



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 458 OF 2013

JOYCE KAVATA MUTHAMA..... APPLICANT

VERSUS

MAVOKO DEVELOPMENT COMPANY LIMITED..... 1ST RESPONDENT

ALPONCINA NYIVA KIAWA.....2ND RESPONDENT

RULING

Coming before me for determination is the Notice of Motion dated 1st March 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction against the Defendants restraining them from trespassing, proceeding with further construction or interfering with or entering the parcel of land known as Plot No. 3192 Phase III within the Mavoko Municipality (hereinafter referred to as the “suit property”) pending hearing and determination of this application and suit. The Plaintiff/Applicant also seeks for an order restraining the 2nd Defendant/Respondent from allocating the suit property to any other person pending the hearing and determination of this suit and that the 1st Defendant/Respondent be compelled to issue the Plaintiff/Applicant with a title document for the suit property.

The Application is supported by the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Joyce Kavata Muthama, filed on 16th April 2013 in which she averred that in the year 2006, she purchased the suit property from the 1st Defendant/Respondent and paid consideration therefor. She averred further that upon finishing the payment of the consideration, the 1st Defendant/Respondent issued her with a Certificate of Ownership duly signed and sealed by its officials. She further stated that a trespasser has now encroached into the suit property, demolished the foundation she had built and started constructing a structure thereon without her knowledge or consent. She further stated that though she reported the matter to the 1st Defendant/Respondent, no action was taken. She then stated that upon her own investigation, she came to learn that it was the 2nd Defendant/Respondent who was encroaching her land. She further stated that upon confronting the 2nd Defendant/Respondent about the encroachment, the 2nd Defendant/Respondent threatened her leading her to seek the court’s intervention. She confirmed that since purchasing the suit property way back in 2006, she has not sold the

same to anybody least of all the 2nd Defendant/Respondent. She further stated that unless restrained by way of an injunction, the 2nd Defendant/Respondent shall persist in her trespass of the suit property and is likely to cause more damage thus permanently depriving her of her rights.

The Application is contested. The 2nd Defendant/Respondent, Alphoncina Nyiva Kiawa, filed her Replying Affidavit sworn on 4th June 2013 in which she averred that she is the rightful owner of the suit property pursuant to Certificate of Ownership No. 1072 issued to her on 29th May 2010 after conducting all the necessary due diligence from the 1st Defendant/Respondent's office. She averred that she bought the suit property from one Angela Nzula Wanyingi on 29th May 2010 at a consideration of Kshs. 200,000/-. She further stated that the 1st Defendant/Respondent through its officers showed her the beacons of the suit property upon payment of the requisite charges of transfer and beacon search amounting to Kshs. 11,000/-. She further stated that a Certificate of Ownership was issued to her. She further stated that she received a go ahead to develop the suit property from the 1st Defendant/Respondent after which she proceeded to develop her plot towards the end of the year 2012, by completing a septic tank. She further indicated that she commenced to build five rooms for her occupation and that of tenants on the suit property. She further indicated that upon getting to hearing of this present suit, she visited the 1st Defendant/Respondent's office where she found multiple plot ownership registers. She denied the Plaintiff/Applicant's claim that she destroyed her foundation stating that upon taking possession of the suit property, she only found a semi-permanent iron sheet house and a septic tank. She also stated that the Plaintiff/Applicant does not feature anywhere leading to the conclusion that her Certificate of Ownership was fraudulently issued.

In response thereto, the Plaintiff/Applicant filed her Further Affidavit sworn on 1st October 2013 in which she stated that she is the registered owner of the suit property having been issued with a Certificate of Ownership No. 345 dated 24th April 2007. She further stated that the 2nd Defendant/Respondent's claim of having done her due diligence is incorrect because the records relating to the suit property showed that it initially was allocated to her. She further stated that the 2nd Defendant/Respondent's Certificate of Ownership was issued later on 7th January 2009 than hers and the first in time prevails. She further averred that the documents relied upon by the 2nd Defendant/Respondent contain numerous alterations which cannot be verified. She further stated that the Respondents have fraudulently altered the records relating to the suit property and insisted she take up Plot No. 3185 which she had not purchased and which may be non-existent.

The Plaintiff/Applicant and the 2nd Defendant/Respondents both filed their written submissions which have been read and taken into account in this ruling.

In determining whether or not to give the Plaintiff/Applicant the orders she seeks of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of **Giella versus Cassman Brown (1973) EA 358** 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.”

In her attempt to prove her right of ownership of the suit property, the Plaintiff/Applicant has produced a Certificate of Ownership No. 345 dated 7th January 2009 issued by the 1st Defendant/Respondent. In response thereto, the 2nd Defendant/Respondent has equally produced her Certificate of Ownership No. 1072 issued on 29th May 2010. The 1st Defendant/Respondent who issued these two certificates failed to file any response herein leaving the two claimants trying to out compete each other. At this interlocutory stage of these proceedings, it is not possible to arrive at a conclusive determination on whose claim is superior to the other. This is a matter for the trial court. As at this juncture, I observe that it is not possible to tell which claimant is superior to the other. To that extent therefore, I find that the Plaintiff/Applicant has failed to make out a prima facie case with a probability of success at the main trial. Since the Plaintiff 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 the Plaintiff’s Application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2014

MARY M. GITUMBI

JUDGE