



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 1111 OF 2013

TABITHA WANJIRUPLAINTIFF/APPLICANT

VERSUS

JOSEPH THEURI WAIGWA.....1ST DEFENDANT/RESPONDENT

SAMUEL MUCHEMI MUNDIA.....2ND DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 17th September 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from trespassing or interfering with the Plaintiff's parcel of land known as Plot Number 41 subsequently allocated Plot Number C42 situate in Komorock Phase III Extension (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit. The Plaintiff also seeks for an order of eviction of the Defendants/Respondents from the suit property, that the Inspector General of Police and the Officer Commanding Police Division, Kayole Division be ordered to avail all necessary assistance to execute the eviction order and that the costs of this Application be borne by the Defendants/Respondents.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Tabitha Wanjiru, sworn on 17th September 2013 in which she averred that she purchased the suit property on 5th December 2002 from one Francis Mutuku Munyao. She produced a copy of the sale agreement. She further averred that a group known as Embakasi/Njiru United Self Help Group was subdividing the land and issuing the title documentation to purchasers. She added that the said purchase of the suit property was duly registered by the said Embakasi/Njiru United Self Help Group and she was issued with Ownership Certificate Number 1257 and a Beacon Certificate No. 721, copies of which she produced. She further asserted that the plot number of the suit property was changed from Plot No. 41 to Plot No. C 42 by the Housing Development Department of the City Council of Nairobi as it then was and that she was subsequently issued with a Plot Formalization Card Number 8007, a copy of which she produced. She further indicated that she paid grant, rates and stand premium in respect of the suit property to the City Council of Nairobi as it then was to facilitate the issuance of a title deed. She averred further that sometimes in February 2013, the 2nd Defendant/Respondent trespassed on to the suit property and commenced to excavate and construct on it. She added that the Defendants have no ownership rights over the suit property and that despite several notices served upon them to vacate, they have refused to comply hence this suit.

The Application is contested. The 2nd Defendant filed his Replying Affidavit sworn on 11th October 2013 in which he averred that the plot he is involved with is Plot Number 42 which was allocated to him in July 2001. He produced a copy of a Plot Card No. 2290 in respect of Plot Number 42 Komarock Phase (3), Embakasi Komarock Self Help Group from the City Council of Nairobi. He also attached an Ownership Certificate in respect of that plot issued by the Embakasi Komarock Self Help Group in the name of one Peterson Murimi Waweru. He did not explain his connection with that person. The Application is further contested by the 1st Defendant who filed his Replying Affidavit sworn on 11th October 2013 in which he averred that he is not a trespasser of the suit property as he is a legitimate owner thereof. He did not attach any documents in support of that assertion.

The Defendants/Applicants also filed their Notice of Motion dated 11th October 2013 seeking orders of temporary injunction restraining the Plaintiff from interfering with or alienating or in any way dealing with Plot Number 42 Embakasi Komarock pending the hearing and determination of this Application and suit. The Application was based on the grounds appearing on the face of it together with the Supporting Affidavit of the 2nd Defendant sworn on 11th October 2013 in which he averred that he purchased this plot of land on 7th March 2011 on behalf of his cousin and that he was given the ownership documents. The documents of ownership which he produced are an agreement for sale dated 7th March 2011 between one Peterson Murimi Waweru and Simon Gitahi Wahome and an Ownership Certificate in the name of one Peter Murimi Waweru issued by the Embakasi Komarock Self Help Group. He further confirmed having commenced excavation works on the plot on 25th February 2013 and construction in September 2013 until he was served with court papers. He sought for the Plaintiff to be ordered to deposit Kshs. 500,000/- being security for costs in this matter. In response thereto the Plaintiff filed a Supplementary Affidavit sworn on 7th November 2013 in which she averred that Embakasi Komarock Self Help Group is an unknown entity and that the entity dealing with the suit property is Embakasi/Njiru United Self Help Group. She further added that the documents of ownership produced by the Defendants are fraudulent.

The Plaintiff filed her written submissions dated 3rd December 2013 which have been read and taken into account in this ruling.

The first issue which I must determine is whether the Plaintiff or the Defendants are entitled to the temporary injunction that they pray for. In deciding whether to grant a temporary injunction, 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 either the Plaintiff/Applicant or the Defendants 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.”

Both the Plaintiff and the Defendants lay claim to the suit property. It is evident that on the ground, the two rivaling parties are claiming the same parcel of land, though they identify them differently. The Plaintiff insists that the parcel of land was previously known as Plot Number 41 but was renamed as Plot Number C 42 while the Defendants claim that the parcel of land in dispute is known as Plot Number 41. It

is not possible at this juncture to ascertain the correct identification of the parcel of land in dispute in this suit. However, the question I seek to answer is which of the two rivaling parties has demonstrated a genuine and arguable case and hence a prima facie case? In support of her claim of ownership of the suit property, the Plaintiff has produced her ownership documents which comprise of a sale agreement between her and one Francis Mutuku Munyao dated 5th December 2002, an Ownership Certificate Number 1257 and a Beacon Certificate No. 721 bearing her name and issued by Embakasi/Njiru United Self Help Group. She also produced a Plot Formalization Card Number 8007 also bearing her name issued by the then City Council of Nairobi. All these documentation were in respect to the suit property. On their part, both Defendants claim to be owners of the suit property. In support of their claims, they produced the documents alluded to earlier. However, it is noteworthy that none of those documents were in either of their names. The probable reason for this could be the statement by the 2nd Defendant that he bought the suit property for his cousin. He however, never disclosed the name of this cousin. In a nutshell, neither of the Defendants was able to provide any documentary evidence of their ownership of the suit property as the Plaintiff has done. My conclusion to this is that the Plaintiff has established that she has a superior claim to the suit property than the Defendants. I therefore find that the Plaintiff has shown that she has a genuine and arguable case and that she has 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.

On the balance of convenience, I agree with the Plaintiff that the same tilts in her favour owing to the fact that she has been in possession of the suit property for over 10 years whereas the Defendants only took possession thereof in February 2013, which is only a couple of months ago.

Arising from the foregoing, I hereby allow the Plaintiff's Notice of Motion dated 17th September 2013 and dismiss the Defendant's Notice of Motion dated 11th October 2013. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 17TH

DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE

