



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 63 OF 2014

JOHN KHAMASI BEGISENPLAINTIFF

VERSUS

JOSEPH MUROTE WANJIKU.....DEFENDANT

RULING

Coming up before me is the Notice of Motion dated 27th January 2014 in which the Plaintiff/Applicant is seeking for orders of temporary injunction restraining the Defendant/Respondent from trespassing on, wasting, constructing on, alienating or otherwise dealing with the property known as Plot No. 84 Komorock Community Shopping Centre (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for a declaration that the registration of Samuel Mbugua Gitau as an entry in the register of the suit property at the Dandora Housing Development which is under the Nairobi City County is correct and lawful and another declaration that the acts of the Defendant/Respondent are fraudulent, unlawful and constitute an illegal occupation and ownership. 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, John Khamasi Begisen, sworn on 24th January 2014 in which he averred that on 15th October 2013, he purchased the suit property from one Samuel Mbugua Gitau vide a Sale Agreement dated the same date. He produced a copy of the same. He also produced a copy of a letter of allocation from the Nairobi City Council to the said Samuel Mbugua Gitau in respect of the suit property. He averred that the said Sale Agreement together with a copy of the Special Power of Attorney was lodged with the Dandora Housing Development Scheme for registration. He further stated that he was shocked when on 13th January 2014 he was informed by friends that the suit property had been fenced off with a perimeter wall. He confirms having reported the matter at the Kayole Police Station though no steps have been taken to address the problem. He produced a copy of a letter from the Nairobi City Council confirming that the said Samuel Mbugua Gitau is the owner of the suit property.

The Application is contested. The Defendant/Respondent, Joseph Murote Wanjiku, filed his Replying Affidavit sworn on 20th February 2014 in which he averred that the Sale Agreement produced by the Plaintiff/Applicant is neither stamped nor registered as required by law and in any case does not confer

title. He further disclosed that there is a pending suit between him and the said Samuel Mbugua Gitau being **Chief Magistrates Civil Case No. 4741 of 2010** in respect of the suit property which is yet to be determined. He stated further that the purported sale and transfer of the suit property to the Plaintiff/Applicant under the circumstances is a nullity. He further stated that he was allotted the suit property by the Nairobi City Council (as it then was) on 17th July 2003. He produced a copy of his allocation letter. He confirmed having made the payments demanded amounting to Kshs. 12,000/- and Kshs. 19,000/- on 19th January 2010 and produced copies of receipts in support thereof. He further stated that he has been in possession of the suit property from 1994 and has been conducting his business from there. The Defendant/Respondent also filed Grounds of Opposition dated 20th February 2014.

In response thereto, the Plaintiff/Applicant filed his Further Affidavit sworn on 27th February 2014 in which he averred that he is not a party in **Chief Magistrates Civil Case No. 4741 of 2010** and therefore this suit is not res judicata. He further added that the said Samuel Mbugua Gitau had a right to sell to him the suit property. He further averred that it is only the Nairobi City County which can authenticate the true owner of the suit property.

The Defendant/Respondent filed his written submissions which have been read and taken into account in this ruling.

The issue I am required to determine is whether to grant the Plaintiff/Applicant a temporary injunction and the other prayers he has made in this Application. 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.”

Has the Plaintiff/Applicant demonstrated that he has a genuine and arguable case? It has been disclosed to this court that there exists an ownership dispute over the suit property which is **Chief Magistrates Civil Case No. 4741 of 2010** between the said Samuel Mbugua Gitau and the Defendant/Respondent herein which dispute is yet to be heard and determined. The Plaintiff/Applicant herein claims to have bought the suit property from the said Samuel Mbugua Gitau, whose ownership over the suit property is yet to be established. The Plaintiff/Applicant now wishes to assert his ownership rights over the suit property to the exclusion of the Defendant/Respondent. Almost all the documents of ownership produced by the Plaintiff/Applicant in respect of the suit property are in the name of the said Samuel Mbugua Gitau, whose title to the suit property is yet to be established. The Sale Agreement produced by the Plaintiff/Applicant cannot also be relied on in light of the pending case. From where I stand, I am not in a position to make a determination, even at this interlocutory stage, that the Plaintiff/Applicant has superior rights over the suit property compared to the Defendant/Respondent in these circumstances. Accordingly, I find that the Plaintiff/Applicant has not established a prima facie case with high chances 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...”

Further to the above, the declarations sought by the Plaintiff/Applicant may only be granted after the suit proceeds for full hearing and determination as they are final orders which cannot be granted at this interlocutory stage. For that reason and for the other reasons given earlier, I decline to grant those orders.

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE