



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

ENVIRONMENT AND LAND CASE NO.172 OF 2013

JANET M MAILU.....PLAINTIFF/APPLICANT

-VERSUS-

HARRISON K NJAGI & ANO.....DEFENDANT/RESPONDENT

RULING

By a Notice of Motion dated 5th February, 2013, brought under **Section 1(A), 1(B),3(A) of the Civil Procedure Act, Order 40 Rules (1),(2) (3) and (10) of the Civil Procedure Rules** together with all enabling provisions of the law, the Plaintiff/Applicant has sought for these orders.

- 1. That an order of injunction do issue restraining the Defendants, their agents, servants or employees from entering , upon, developing constructing,wasting,alienating and /or interfering with the suit property being Plot No. A4-157 till the hearing and determination of the main suit.***
- 2. Any such other or further Order the Honourable Court deem fit to grant.***
- 3. Costs be provided for.***

The application was premised on these grounds:-

- a. That the Defendant has illegally taken over the suit property (Plot No. A4-157) from the Plaintiff in violation of the Plaintiff rights and provisions of several statutes.***
- b. The Plaintiff's developments thereon have been demolished.***
- c. The 1st Defendant for the re-possession and allocation of the suit property to the 1st Defendant.***
- d. That the entire conduct of the Defendants is fraudulent and void.***
- e. That the Plaintiff stands to suffer great irreparable great loss.***

The said application was also supported by the supporting affidavit of **Janet N Mailu** who averred that she has been the owner of the suit property known as **Plot No. A4-157**, situated in Kayole in Nairobi since 1988. She further stated that she has been in occupation of the said plot since then. However on 7/12/2012 when she went to the offices of the 2nd Defendant to pay for the outstanding rates, the 2nd

Defendant's officers refused to accept payment and instead gave her a copy of the purported re-possession notices dated 5/12/2012 as per **annexture J2**. The applicant alleged that she was told by the 2nd Defendant's officers that the plot had already been re-possessed and given to another person.

That the said notice was never served upon her and she came to learn about it when she was given a copy at the 2nd Defendant's offices.

That finally applicant established that the 1st Defendant had through dubious means been given the said plot. There were no council minutes and/or resolution to repossess the said plot or authorizing the property to be given to the 1st Defendant. Therefore the purported repossession and grant of the plot to the 1st Defendant was fraudulent and illegal for reason that applicant was denied a chance to be heard and the required procedure was never followed. She also averred that the 1st Defendant was not an innocent purchaser having rushed through the back door to acquire the plot which was not advertised.

Applicant further alleged that the 1st Defendant has proceeded to demolish her development on the said plot without notice and/or court order. The said demolition and eviction are illegal and an abuse of the due process. The 1st Defendant has also commenced construction on the said plot and thus the injustice relief sought.

This application was vehemently opposed by the 1st Defendant, **Haron K Njagi**. He deposed that he is the registered and bonafide owner of **Plot No. A4 – 157** located in Kayole having been allocated the same by the City Council of Nairobi on 11th day of November, 1994 as per annexture '**HKN1**'.

The Respondent further averred that he paid **Kshs.55, 280/=** on 3/1/1995 to the City Council of Nairobi as per '**HKN2**'- a payment receipt. He was also issued with **beacon certificate** by the Chief Land Surveyor of Nairobi City Council on 2/2/1995 which confirmed that he was the actual owner of **Plot No. A4- 157 Kayole** as per annexture **HKN3**.

Further on 19/12/2008, he was issued by the City Council of Nairobi with Clearance Certificate, which confirmed that as the registered owner of **Plot A4-157 Kayole**, he had paid all sums due to the City Council. He further paid the land rates due to the City Council of Nairobi on 31/12/2012 as per annexture '**HKN5**'.

The Respondent therefore contended that he was legally allocated the plot in question by the allocating - authority Nairobi City Council following all legal procedures that are in force. Respondent stated that it was in the interest of justice that application dated 5th February, 2013 should be dismissed as the Plaintiff is using the court process to acquire the suit plot irregularly.

