



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1523 OF 2013

SAMMY JIMMY MWANGI NG'ANG'APLAINTIFF/APPLICANT

VERSUS

DOMINIC NZIOKA KASANGA1ST DEFENDANT/RESPONDENT

ISAAC KIBANDE WANARIANGE.....2ND DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 16th December 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from entering, taking possession, selling, constructing on, developing or in any other way interfering with the parcel of land known as Plot No. 72 upon parcel L.R. No. 209/9606 Mowlem Valley Jua Kali Association, Dandora (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for the OCS Buruburu Police Station to be ordered to enforce the orders and for costs 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, Sammy Jimmy Mwangi Nganga, sworn on 16th December 2013 in which he averred that he is the owner of the suit property. In support of that assertion, he produced copies of a Beacon Certificate, Membership Card and payment receipts. He then stated that the 1st Defendant has without any justification, entered the suit property and claimed ownership over it. He stated further that he has tried to engage the 2nd Defendant, an official with Mowlem Valley Jua Kali Association to refer to the Association's records to resolve this conflict without success. He confirms having sent a demand letter to the 1st Defendant but that has not been heeded. He also confirmed having reported the dispute to the Chief, Kariobangi South but stated that the 1st Defendant ignored the Chief's summons to discuss this matter. He stated further that the 1st Defendant has now commenced construction upon the suit property with support from the 2nd Defendant who is supervising the construction. He further stated that unless restrained by this court, the Defendants will continue with the intended development on the suit property to his detriment.

The Application is contested. The Defendants filed their Grounds of Opposition dated 15th April 2014 stating, inter alia, that the Application is frivolous, vexatious, misconceived and an abuse of the due process of the court, that the Plaintiff/Applicant has no locus standi, no prima facie case and has come to

court with dirty hands. In addition, the 2nd Defendant, Isaac Kibande Wanariange, filed his Replying Affidavit sworn on 2nd May 2014 in which he averred that the Plaintiff/Applicant did not exhibit a share certificate in respect of the suit property. He averred that he was allocated the suit property in the year 2003. In support of that assertion, he produced a copy of a share certificate which had been marked by hand as follows “cancelled transferred on 24/6/2013”. He also produced a beacon certificate which was also marked “transferred on 24/6/2013”. He explained that the reason why those certificates were marked as such was because he transferred to the 1st Defendant the suit property on 24th June 2013 and so the suit property belongs to the 1st Defendant. He further confirmed that the development being carried out on the suit property is by the 1st Defendant and not him. He also denied that he was supervising that construction. He further added that the parcel of land allocated to the Plaintiff/Applicant is still there but is not the suit property.

Both the Plaintiff and the Defendants filed their written submissions.

The issue that I must determine is whether to grant the Plaintiff/Applicant the temporary injunction that he seeks. 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.”

The question whether the Plaintiff/Applicant has demonstrated a genuine and arguable case no doubt leads us to an assessment of the documents of ownership produced by him in this Application. The Plaintiff/Applicant relies on a copy of a Membership Card issued by the Mowlem Valley Jua Kali Association as well as a Beacon Certificate. Both documents appear to bear the dates 15/7/00 and 8/7/00 respectively and refer to the suit property. Both documents also bear the Plaintiff/Applicant’s name. In addition, the Plaintiff/Applicant has produced copies of receipts for land rates, “federation” and shares, all bearing his name and purportedly issued by the Mowlem Valley Jua Kali Association. The Defendants on the other hand have produced a share certificate and beacon certificate bearing the name of the 2nd Defendant which have been cancelled as stated earlier. There were also produced copies of various receipts also in the 2nd Defendant’s name. As noted earlier, the 2nd Defendant explained that the reason why his documents are cancelled is because he transferred the suit property to the 1st Defendant. However, no single document was produced to support the claim that the 1st Defendant is now the owner of the suit property. In the circumstances, I consider the claim by the Plaintiff/Applicant over the suit property to be superior. In the circumstances, I find that the Plaintiff/Applicant has established 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.”

I further wish to rely on the case of **Jaj Super Power Cash and Carry Ltd versus Nairobi City Council and 2 Others Civil Appeal Number 111 of 2002** (unreported) where the Court of Appeal stated as follows:

“This court has recognized and held that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

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 17TH DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE