



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 905 OF 2013

MARGARET WANJIKU NJOROGE.....PLAINTIFF

VERSUS

WILSON KIMANI KIARIE.....1ST DEFENDANT

JOSEPH WANJINE WACHIRA.....2ND DEFENDANT

THE CHAIRMAN, NATIONAL LAND COMMISSION.....3RD DEFENDANT

RULING

The Plaintiff's Application

The application before the court is a Notice of Motion dated 24th July 2013 filed by the Plaintiff, seeking orders of a temporary injunction against the Defendants to restrain them from selling off, disposing, alienating for sale or any other way dealing with and/or interfering with the Plaintiff's possession of that parcel of land known as L.R No. 4953/3727 situated in Thika (hereinafter referred to as "the suit property").

The grounds for the application are that the Plaintiff is the bonafide lessee of the suit property, and that the 1st and 2nd Defendants illegally and/or fraudulently acquired title to the suit property from the 3rd Defendant and have subdivided and undertaken construction thereon. The Plaintiff in her supporting and further affidavit sworn on 24th July 2013 and 21st November 2013 respectively explained that she applied for allotment of land within Thika town, and that she was issued with an allotment letter with respect to land in Thika, which was later surveyed and registered as L.R 4953/3727. She annexed a copy of the said allotment letter dated 28th November 1996.

The Plaintiff stated that she was to pay Kshs.437,777/= as stand Premium and an annual rent of Kshs.80,000/=, and that on 16th April 1997 she paid an initial amount of Kshs.50,000/= through a bankers cheque and was issued with receipt. Further, that she also paid a further Kshs.10,000/= which was also done through a bankers Cheque and a receipt issued to that effect. She annexed a copy of one receipt for Kshs 50,000/=. However, that when she visited the site in 2012 she found houses being constructed on the site, and upon investigations found that the suit property had been allocated to and registered in the names of the 1st and 2nd Defendants. She attached a copy of the alleged grant to the said Defendants.

The Plaintiff in her further affidavit contested the letter of allotment and plan issued to the 1st and 2nd

Defendants, stating that that the letter of Allotment exhibited by the 1st and 2nd Defendants does not show the correct reference number and plan number. Further, that that the alleged letter of allotment does not have a particular date or authorization and is not executed by the Commissioner of Lands, but only has a stamp of verification on the 16th October 2012. The Plaintiff also averred that the said letter of allotment is shown to have been obtained from the Physical Planning Department on 16th October 2012 after she had reported the fraudulent actions by the Defendants at Thika Police station.

The Defendants' Response

The 1st and 2nd Defendants opposed the Plaintiff's application in a replying affidavit and further affidavit both sworn by the 1st Defendant on 12th November 2013 and 9th June 2013 respectively. The 1st and 2nd Defendants stated that they received an allotment letter of the suit property in the year 1996, and that they paid the sum of Kshs.439,777/= towards stand premium and other statutory payments. Further, that they have also been paying land rent on the property. They annexed a copy of the allotment letter dated 28th November 1996 and of plan reference No. TKA/4/95/93, a copy of a cheque for Kshs.439,777/= and receipt for the same from the lands office, and copies of receipts for payment of rates.

The 1st and 2nd Defendants asserted that their allotment letter is genuine and legitimate, and bears signature by the Commissioner of Lands. Furthermore, that the plan attached to their allotment letter was not issued in 2012 as alleged by the Plaintiff, but was issued in 1996 alongside the allotment letter. The Defendants explained that the allotment letter showed that it was verified in 2012 because this is the time when the plan attached was stamped by the Physical Planning Department. According to the Defendants, this was the time that the deed plan was being prepared in order to be lodged with the Commissioner of Lands for issuance of grant.

The 1st and 2nd Defendants denied having been issued with a grant to the suit property, and stated that they are awaiting for issuance of a grant which has been held up by the moratorium on signing of new titles occasioned by the new constitutional dispensation. Further, that the deed plan No. 345534 in respect of the suit property was submitted for registration on 21st November 2012, and they annexed copies of a memorandum by the Director of Survey forwarding the deed plan to the Commissioner of Lands, an acknowledgement of receipt at the office of the Commissioner of Lands, and of the deed plan duly executed by the Director of Survey. The Defendants averred that they have no knowledge of deed plan No. 218497 as alleged in documents adduced by the Plaintiff.

The 1st and 2nd Defendants further stated that it is evident from the Plaintiff's own evidence that she never complied with the condition to pay the statutory charges of Kshs.437,777 on the suit premises, as she has only proved that she had paid Kshs.60,000/= thereon and has never paid land rent . Further, that the Plaintiff has never been in occupation of the suit property, and that the Defendants are therefore not doing any act that is interfering with her possession of the property. Furthermore, and that if the Plaintiff was aware of the occupation of the suit property as early as February 2012, the question begs as to why she only came to court in July 2013.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 27th March 2014 while the Defendants' counsel filed submissions dated 9th July 2014. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction.

I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements

are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR 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.”

The Plaintiff in the Plaint filed herein dated 24th July 2013 is seeking a declaration that she is the owner of the suit property, an order of rectification of, and cancellation of any title issued to the 1st and 2nd Defendants and a permanent injunction against the Defendants restraining them from dealing with the suit property. The Plaintiff has produced a letter of allotment dated 28th November 1996 and a receipt of Kshs 50,000/= being payment for stand premium as her evidence.

The Plaintiff’s submission is that the evidence she has brought shows that she is the *bona fide* holder of the suit property, and that the documentation produced by the Defendants have several irregularities and raise the possibility of forgery. Further, that the Defendants have wasted the land by illegal subdivisions and selling it, that will result in the Plaintiff suffering irreparable harm. Lastly, that the balance of convenience is in the Plaintiff’s favor as she stands to lose her title to the suit property if the interim orders are not granted.

The Defendants on the other hand submitted that the Plaintiff was trying to enforce non-existent rights, and could therefore not suffer any irreparable damage. Further, that the Plaintiff had by her own admission only paid Ksh 60000/- Of the required amount and had been indolent and has therefore not come to court with clean hands. Lastly, that the balance of convenience tilted in favour of the Defendants since they had sub-divided the suit property and sold it to third parties, who are the ones in possession of the same and are carrying out developments thereon.

I have perused the letter of allotments annexed by the Plaintiff and note that it relates to an unsurveyed residential plot in Thika Municipality. She did not produced any evidence of a plan showing the location of the said plot. In addition she did not produce any evidence of the survey that she alleged subsequently occurred that resulted in the plot being the suit property. Other than the receipt for Kshs 50,000/-, the Plaintiff did not produce any other evidence of her compliance with the terms of the letter of allocation which required payment of stand premium and other fees totaling Kshs 439,777/=. I am guided in this respect by the holding of the Court of Appeal in **Dr. Joseph N.K. arap Ngok v Justice Moiwo ole Keiwa and 4 others, Civil Application No.NAI 60 of 1997** wherein the said Court stated as follows with regard to allotment:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of title document pursuant to provisions held.”

I therefore find arising from the foregoing reasons that the Plaintiff has not established a *prima facie* case, and the prayers sought in her Notice of Motion dated 24th July 2013 are accordingly denied. The Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____8th ____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE