



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND CASE NO. 60 OF 2016

NURIA DIDA JATTANI.....PLAINTIFF/APPLICANT

VERSUS

ABDI ADAN OGORSU.....1ST DEFENDANT/RESPONDENT

DIDA JATTANI.....2ND DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 25th May, 2016 seeks the following orders:-

(1) THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the defendants/respondents by themselves, their savants, and/or agents from evicting, entering or in any way interfering with the Applicant's use and occupation of Plot No. 155 Low Density Kiwanjani Market until this application is heard and determined.

(2) THAT this Honourable Court be pleased to issue an order of temporary injunction restraining the defendants/respondents by themselves, their servants, and/or agents from evicting, entering or in any way interfering with the Applicant's use and occupation of Plot No. 155 Low Density Kiwanjani Market until this suit is heard and determined.

(3) THAT the OCS Isiolo Police Station be ordered and directed to see that the Order of this court is obeyed.

(4) THAT the costs of this application be provided for.

2. The grounds in support of the application are;

(1) THAT the Applicant got married to one DIDA JATTANI when when she was only 15 years old and they were blessed with four children.

(2) THAT the Applicant later separated with the husband due to the husband's cruelty, drunkenness and brutality.

(3) THAT the Applicant later on got Plot No. 155 Low Density Kiwanjani Market from Isiolo County Government when the County was issuing Plots to the Locals.

(4) THAT she has lived there with her children, built her home and sold part of it to three people namely HASSAN ALI GURACHA, RUFO DUBA KANCHORA and MOHAMED JILLO ROBA.

(5) THAT the 1st Respondent herein in connivance with the 2nd Respondent are claiming that Plot No. 155 is theirs and that they have threatened the life of the Applicant forcing her to flee her home for her own safety.

(6) THAT the Applicant now lives in fear and her Plot is in the process of being snatched away from her.

(7) THAT the intervention of this court is necessary so that the applicant's life and her Plot can be preserved until the court is able to hear and determine this matter.

3. The application is further supported by the affidavit of NURIA DIDA JATTANI and has the grounds:-

(1) THAT she (Applicant) got married to one DIDA JATTANI, the 2nd defendant herein when she was still a young girl of 15 years and they were blessed with 4 children.

(2) THAT after the birth of their last born child, her husband became a drunkard and unfaithful and stopped providing for the children and the applicant.

(3) THAT she left the children behind but they later followed her and having the responsibility of taking care of the children, she engaged in small businesses here and there and even washed clothes for people for a fee and did other house chores just to earn a living.

(4) THAT later on, the Isiolo County Government started issuing Plots to the locals at a place called Kiwanjani Low Density (See a copy of the Plan of the Kiwanjani planned residential area marked "N.D.J I")

(5) THAT Applicant was one of the people who got a Plot there and given Plot No. 155 (See a copy of the Demand Notice by Isiolo County Government demanding for Plot rate bills marked "N.D.J. 2" and the minutes of the Council marked "N. D. J. 3").

(6) THAT Applicant has been in peaceful occupation of this Plot and even built her house there.

(7) THAT she has even sold part of the Plot to HASSAN ALI GURACHA, RUGO DUBA KANCORA and MOHAMED JILLO ROBA (See the three sale agreements marked "N. D. J. "4a", "4b" and "4c").

(8) THAT the beacons for the Plot were fixed (See a copy of the Certificate marked "N.D.J. 5").

(9) THAT 3 weeks ago, a man who the applicant later came to know as Abdi Adan Ogorsu in connivance with her former husband (the 2nd Respondent herein) came claiming the plot stating that it is his and that Applicant should vacate the said Plot or he would kill her.

(10) THAT the 1st Respondent purports to have documentation for the said Plot but with a different Plot No. 162.

13a. THAT the threats towards Applicant's life have forced her to flee from her home to safe-place which for safety reasons she would not disclose.

13b. THAT she has reported to the Police but they need a Court Order.

14. THAT Applicant's life is now at a stand still since she cant go on with her normal duties for fear of being killed.

15. THAT she doesn't know the state of her property now as she cant go back to the Plot No. 155 for fear of her life.

16a. THAT these threats have made the two purchasers to demand for a refund of their monies which Applicant is not in a position to refund.

16b. THAT she needs this Court's protection from the defendants.

4. Applicant has also filed a supplementary affidavit where she states that:-

(1) THAT her exhibits show clearly that Plot No. 155 is hers and is a whole 2 acres and she only sold small portions to the buyers keeping the rest of the Plot.

