



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1411 OF 2013

TABITHA MUTHONI MWANGIPLAINTIFF/APPLICANT

VERSUS

LEAH WANJIRU NJUGUNA.....DEFENDANT/RESPONDENT

RULING

Coming before me for determination is the Notice of Motion dated 19th November 2013 in which the Plaintiff/Applicant seeks for orders of injunction to be issued restraining the Defendant from remaining in or trespassing onto Plot No. 760 Kamae Phase 2, Kamae Resettlement Project (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit and for costs to be provided for.

The Application is premised upon the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Tabitha Muthoni Mwangi, sworn on 19th November 2013 in which she averred that on

30th October 2010, she purchased the suit property from one John Irungu Chege and was issued with an Ownership Certificate in the joint names of her husband Richard Migwi Kamau and herself. She produced a copy of that Ownership Certificate. She then averred that later, she agreed with her husband that the suit property be transferred into her name and a new Ownership Certificate in her name was exhibited. She then stated that following a domestic misunderstanding, she and her said husband started living separately in June 2011. She stated that her said husband was residing on the suit property and had developed the same by constructing 13 temporary rooms for rent using funds accumulated by the both of them. She further averred that her husband was living in two rooms while renting out the other 11 rooms and that while she was living apart from her husband, he continued to maintain her and their children hence she allowed him to continue collecting rent. She then stated that her husband died on 30th August 2013 and that prior to his death, he was cohabiting with the Defendant/Respondent on the suit property. She then averred that following the death of her husband, she asked the Defendant/Respondent to vacate the suit property which she declined to do. She also averred that the Defendant/Respondent also prevented her from collecting rent from the suit property. She then stated that the Defendant/Respondent is occupying two rooms with a rental value of Kshs. 3,400/- while collecting rent of Kshs. 17,000/- which she has been collecting since September 2013. She then stated that she requires the said rental income for

her own upkeep and that of the children of her marriage.

The Application is contested. The Defendant/Respondent, Leah Wanjiru Njuguna, filed her Replying Affidavit sworn on 9th December 2013 in which she averred that it is not true that the Plaintiff/Applicant is the owner of the suit property and that the same was owned by her late husband Richard Migwi Kamau. She further contested the Plaintiff/Applicant's claim to her late husband stating that the Plaintiff/Applicant deserted him and he remarried. She further contested the validity of the Plaintiff's ownership documents stating that her late husband complained of losing documents and had gone as far as reporting that loss to the police. She produced a copy of the police abstract. She further averred that when the suit property was being developed, the Plaintiff/Applicant was not living with the said Richard Migwi and is therefore not entitled to the proceeds therefrom. She further averred that the Plaintiff/Applicant did not come to claim the suit property when her husband was alive but only came after his death. She further indicated that the Plaintiff is seeking for final orders of eviction at an interlocutory stage of these proceedings which should not be the case.

The Plaintiff filed written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the interlocutory injunction, 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.”

Has the Plaintiff/Applicant established a *prima facie* case? This heavily depends on whether the Plaintiff/Applicant has been able to convince this court that she is indeed the proprietor of the suit property. The conventional way of proving this is by production to this court of valid title documents in respect of the suit property. The documents that the Plaintiff has produced as evidence of ownership of the suit property are two Ownership Certificates, one in the joint names of her and Richard Migwi Kamau dated 30th October 2010 and another in her name dated 7th June 2012. The Sale Agreement that the Plaintiff/Applicant exhibited was between the said John Irungu Chege and Richard Migwi Kamau. While the Plaintiff/Applicant stated that she separated with the said

Richard Migwi Kamau on June 2011, she does not explain how the Ownership Certificate in her name dated 7th June 2012 came to be. There is an allegation of fraud by the Defendant/Respondent, who states that the late Richard Migwi Kamau complained of losing some important land ownership documents and in fact reported the loss to the police. I find the allegation of fraud to be plausible and does leave me with doubt over the Plaintiff/Applicant's claim of ownership of the suit property. To that extent therefore, I find that the Plaintiff/Applicant has not established 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 this Application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2014

MARY M. GITUMBI

JUDGE