Though the 2nd Defendant, City Council of Nairobi entered appearance through the law firm of **Abwao Odhiambo Advocate**, they did not file any response to the Plaintiff's application dated 5/2/2013.

The parties herein canvassed the application through written submissions which I have considered. The applicant herein has sought for an injunctive relief. The applicant must therefore satisfy the threshold principles for grant of injunctions as was laid down in the case of **Giella Vs Cassman Brown and Co .Ltd (1973) EA 358**. Where the Court held that the applicant must show that :-

- a. He has a prima facie case with probability of success.*
- b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c. When the court is in doubt, to decide the case on a balance of convenience.*

The applicant herein alleged that she was allocated the plot in issue in 1988. She alleged that this plot was

initially allocated to one **Peter M Makula** on 16/12/1988 upon payment of **Kshs.50,000/=** as per annexure 'J1' which are copies of receipts from City Council of Nairobi. She alleged that the said **Peter M. Makula** transferred the plot to her and cancelled his names on the receipts and the names of the applicant **Janet Ndelele Mailu** were inserted on them.

The said receipts were allegedly certified as true copies of the original on 26/4/2000. However, the applicant does not have any letter of allotment or any receipt showing payments of land rates to the City Council of Nairobi.

The Respondent attached several annexures to his replying affidavit. Annexure 'HKN1' is a **letter of allotment**, showing that the Respondent was allocated **Plot No. A4- 157 on 11/11/1994**. He also attached clearance certificates as **HKN 4**. From the annexures attached to the Replying a Affidavit, the Respondent has demonstrated **prima –facie** that the **Plot No. A4-157** was allocated to him. Though the applicant attached two receipts which have her names inserted on them after cancelling the names of **Paul M Makula**, the said **Paul M Makula** did not swear an affidavit to confirm that he indeed transferred the plot to the applicant. There is no letter of allotment of the plot in question to the applicant. The applicant had failed to demonstrate that she has a **prima facie case** with high probability of success. Even though an allotment letter is not a certificate of title which can be held as conclusive evidence of proprietorship as provided by **Section 26** of the Land Registration Act, at least, it is a prima facie evidence that the plot or land in issue was allocated to the person holding it. In the instant case, it is the Respondent who possesses letter of allotment but not the Plaintiff applicant.

The applicant also alleged that she has been in possession of the plot in question since 1988 and has even constructed development on it. That the 1st Defendant demolished her development and commenced his construction. On the other hand, the 1st Defendant alleged that he has been in possession of the suit land since 1994 when he was allocated the same by the City Council of Nairobi. However, no evidence was tendered by the applicant to show that a development on the plot in issue had been demolished and another one was being put up. The court cannot ascertain that indeed applicant has been in possession of the suit land and she had even put up a development. The court cannot therefore find and hold that applicant will suffer irreparable loss which cannot be compensated by way of damages.

The 2nd Defendant has not put up any parties or filed any document. The 2nd Defendant is the right party would have shed light on who really owns this suit plot. However, the 2nd Defendant failed to do so. However, 1st Defendant is in possession of a letter of allotment and other documents to prove that he was allocated the plot in issue.

The balance of convenience herein tilts in favour of the 1st Defendant.

The issue of ownership of **Plot No. A4- 175** can only be solved after the matter is ventilated in court and evidence called and tested through a full trial.

For the above reasons, the court finds that the Plaintiff/Applicant has failed to establish the threshold principles for grant of injunctive relief. Consequently, the court disallows the Plaintiff/Applicant Notice of Motion dated 5/2/2013. I decline to confirm the interim orders. I proceed to vacate the said interim orders and dismisses the Plaintiff's Notice of Motion dated 5/2/2013.

Costs in the cause.

It is so ordered.

Dated, Signed and Delivered this 14th day of March 2014

L . N. GACHERU

JUDGE