



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 35 OF 2014

NGEI MATIBO.....PLAINTIFF

VERSUS

LAWI NYATENGDEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 17th January 2014 in which the Plaintiff/Applicant seeks for orders restraining the Defendant from trespassing or in any other manner interfering with the land parcel known as Nairobi/Block Tassia II-97/1124/11 (hereinafter referred to as the “1st Plot”) and Nairobi/Block Tassia II-97/1124/191 (hereinafter referred to as the “2nd Plot”) pending the hearing and determination of this application and suit, that the Officer Commanding Embakasi Police Station do enforce compliance of the order and that the Defendant be condemned to pay costs of this application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Ngei Matibo, sworn on 17th January 2014 wherein he stated that he purchased the 1st Plot from the Defendant under a scheme managed by the National Social Security Fund (“NSSF”) for a sum of Kshs. 700,000/- all of which he paid to the Defendant. He exhibited the sale agreement and a plot ownership card. He further averred that the Defendant subsequently transferred to him the 1st Plot but failed to process title documents thereto for him despite his having paid him to do so. He further averred that on 26th November 2013, he approached NSSF in order to purchase another plot of land and that he was allocated the 2nd Plot. He confirmed that he paid to NSSF a total of Kshs. 581,460/- for the 2nd Plot. He exhibited a letter dated 20th December 2013 written by NSSF confirming his ownership of the 2nd Plot. He then stated that on 23rd December 2013, he was informed that the Defendant was depositing construction material at the 2nd Plot with intention to commence construction thereon. He then stated that he rushed to Tassia Police Patrol Base where he reported the matter but that the police advised him to obtain a court order. He further added that the Defendant has now constructed some foundation on the 2nd Plot.

The Application is contested. The Defendant filed the following Grounds of Opposition dated 3rd February 2014:

1. That the motion is incurably defective and bad in law and ought to be struck out with costs.

2. That the Plaintiff has no claim whatsoever against the Defendant.
3. That the application has no basis in fact and/or in law.
4. That the Defendant has nothing to do with the suit property.
5. That the Defendant does not have any interest in that land.
6. That the Defendant is not the registered owner of the suit property.
7. That the Plaintiff has failed to furnish this honourable court adequate or sufficient evidence or proof to establish the allegations of fact being raised in the application.
8. That the prayers sought by the Applicant are not capable of being granted or otherwise enforced by this honourable court.
9. That the application should be dismissed with costs.

Both the Plaintiff and the Defendant filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, 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/Applicant 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 has shown that he purchased the 1st Plot from the Defendant. He holds a plot ownership card from Kwandege Self Help Group in this respect. He has also displayed a letter from the NSSF confirming his ownership of the 2nd Plot. The Defendant has not disputed the Plaintiff’s ownership of both the 1st and 2nd Plot. He has in fact stated categorically that he has no interest in those properties. To that extent therefore, I find that the Plaintiff/Applicant has established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? Land is unique and no one parcel can be equated in value to another. The value of the 1st and 2nd Plot can be ascertained. However, it would not be right to say that the Plaintiff/Applicant can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 14th DAY OF March, 2014

MARY M. GITUMBI

JUDGE