



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 437 OF 2014

FRED NZAU KIMANZI.....PLAINTIFF

VERSUS

ESTHER GATHEE..... 1ST DEFENDANT

GEOFFREY KAMAU.....2ND DEFENDANT

JOSEPH MAINA.....3RD DEFENDANT

GATHERA SELF HELP GROUP.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 4th April 2014 in which the Plaintiff/Applicant seeks for orders of a temporary injunction restraining the Defendants from further trespassing on, building, constructing, developing and or whatsoever dealing or interfering with the land parcel known as Plot No. 57 located in Gathera Area, Kayole (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Fred Nzau Kimanzi, sworn on 4th April 2014 in which he averred that two years ago he purchased the suit property together with Plot No. 55 from Gathera Self Help Group and paid the purchase price of Kshs. 630,000/- to them and commenced developing the same. He further stated that he was issued with Plot Formalization Cards by the City Council of Nairobi (as it then was) which he produced. He further averred that upon visiting the Housing Development Department of the City Council of Nairobi (as it then was), he was informed that he could only pay for the suit property which in their records reflected him as the owner but he was not allowed to pay for the Plot No. 55 as the same had been sold by the 2nd, 3rd and 4th Defendants to one Simon Wariu Kihereko. He further stated that he was issued with a Certificate of Ownership for the suit property but was informed to seek a refund for sums paid for Plot No. 55 from the 2nd and 3rd Defendants. He confirms having reported the matter to the Provincial Administration namely the Chief, Njiru Location who after several meetings with the Defendants ordered that the 2nd and 3rd Defendants be reported at Kayole divisional Criminal Investigations Office for appropriate criminal action to be taken against them. He further confirmed that the 2nd and 3rd Defendants

were charged in court with the offence of obtaining money from him by false pretences. He further stated that the 2nd, 3rd and 4th Defendants have now purported to sell the suit property to the 1st Defendant who on or about 10th February 2014 trespassed thereon and commenced construction.

The Application is not opposed. Despite being duly served, none of the Defendants filed a response to this Application.

In deciding whether to grant the temporary 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.”

Looking at the facts of this case, the Plaintiff has based its claim of ownership over the suit property on a Certificate of Ownership issued by Gathera Self Help Group. He also relies on a Plot Formalization Card in respect of the suit property issued by the then City Council of Nairobi. The Defendants on their part lay no claim to the suit property whatsoever and in fact failed to enter any opposition to this Application despite being duly served. This means that the Plaintiff’s claim to the suit property remains unchallenged. In the circumstances, I find that the Plaintiff has indeed established a prima facie case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff 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 all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction. I therefore allow his Application. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF JULY 2014.

MARY M. GITUMBI

JUDGE