



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO 1245 OF 2013

JOHN KINYUA RIMBERIA.....PLAINTIFF

VERSUS

SARAH MOSIORI.....1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED.....2ND DEFENDANT

RULING

The application for this Court's consideration is the Notice of Motion dated 15th October 2013 brought under Order 40 Rules 1,2,3,4, and 9 of the Civil Procedure Rules and section 3A and 63 (e) of the Civil Procedure Act seeking for orders that a temporary injunction do issue restraining the 1st defendants either through her servants, employees, assignees or anyone acting under them from trespassing, entering, erecting structures or undertaking developments in any other way dealing with the parcel of land known as plot number C1851 pending the hearing and determination of this suit.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of John Kinyua Rimberia who stated that he is the registered owner of plot No C 1851 and has been a member of the 2nd defendant since 1976 where he holds one share. He stated that he was allotted the suit property in mid-1990 and later on allotted a house on plot **P3473B**. He added that he was physically shown the suit property and has been paying confirmation fees adding to Ksh 550. He was issued with a receipt on 3rd June 1976 for the transaction. That after making further payments in 1978 he was issued with a share certificate on 1st August 1978, he was later issued with a bonus plot No P3473B after paying the required fees in 1996. He added that in January 2013, he found that a small one bedroomed structure had been erected on Plot No C1851 to which he has confirmed that the 1st defendant had constructed on his plot. He added that he presented all his documents to the 2nd defendant who found the documents to be legit but still remained ambiguous on the claim held by the 1st defendant on the suit parcel. The applicant stated that the 1st defendant has now embarked in the construction of permanent structures and employed a gang of youth to deter him from accessing the plot claiming that she will not vacate the suit property and at the same time the 2nd defendant has failed in its duty to intervene and restore her parcel of land. He pleads that it is in the interest of justice that this court bars the 1st defendant from trespassing on the aforesaid parcel and to suspend construction works thereon.

This application is opposed. The 1st Defendant through the firm of Mogeni & Co Advocates filed grounds of opposition where they stated that the 1st Defendant is not and has never been registered owner of the plot in dispute and has wrongly been sued as the parcel in dispute is plot **V9929** does not belong to her. Further to that the 1st defendant filed her Replying Affidavit on 14th January 2014 averred that she

was the caretaker of **Lilian Brenda K. Ogwoka** who is the registered owner of the property Plot No V9929. She added that she was not privy to how the plaintiff and the 1st defendant acquired the plots from the 2nd defendant. She also believes that the plaintiff has not attached any documents to prove ownership of the plot in dispute and further the plaintiff has not shown the title or share certificate showing that he is the owner of the plot no C1851. She has also shown that her principal has a share certificate which was signed by the chairman and dated.

I have carefully considered the Affidavits on record, the written submissions and the authorities relied on by the parties. This is an injunction application and the principles applicable were well settled in **Giella –vs- Cassman Brown [1973] EA 358** ;that the Applicant must establish a prima facie case with a probability of success, that the applicant must demonstrate that damages will not be an adequate remedy and that if the court is in doubt on the foregoing, it determines the matter on a balance of convenience.

Prima facie case was defined by the Court of Appeal in the case of **Mrao –vs- First American Bank (K) Ltd** as where an applicant establishes that his legal right has been infringed by a Defendant thereby calling for a rebuttal by the latter. In the present case, has the Plaintiff established a prima facie case with a probability of success?

The plaintiff has contended that he purchased Plot No C 1851 from the 2nd defendant in 1976, and has shown receipts evidencing the monies that he paid in acquiring the suit property. He also annexed the share certificate No. 3634 of the suit property that was issued on 25th February 2013 thereafter he was taken by the 2nd defendant and that the plot was identified to him .However the 1st defendant has refuted the plaintiff's claims that she had constructed on the suit property and instead shown this court documents of a different plot No V9929 and that the suit property did not belong to the defendant as she was a caretaker who had been employed by the owner of the plot **V9929**, one **Lilian Brenda K. Ogwoka** to take care of the property.

In the present case the court is faced with a situation where both the Plaintiff and the 1st Defendant each claim ownership of the suit property. Each of the parties has tendered documents on the basis of which each stakes claim to the piece of land. The 2nd Defendant from whom the Plaintiff and the 1st Defendant claim to have purchased the plot from and each shown this specific plot now the subject of the suit has not as yet elucidated who between the two parties is the person entitled to this parcel of land because they failed to file their pleadings with regard to this application. On the basis of the material and evidence placed before the court by the plaintiff and the 1st Defendant it is not possible at this stage to determine who between the two is legally entitled to ownership of the plot and therefore possession of this plot.

The written submissions by the parties cannot shed any more light than the parties' affidavits as to who the true owner of the parcel of land in dispute is. As it is, each of the parties has a different number designating the plot and yet each of them states this is the plot each of them was shown on the ground. It is notable that none of the parties has produced any survey map in their pleadings to back the allocation and the identification of the plot and this therefore puts to question how the plot was being identified and shown to the parties as it were on the ground.

The principles upon which an injunctive relief may be granted are now well settled as laid out in the case **Giella Vs. Cassman Brown Ltd [1973] EA pg 358** where a party must firstly show that they have a prima facie case with a probability of success and secondly a party has to show or demonstrate that unless the injunction is granted they will suffer loss and damage that cannot be adequately compensated for by an award in damages. If in any case the court is in doubt, the court may resolve the issue by considering the balance of convenience having regard to the attendant circumstances.

Looking at this case and keeping in mind the unresolved issue as to who is actually entitled to ownership of the suit property which I make a finding that it cannot be resolved at this interlocutory stage, I am not prepared to hold that the Plaintiff has established that he has made out a prima facie case with a probability of success against the 1st Defendant. If the question of ownership was settled, this court would

have held a prima facie case with a probability of success had been established. In the same breath since it is uncertain whether the 1st defendant is the actual and proper owner of the suit property, the order that would commend itself in the interest of justice to all the parties would be that the parties maintain the status quo such that no party effects any further development and/or purports to alienate and/or dispose of the property until the suit is heard and determined. See the case of **Ougo and another Vs Otieno Civil appeal No. 3 of 1987** where the Court of Appeal held that:-

“where there are serious conflict of facts the trial Court should maintain the status quo until the dispute has been decided in a trial”

The Court finds that in the instant case, maintenance of **Status Quo** is the best option.

The end result is that status quo be maintained on the terms outlined above and that the plaintiff do effect service of summons upon the 2nd defendant for it to enter appearance to facilitate the closure of pleadings and subsequent hearing of the suit once the pleadings are closed. The costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and delivered this **3rd** day of **October** 2014

L.N. GACHERU

JUDGE

In the presence of:-

.....For the Plaintiff

.....For the Defendants

Kamau: Court Clerk

L.N. GACHERU

JUDGE