(2) THAT the 1st defendant has invaded her Plot and cannot show any minutes of the Local Government allocating the Plot to him.

(3) THAT the exhibits by the 1st defendant have been made recently to grab her Plot.

5. The application is opposed by the first Respondents Replying Affidavit of ABDI ADAN HAGARSO who has filed a replying affidavit where he has deponed as follows:-

(1) THAT he understands that the subject matter of this suit is an alleged Plot No. 155 Low Density Kiwanjani Market measuring two acres.

(2) THAT the matters alleged in paragraph 3, 4, and 5 of the Plaintiff's Supporting Affidavit are alien and irrelevant to the claim and are positioned to elicit sympathy to the Plaintiff.

(3) THAT he knows the area and extent of Kiwanjani area very well and the documents marked NDJI referred to in paragraph 6 of the Plaintiff's Supporting Affidavit is in respect of land parcels bordering the ISIOLO General Hospital, St Kizito Primary School and Prison which are far away from Kiwanjani and in a different administrative Division.

(4) THAT moreover the said document NDJI do not refer to alleged Plot No. 155.

(5) THAT in reaction to paragraph 7 and 8 of the Plaintiff's Supporting Affidavit he has no interest or claim over alleged Plot No. 155 as he has his own Plot No. 162 Low Density Kiwanjani, See Part Development Plan and Rent receipts marked Exhibit AAI.

(6) THAT he has clearly fenced his plot and erected a timber house thereon.

(7) THAT the three sale agreements referred to in paragraph 9 of the Plaintiff's Supporting Affidavit show clearly that the Plaintiff sold the same Plot Number 155, her own property, to three different persons and received a total of Kshs. 1,800,000/=.

(8) THAT the 1st Respondent has a witness in the name of KADI KUNI BORU who can confirm that 1st respondent is the owner of the neighbouring Plot No. 162.

(9) THAT the other Purchaser RUFO DUBA is the wife of GIRO LIBAN the ISIOLO County Chief Officer for Health and the Plaintiff had mistakenly but deliberately pointed out to this buyer 1st Respondent 's Plot No. 162 which prompted him to raise protests in defence of his property.

(10) THAT now the three buyers and others unknown have come forward demanding their monies and this is what has forced the Plaintiff to abandon her home and go into hiding.

(11) THAT for more than a year 1st Respondent even paid the Plaintiff money in return for her guarding his said property as revealed in his Advocates's letter to the Plaintiff dated 13th May, 2016. See Exhibit AA2.

(12) THAT upon realizing that the Plaintiff was scheming to fraudulently sell his said property 1st

Respondent placed a Caveat with the County Government; See Exhibit AA3 is a copy of my Affidavit.

(13) THAT the beacons certificate referred to in paragraph 10 of the Plaintiff's Supporting Affidavit is of no assistance to the Plaintiff as it does not concern her alleged Plot NO. 155 or any identifiable property and is not issued by any licensed surveyor.

(14) THAT the matters alleged in paragraph 11 of the Plaintiff's Supporting Affidavit are absolute untruths as 1st Respondent has known the Plaintiff for several years but he has had no dealings or association with her former husband.

(15) THAT 1st Respondent has valid and official documents of ownership of Plot No. 162 referred to in paragraph 12 of the Plaintiff's Supporting Affidavit.

(16) He denies alleged threats to the Plaintiff and that her misfortunes are of her own making.

(17) 1st Respondent is surprised that the Plaintiff has made any reports to the Police as he has never been summoned or questioned by the police.

(18) THAT as regards paragraph 13 of the Plaintiff's Supporting Affidavit, the allegations are falsehoods concocted to whip up sympathy.

(19) THAT as regards paragraph 14 of the Plaintiff's Supporting Affidavit the Plaintiff has sold all her land including her so called home and she has nowhere to return to.

(20) THAT in answer to paragraph 15 of the Plaintiff's Supporting Affidavit 1st Respondent reiterates that the present conflict is among the common three buyers and pitted against the Plaintiff all of whom are demanding their money back.

(21) THAT 1st Respondent believe that the Plaintiff's illegal quest for his property is to assist her raise money to pay off the several buyers claiming from her.

(22) THAT it is openly obvious that the Plaintiff is seeking injunction in respect to property she sold several times and which she no longer owns.

