



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 422 OF 2013

PETER KAMAU KIRIBA.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

JANE WAIRIMU MWANGI..... 2ND DEFENDANT

COOPERATIVE BANK OF KENYA LTD..... 3RD DEFENDANT

LAND REGISTRAR NAIROBI..... 4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 2nd April 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from trespassing onto, selling, disposing, transferring and constructing on or in any manner interfering with the property known as Nairobi/Block 83/1583 formerly known as Plot No. A26-26 Umoja Innercore Sector 1-3 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for the 4th Defendant to be ordered to rectify the register by cancelling all the entries therein entered on 27th September 2011 and issue a new Certificate of Lease to the Plaintiff.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Peter Kamau Kiriba, sworn on 2nd April 2013 in which he averred that on 31st December 1999 he bought the suit property from one Osman Khalid. He produced a copy of the sale agreement. He further averred that after the sale, he applied for change of ownership with the Housing Development Department of the 1st Defendant which was effected on 29th September 2003. He added that since then, he has been paying annual rates dutifully when on a routine check of the suit property in December 2011, he found that the suit property had been encroached into by an unknown person and fenced off. He further averred that he wrote a letter to the Director, Housing Development Department on 1st December 2011 complaining of the said encroachment but did not receive a response. He further averred that upon making further enquiries, he came to learn that the 1st Defendant had fraudulently transferred the suit property to the 2nd Defendant and that the 4th Defendant had issued a Certificate of Lease dated 27th September 2011 to the 2nd Defendant. He annexed a copy of the said

Certificate of Lease. He further stated that upon conducting a search on the suit property, he came to discover that the 2nd Defendant had charged the suit property to the 3rd Defendant for a loan of Kshs. 3 million. He confirmed that he had not transferred the suit property to anybody and that his proposed development on the suit property had been approved by the 1st Defendant.

The Application is contested. The 1st Defendant filed the Replying Affidavit of Jane Ndonga, its Director of Housing Development Department, sworn on 6th May 2013 in which she averred that the Application and the entire suit discloses no cause of action against the 1st Defendant, that the Plaintiff/Applicant has never paid rent and rates since he allegedly bought the suit property from the original allottee, that the 1st Defendant never colluded with the other Defendants to defraud the Plaintiff or to transfer the suit property to the 2nd Defendant, that it was upon the Plaintiff/Applicant to start processing for the certificate of title over the suit property immediately upon transfer of the suit property to himself therefore he cannot blame anyone if he never followed up on his rights, that the 1st Defendant does not issue title deeds and did not issue the Certificate of Lease to the 2nd Defendant and further that the 1st Defendant had not approved any plans presented by the Plaintiff/Applicant as alleged.

The Application is further contested by the 2nd Defendant, Jane Wairimu Mwangi who filed her Replying Affidavit sworn on 19th June 2013 wherein she averred that the Plaintiff/Applicant had not annexed or exhibited any registered Lease and a Certificate of Lease to support his allegations of ownership over the suit property but had instead annexed official documents that prove that the suit property is lawfully and legally registered in her name. She further added that whereas the Plaintiff/Applicant may have entered into a sale agreement with Osman Khalid, the suit property was solely owned by the 1st Defendant which on 8th October 2008 resolved to repossess the still undeveloped suit property for reallocation as the original allottee and the Plaintiff had failed to develop it and allowed the same to run into huge arrears of unpaid rates and rents. She stated further that the suit property was allocated to one Martha Wanjiku on 26th November 2008 vide a Letter of Allotment of even date a copy of which she produced. She further averred that the said Martha Wanjiku paid rates and all other payments required by the 1st Defendant. She further averred that the said Martha Wanjiku by a duly registered Special Power of Attorney dated 20th July 2011 appointed her as her lawful attorney for the purpose of managing the suit property including payment of rates as well as to execute all documents necessary for the transfer of the suit property to herself. She further averred that the 1st Defendant proceeded to grant her a Lease Agreement that was duly executed and a Certificate of Lease was issued to her. She confirmed having taken immediate possession of the suit property which was at the time being used as a garbage dump by unknown persons and began the process of ferrying out the dumped garbage using trucks and also fenced the same to deter any further dumping. She added that the allegations of fraud by the Plaintiff/Applicant were groundless and unproved. She added that the 3rd Defendant conducted due diligence prior to advancing her a loan using the suit property as collateral and found everything to be in order. She stated that the Plaintiff/Applicant did not carry out any activity on the land from September 2003 to 1st December 2011 if at all he held the same and that the Plaintiff/Applicant concealed the fact that the suit property was repossessed from him by the City Council of Nairobi for failure to develop the same. She further averred that the allegations of fraud against the Defendants by the Plaintiff/Applicant have not been proved and that he had not demonstrated any superior registrable rights over the suit property and the 4th Defendant should not be ordered to alter the register.

