



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 431 of 2012

MARY WANGUI MAHINDI.....PLAINTIFF/APPLICANT

-VERSUS-

WAMBUI KAMITHI.....1ST DEFENDANT/RESPONDENT

NJENGA MWAURA.....2ND DEFENDANT/RESPONDENT

JANE WANJIKU NDEGWA.....3RD DEFENDANT/RESPONDENT

RULING

The Plaintiff by a plaint dated 23rd July 2012 and filed I court on the same date sought a permanent injunction and an order of eviction of the Defendant from L.R. No. Dagoretti/Ruthimitu/T243 simultaneously with the Plaintiff filed on interlocutory application by way of Notice of Motion dated 23rd July 2012 expressed to be brought under Order 40 Rule 1, 2 & 4 of the Civil Procedure rules, Section 3A and 63 Civil Procedure Act and all enabling provisions of Law.

The Notice of Motion application inter alia sought the following orders:

1. That a temporary injunction do issue restraining the Defendants by themselves and/or by their agents, servants, employees and/or any persons acting under their authority from entering, trespassing, constructing structures or interfering with ownership rights or in any manner from dealing with L.R. No. Dagoretti/Ruthimitu/T.243 within Nairobi, pending the hearing and determination of this application.
2. That a temporary injunction do issue restraining the Defendants by themselves and/or by their agents, servants employees and/or any person acting under their authority from entering, trespassing, constructing structures or interfering in any other manner with ownership rights or dealing with L.R.No. Dagoretti/Ruthimitu/T.243 within Nairobi until the determination of this suit.
3. The application is supported by the supporting affidavit sworn by the Plaintiff on 23rd July 2012 and a supplementary affidavit filed on 12th October, 2012. Briefly it is the plaintiff's case that she is the registered owner of the suit property as evidenced by a certificate of lease issued on 4th May 2006 for a term of 99 years from 1st October, 1995. As per the supplementary affidavit the Plaintiff state that she applied and was allocated the subject plot by the government after the appropriate procedures were followed and has annexed letter of allotment and copy of the abstract of title (green card) to show that the property was government land prior to being allocated to her. The Plaintiff further claims the Defendants in or about May 2012 unlawfully entered in to her slot and started erecting illegal structures and further

that the Defendants had deposited building materials at the time of filing suit but then continued with the construction even after the court issued an interim order restraining them from building.

The Defendants on their part filed a replying affidavit in opposition to the Plaintiff's application sworn by Njenga Mwaura on 21st September 2012 on behalf of the Defendants. Briefly the defendants contended that they have been in occupation of the suit premises since 1968 having been allowed by the provincial administration to occupy the subject land since it was government land that had been set aside for public purposes. They contend that they have developed the property and have erected temporary structures that are occupied by tenants. It is the defendant's case that on 6th April 2012 one block of the houses was burnt down resulting in the death of two children but other blocks remained and continued to be occupied by tenants. The defendants have annexed photographs showing the razed block and the blocks that remained standing. The Defendants' further claim that by the time the plaintiff filed this suit they had rebuilt the block that was razed by fire and consequently there is nothing to restrain them from doing since the status is that they presently are in occupation of the property where they have rent paying tenants.

The Defendants further contend they have acquired proprietary interest on the suit property by virtue of adverse possession. The Defendants state that the plaintiff obtained an interim order of injunction through concealment of material facts that indeed the defendants were in actual possession of the property and were not entering the property in May 2012 as alleged in the plaintiff's application. They state that had the court known of the true position the court would not have issued the *ex parte* order of injunction.

On the basis of the information and material placed before me, I am not able to make a finding that the plaintiff has established she has a *prima facie* case with a probability of success as the contrasting positions would need to be canvassed at the full trial where parties will testify and be cross examined on their assertions. I am also not persuaded that the defendants only attempted to enter the plot in May 2012 and that it is necessary to restrain them from so entering and erecting structures. The assertion by the defendants that they have indeed been in occupation and have structures therein where they have tenants appears to have credence. In the absence of any ground survey evidence the court is not certain whether indeed the plot the defendants claim to have occupied since 1968 is the same plot the Plaintiff holds a certificate of lease to and these must be matters of evidence at the trial. The plaintiff does not claim to have undertaken any development on the ground to establish her ownership of any part of the parcel of land occupied by the defendant. Has the plaintiff done anything on the property since 1995 to lay or establish any claim to the property? There is no evidence of this.

In the premises of this case I find that the plaintiff has failed to establish a *prima facie* case to entitle him to a grant of an order of injunction. An injunction is an equitable remedy and is therefore discretionally and a party has to place sufficient information and material before a court to enable a court to exercise its discretion in favour of a party seeking injunction. The plaintiff has not discharged that obligation in this case. The plaintiff's application herein is akin to the plaintiff seeking orders of injunction in order to enable her evict the defendants from what she alleges to be the suit land. The court will not sanction such venture.

The parties have filed written submissions as per the directions given by the court on 17th December 2012 and that both counsels on 20th February 2012 when the matter came before me for highlighting of submissions opted to place reliance on the filed affidavits and the submissions and invited the court to render its ruling on the application.

I have considered the filed affidavits and the respective parties submissions and the question /issue that arises is whether the plaintiff has satisfied the requisite threshold for the grant of an injunction.

The often cited leading case of **GIELLA VS. CASSMASN BROWN & CO. LTD (1973) EA 358** laid down the principles and/or conditions that an applicant need to satisfy to entitle him/her to an order of injunction:-

- (i) Must demonstrate that he has a *prima facie* case with a probability of success;

(ii) Must show that he stands to suffer irreparable damage that cannot be compensated by an award in damages;

(iii) That the balance of convenience tilts in his favour.

In the present application the applicant has produced a certificate of lease issued in 2006 that shows the applicant is the registered owner of the suit property. The defendants however contend that they have been in actual possession since 1968 and have developed the property and that their tenants reside in the structures they have erected thereon.

The defendants claim to have acquired equitable proprietary interest over the parcel of land by adverse possession which are overriding rights and supersede the lights of ownership of the plaintiff. It is indeed unclear what the status of the property was in 1995 when the same was allocated to the plaintiff. Equally unclear is what was the status of the property from 1995 and 2006 when the certificate of lease was issued to the plaintiff. The defendants' claim that the property constituted part of government land that was set aside for public. From what I have stated above it will be unnecessary for me to consider other limbs/principles laid down in the **GIELLA VS. CASSMAN BERONW (supra) case**, as I am persuaded no prima facie case was established by the Plaintiff. The plaintiff's application fails and the same is dismissed with costs to the defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd Defendant