



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 415 OF 2012

MONICA WANJIKU KAKAYI.....PLAINTIFF

VERSUS

JOHN KAMAU CHEGE.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 16th July 2012 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from developing or building a wall or occupying the parcel of land known as Plot Number 2208 formerly Makongeni Settlement Scheme Plot No. 128 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. She also sought for an order compelling the Defendant/Respondent to allow her unhindered access, quiet enjoyment, occupation and user of the parcel of land known as Plot Number 129 Makongeni Settlement Scheme (hereinafter referred to as the “Neighboring Plot”) pending the hearing and determination of this suit. The Plaintiff/Applicant also sought for the 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 sworn by the Plaintiff, Monica Wanjiku Kakayi, on 17th July 2012, in which she averred that she is the rightful owner of the suit property. In support of that assertion, the Plaintiff/Applicant produced a copy of a sale agreement dated 9th October 2007 between her and one Dedan Kanyotu in respect of the suit property, a transfer form duly signed by the said persons and a copy of a certificate entitled “Allocation of Plots” issued by Makongeni Settlement Scheme in the Plaintiff’s name. She further averred that the Defendant/Respondent has trespassed on the suit property and began construction of a wall therein thereby blocking her and her family from accessing her residential home. She further claimed that she is the bona fide owner of both the suit property and the Neighboring Plot.

The Application is contested. The Defendant/Respondent filed his Replying Affidavit sworn on 31st July 2012 in which he averred that contrary to the Plaintiff/Applicant’s allegations, the suit property belongs to him having purchased the same and been issued with a Certificate in respect thereof on 20th May 2001. He produced a certificate entitled “Allocation of Plot” from Makongeni Settlement Scheme which was in reference to Plot No. 0217. He further stated that upon purchase of the suit property, he built a semi-permanent house thereon where his son has been living with his family ever since. He further stated that on or around 2007, the Plaintiff/Applicant without any justifiable reason started encroaching and/or trespassing on the suit property insisting that she had bought the same. He further disclosed that the local

provincial administration summoned both of them to ascertain the real owner of the suit property after which the New Makongeni Settlement Scheme confirmed that the suit property belongs to him and issued him with a certificate confirming that fact. He further asserted that the documents of ownership produced by the Plaintiff/Applicant are all forgeries and are not recognized by the Makongeni Settlement Scheme.

In response thereto, the Plaintiff/Applicant filed her Supplementary Supporting Affidavit sworn on 10th January 2013 in which she averred that it is not true that the Defendant/Respondent has been living on the suit property as asserted by him. She further stated that the current association managing the said parcels of land is now known as Makongeni Sector Plot Owners having changed its name from Makongeni Settlement Scheme.

The issue I must determine is whether to grant to the Plaintiff/Applicant the temporary injunction she seeks as well as issue an order allowing her unhindered access to the suit property through the Neighboring Plot. 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 she has a genuine and arguable case? Both the Plaintiff and the Defendant have laid claim to the suit property. The Plaintiff has produced her documentation in support of her claim. She produced a sale agreement, a transfer form and a certificate issued by Makongeni Settlement Scheme, all referring to Plot No. 128 which is the suit property. The Plaintiff stated that the suit property was renumbered and is now known as Plot No. 2208. The Plaintiff stated that she lives with her family on the suit property where she has a permanent house. It would appear to me that all was well until the Defendant/Respondent commenced construction of a perimeter wall around the Neighboring Plot, thereby effectively denying the Plaintiff access to her house on the suit property. The photos produced by the Plaintiff show that the permanent house she lives in is built so close to the Neighbouring Plot that the wall being constructed by the Defendant/Respondent has effectively blocked the Plaintiff’s access to her house on the suit property. The Plaintiff/Applicant has laid claim to the Neighbouring Plot alleging that the same belongs to her. She has however not produced any documents of ownership of the Neighbouring Plot and her claim therefore appears to be belated arising from her inability to access her house on the suit property. The Defendant/Respondent has on his part also claimed ownership of the suit property alleging that his son’s family live there. However, the documents of ownership that he has produced refer to Plot No. 0217 and not either the suit property or the Neighboring Plot. To my mind, the Plaintiff/Applicant appears to have a superior claim over the suit property and has as far as I can tell at this interlocutory stage, demonstrated that she is the rightful owner of the suit property. On that account, I find that she has demonstrated a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured

in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

Further, 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**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

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

MARY M. GITUMBI

JUDGE