(23) THAT 1st Respondent is in effective occupation and use of his Plot No. 162 which the Plaintiff falsely labels as Plot No. 155 and any injunction issued would be tantamount to evicting him from his own property thereby enabling the Plaintiff to grab land dispose of his land.

6. On 1/12/2016 directions were given for the application to be canvassed by way of written submissions. It is however noted that the 2nd Respondent has never filed any documents in response to the plaint or the application. Plaintiff and 1st defendant have duly filed submissions.

7. In her submissions applicant states that she was married to the 2nd Respondent but the marriage broke down. She has further stated that she is the bonafide allottee of plot no.155 at Kiwanjani low density market in isiolo. She states that in may 2016, 1st defendant connived with the 2nd defendant to claim the aforementioned plot as belonging to the 1st defendant. She invites the court to see her documents to prove her case.

8. On his part 1st defendant avers that plaintiff sold all her land so she has no plot known as 155 and that there are no documents to prove ownership of the alleged plot.

9. 1st defendant has stated that his plot is no.162 at Kiwanjani which is developed and has a fence and gate.

10. The principles of granting an injunction are well laid in **Giella vs. Cassman Brown & Co. Ltd (1973) E.A. 358**. This court is duty bound to interrogate the plaintiff's case to see if it meets the criteria laid out in the aforementioned case.

11. PRIMA FACIE CASE.

“an applicant must show a prima facie case with a probability of success”. In **Mrao Ltd –vs- First American Bank of Kenya Ltd. & 2 others (2003) KLR 125** it was held;

“A prima facie case is more than an arguable case. It was not sufficient to raise issues. The evidence must show an infringement of a right and the standard is higher than an arguable case”.

12. The documents availed by the applicant are not in her favour. Exhibit N.D.J.1 is a development plan. The applicant has not demonstrated that she has any nexus with the said document. Annexure N.D.J.2 is a demand notice for rate payments. It is for march 2015. The document on its own is not prove of ownership and there is no updated record to show that she is the one paying rates. Annexure N.D.J.3 are minutes which show that her application for 2 acres at Kiwanjani had been approved. The allotment of the plot no.155 is not captured in the minutes. As for annexures N.D.J.4 a,b and c, these are sale agreements indicating that she has sold the plot no.155. There is no clarity on how it came to be that applicant has sold the plots but still retains the plot. To this end I find that the application has not met the first criteria of granting the injunction.

13. Likely hood of suffering irreparable injury;

The applicant must demonstrate that she is likely to suffer irreparable damage and that damages would not be adequate compensation see **Kenya Commercial Finance Co. Ltd. Vs. Afraha Education Society (2001) vol 1 E.A. 86**. In **Regina Munyao vs. Nicholas Matata Mukosi H.C.C NO 246/2010** at Machakos Judge Makhadia gave weight to the issue of who was in occupation of the land and how the land was being used.

14. In her affidavit, applicant states that she has been in peaceful occupation of the plot. This is also the plot she has partly sold to three people. So how much of the plot is remaining?. What is the acreage she is occupying?, where is evidence of her dwelling or any development on the plot? And how is she utilizing the land?. These are questions where answers cannot be found anywhere in the applicant's documents. I find that with regard to this criteria, the application fails.

15. **Balance of convenience;**

In Halsbury Laws of England 4th Edition Vol 11. Page 805 its stated thus;

“ the court has to way one thing against the other to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles. “ In the Films rover international case (1988)3 ALL.ER 772 quoted by the applicant ,its atested that “a fundamental principle ofthat the court should take whichever course that appears to carry the lower risk of injustice ...”

In the instant case the applicant has not been able to state the extent of the land and where it is to be found on the ground. The 1st Respondent states that his plot is no. 162 and it is distinct from plaintiff's plot. Against this back ground, I find that the balance of convenience is not in favour of granting the injunction.

16. This is a case where evidence is required for each side to state their case. In **Mbuthia vs. Jimba Credit Corporation & another, 1988 KLR** it was opined that;

“the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each sides propositions.”

17. In the circumstances, this application fails. Any interim orders are hereby vacated and applicant is condemned to pay costs of the application. Dismissed with Costs to Respondent

It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 5TH DAY OF APRIL, 2017 IN PRESENCE OF:-

C:A Janet

Githinji h/b for Rimita for Plaintiff

Nyenyire h/b for Mr. Mukira for both defendants

L.N. MBUGUA

JUDGE