The Application is further contested by the 3rd Defendant which filed the Replying Affidavit of John Wambugu, its Legal Officer, sworn on 16th July 2013 who averred that the Plaintiff/Applicant never issued any demand or notice to the 3rd Defendant prior to filing this suit hence the 3rd Defendant was not aware of the Plaintiff's claim. He stated further that the 3rd Defendant exercised due diligence by conducting all the enquiries prior to granting the 2nd Defendant a term loan of Kshs. 3 million upon registration of a charge in favour of the 3rd Defendant. He further denied that the 3rd Defendant was party to any fraud or illegality attributed to it by the Plaintiff/Applicant either unilaterally or in collusion with the other Defendants. He further stated that as a chargee, the 3rd Defendant has the first right over the suit

property and the prayers sought by the Plaintiff cannot override this right and cannot therefore be granted. He stated further that the Plaintiff/Applicant's remedy, if any, is for damages against the 1st and 2nd Defendant.

The Plaintiff/Applicant, 2nd and 3rd Defendant filed their written submissions.

The issue that I am called upon to determine is whether to grant the Plaintiff/Applicant a temporary injunction in respect of the suit property. In deciding whether to grant the temporary injunction sought after by the Plaintiff, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“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 the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Looking at the facts of this case, the Plaintiff/Applicant asserts that he is the owner of the suit property which the 2nd Defendant is allegedly trespassing upon. In support of this assertion, the Plaintiff/Applicant produced a sale agreement dated 31st December 1999 entered into between him and one Osman Khalid, who allegedly previously owned the suit property. The Plaintiff/Applicant, however, proceeded to produce a Certificate of Lease in the name of the 2nd Defendant in respect of the suit property and asserted that the same is invalid as it was obtained by way of fraud and collusion between the Defendants. Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and this position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I observe that apart from the stated sale agreement, the Plaintiff/Applicant has not produced any title document in respect of the suit property. A sale agreement does not confer any interest or right over land. However, on the other hand, the 2nd Defendant/Respondent who has also laid claim of ownership over the suit property has produced to this court copies of her Lease Agreement with the 1st Defendant as well as her Certificate of Lease for the suit property. The position of the law in regard to this is to be found in **Section 26(1)** of the **Land Registration Act** which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

Going by this legal provision, this court is duty bound to hold that the Certificate of Lease produced by the 2nd Defendant is prima facie evidence that the person named as the proprietor, in this case the 2nd Defendant/Respondent, is the absolute and indefeasible owner of the suit property and that the title of such a proprietor shall not be subject to challenge except on the grounds given. While the Plaintiff/Applicant alleges that the 2nd Defendant/Respondent's title was obtained through fraud, this has not been proved. Further, no evidence is adduced to show that the 2nd Defendant/Respondent was party to such fraud, if any. Further to this, it has been established that the suit property is currently charged to the 3rd Defendant as security for a loan of Kshs. 3 million advanced to the 2nd Defendant. With such an encumbrance on the title, it is clear that the interests of the 3rd Defendant would be prejudiced should a temporary injunction be issued to the Plaintiff/Applicant as prayed. Arising from the foregoing, I find that at this interlocutory stage of these proceedings, the Plaintiff/Applicant has failed to establish a prima facie case with high chances of success at the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 10TH

DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE