rd November 2003 brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules. In it the Plaintiff/Applicant seeks an injunction to restrain the third Defendant his agents or representatives in the suit from taking possession of and/or further developing plot No. B2- 173 Kayole Estate and an order directing him to remove his property or materials from the said plot. Costs are also sought from the defendants. The grounds given as the basis of the application are that the third Defendant has no lawful authority to develop the plot which the Plaintiff/Applicant claims to be the sole owner and that the Defendants' conduct will occasion the Plaintiff/Applicant irreparable loss.

On the face of it, the Chamber Summons is a muddle in that the orders sought are against the third Defendant/Respondent, yet in prayer 4 it seeks costs as against all defendants and in ground 2 it alludes to the conduct of all the defendants. I do not see how Order 39 r. 1 & 2 would apply as against the 1st and 2nd Defendants in the circumstances of this suit. The Application having been served on the other two defendants they have appeared and filed affidavits in reply even in the circumstances noted above. The affidavit in support of the application alludes to certain wrong doing by the 1st and 2nd Defendant/Respondents but no orders are sought in respect of the alleged wrongs. For this reason I will avoid straying into those areas and dwell mainly on whether the application itself is meritorious and whether the reliefs sought ought to be awarded.

In summary, the Applicant's contention is that he is the legal owner of the subject plot by virtue of an allotment letter from the 1st Defendant dated 11th September 1994 which required him to pay a deposit of Kshs.13,500/= being 30% of the purchase price within 30 days and the balance within a period of five years. The said letter stipulated that the allotment would be withdrawn if the down payment was not paid within the specified period and without further communication to him. The Applicant paid the said deposit but concedes that he did so later than the stipulated period. The Applicants contends that by accepting the late payment the 1st Defendant waived the limitation of 30 days. I would agree with him. The Applicant further states that the subject plot was allocated to the 2nd Defendant who in turn sold it to the 3rd Defendant in 1997 only three years after his own allocation, whereas he had up to five years to clear the balance of purchase price. It does not seem like the Defendant paid the "other payments" in respect of survey fees, legal fees which were required to be paid in the initial stage. If he did he has not talked about them although from his annexures he did pay the annual ground rent of Shs.380/=.

The issue for determination really is whether the Plaintiff/Applicant has a better title as against the third Respondent or whether the third Respondent has any title at all. The 3rd Respondent undoubtedly acquired the plot from the 2nd Defendant and not the 1st Defendant, who according to the Applicant acquired the plot by way of a suspicious allocation in circumstances which the Applicant claims were discriminatory against him. The Applicant claims that title to him passed once the deposit was paid, a position I would choose not to agree with since the balance purchase price still remained unpaid and other transfer formalities had not been done. I find that the alleged wrongful or unfair re-allocation to the 2nd Respondent by the 1st Respondent falls in the area of Judicial Review as clearly shown by the complaints in paragraphs 5 (a) to 8 of the Applicant's Supplementary Affidavit sworn on 27th November 2003. In these paragraphs the Applicant alludes to discrimination by the 1st Defendant/Respondent against him in its allocation of the same plot to the 2nd Respondent, repossession of the plot without being given due

notice or a right to be heard as to whether he still had the intention to complete.

Much as the dealings between the 1st and 2nd Defendants may seem suspicious, again I think the present application does not offer much help in deciding whether the Title to the 3rd Defendant is null and void. The application does not pin point the 3rd Defendant/Respondent wrongdoing or participation in the suspicious allocation to the 2nd Respondent. In his own affidavit he has sworn that he did make enquiries as to the 2nd Defendant's ownership and found that she had all the documentation necessary to effect a transfer. This is not challenged by the Applicant. I do not think he would have any reason to go beyond that evidence in his investigation of title. I find that he is a holder for value as demonstrated in his evidence. His title can only be challenged upon proof of fraud or misrepresentation which has not been established in this case.

As to whether I should exercise my discretion and award the relief by way of an injunction I must satisfy myself that

(1) The Applicant has demonstrated a prima facie case with a probability of success

(2) If I do not grant the injunction the Applicant will suffer Irreparable loss/damage not capable of compensation in damages

(3) That on a balance of convenience the Applicant is entitled to the relief.

The cause of action herein arises out of want of title on the part of the 3rd Respondent who claims to be a bona fide purchaser for value. In addition to the findings already noted, I find that the Plaintiff herein challenges the 2nd Defendant's title on grounds of illegality thus making the sale to the 3rd Defendant/Respondent a nullity. The Plaintiff/Applicant does not go beyond the mere allegation of illegality to plead specifically to fraud and/or misrepresentation the only grounds on which the title can be challenged. Further, as earlier stated, the reliefs sought as against the 1st Defendant/Respondent and consequentially against the second can only be pursued by way of Judicial review, which leads me to find that the present action itself does not lie. The Application therefore fails the test of a prima facie case.

As to whether the Applicant would suffer irreparable loss if an injunction is not granted I find that he had not proven that fact. He has averred to having

“organized development plans and obtained approved plans”

but no details of expenses or inconvenience have been given. He has been content to “sit” on his claimed rights to occupy and develop the plot for nine years after paying only the deposit and one year's annual rent and has not attempted to complete the sale by paying the balance of purchase price. If he were to chose to pursue the remedy of Judicial Review and succeed in his claim then damages would adequately compensate him.

On the balance of convenience I find that it is the third Defendant who would suffer irreparable loss and great prejudice if the stay granted herein were made permanent. He has invested heavily on the plot in question which as earlier stated he acquired for value without notice of defect in Title.

For these reasons I find that the application fails and dismiss the same with costs.

Delivered and signed at Nairobi this 26th Day of February 2004

M.G. Mugo,

Ag. Judge