



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 30 of 2012

SALOME MUTHONI MUHONI

& DANIEL MBURU MUHONI

(suing as administrators of the Estate of

JOSEPH MUHONI NJOROGEPLAINTIFFS

VERSUS

JAMES MBURU KANYINGI.....1ST DEFENDANT

EMBAKASI RANCHING COMPANY LTD.....2ND DEFENDANT

RULING

This ruling is with respect to the Plaintiff's Notice of Motion dated 20th January 2012 brought under the provisions of Order 40 Rules 1, 2 and 9 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. The Plaintiff is seeking the following substantive orders:-

1. That an order of temporary injunction do issue against the Defendant, his servants, agents, employees and any other person(s) claiming title through the Defendant from selling or purporting to sell, transfer, alienate or otherwise deal with Plot Numbers S 405 and S 406 pending the hearing and determination of the suit.

2. That the Respondent be restrained from trespassing into and erecting any structure on the said plot.

3. That the Respondent be evicted from property known as Plot Numbers S 405 and S 406

The application is supported by the affidavit of Salome Muthoni Muhoni sworn on 20th January 2012 where the detailed facts are set out. The Plaintiff's case is that she is one of the administrators of the Estate of Joseph Muhoni Njoroge (deceased), who before his death was a share holder of Embakasi Ranching Company Limited with share certificate number 2319. The Plaintiff has attached evidence of copies of the Grant of Letters of Administration, Death Certificate and share certificate.

The Plaintiff has further stated that prior to his demise, Joseph Muhoni Njoroge (Deceased) had been issued with an allotment letter on 28th February 1983 for Plot Numbers S-405 and 406 which had a condition requiring the payment of survey and civil engineering fees which were duly paid. Evidence of the allotment letter and payment receipts has been exhibited.

According to the Plaintiff, they took possession of the suit properties after issuance of the allotment letter and further, that although the Plaintiff's husband Joseph Muhoni Njoroge (Deceased) passed on before they could build thereon, his remains and the remains of the Plaintiff's son who passed on in the year 2004 were interred in the suit properties with approval of the 2nd Defendant.

The Plaintiffs allege that on 21st August 2008, she paid Kshs.2, 000/= to the 2nd Defendant who visited the site, confirmed to her the exact location and position of the beacons of the suit properties and issued to her a beacon certificate a copy of which has been attached to the application. It is the Plaintiff's case that early in the year 2012, she visited the suit properties and found the Defendant constructing some structures thereon. Further, the Plaintiff alleges that when she confronted the 1st Defendant, he insisted that the plot he was developing was his own. The Plaintiff has stated that she reported the issue to the Chief Ruai Location and the O.C.S Ruai Police Station. The Plaintiff insists that the site where the 1st Defendant is constructing is the site for Plot Numbers S405 and S406 earlier shown to her by the 2nd Defendant.

The application is opposed by the 1st Defendant whose replying affidavit sworn on 10th May 2012 was filed in court on 16th May 2012. The 1st Defendant has stated that he is a member of the 2nd Defendant and further, that on 27th July 2006 he purchased and was allocated plot No. V5150 whose share certificate he annexed as evidence.

It is the 1st Defendant's case that on 4th June 2009, he paid for a site visit whereupon the company's

survey confirmed plot No. V5150. Further, that he started construction on the site after receiving an authority letter from the 2nd Defendant whose copy has been annexed as evidence. The 1st Defendant alleged that after he had started construction, the Plaintiff laid claim to the property stating that the plot had been allocated to her. According to the 1st Defendant, the provincial administration confirmed the plot belonged to him and the 1st Defendant maintains that the Plaintiff's claim is for plot No. S405 & S406 which is different from his plot no. V 5150. The 1st Defendant insists that the Plaintiff should pursue the 2nd Defendant to be shown her plot.

The Notice of Motion was heard on 19th February 2013, and the Plaintiffs' Counsel requested for a ruling on the basis of written submissions filed in court by the Plaintiff and 1st Defendant. The 2nd Defendant's counsel indicated that he was not responding to the application.

The Plaintiffs' Counsel in submissions dated 4th November 2012 argued that the Plaintiff had demonstrated a *prima facie* case with probability of success as she had title documents to prove ownership. Further, the Plaintiff argued that she is both physically and emotionally attached to the suit properties and that no kind of compensation can compensate her for the land where her husband and son are laying. Lastly, it was submitted for the Plaintiff that the balance of probabilities lies in her favour as the plot is the resting place of her relatives who were interred there before the 1st Defendant commenced the process of purchasing plot V 5150.

The 1st Defendant's Counsel in submissions dated 6th November 2012 argued that the Plaintiffs had not shown a *prima facie* case that the plot the 1st Defendant is constructing is S 405 and S 406. It was further argued that since there is no survey or boundary report showing that plot S 405 and S 406 is the same as plot V 5150, it is impossible for this court to determine the *locus in quo*. Lastly, the 1st Defendant submitted that he is developing his land which had been duly authorised by the 2nd Defendant.

I have read and carefully considered the pleadings, evidence and submissions made by the parties herein. The issues to be determined is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction and the requirements for a mandatory injunction as laid out in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The requirements for a temporary injunction 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. For a mandatory injunction to issue there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The first question to be answered therefore is whether the Plaintiffs have established a *prima facie* case. The Plaintiffs in their Plaint dated 20th January 2012 and filed on the same date are seeking orders that they be declared owners of plot numbers S 405 and 406 on LR 10904/2, and that their purported allocation to be null and void. They also seek eviction orders as against the 1st Defendant. The Plaintiffs have brought evidence to show they were issued with a grant of letters of administration by the High Court of Nairobi on 16th September 2005 with respect to the estate of John Muhuni Njoroge, and also provided a copy of a share certificate number 2319 issued to the deceased Joseph Muhuni Njoroge by the 2nd Defendant dated 1.8.78 and showing that the deceased owned 2 shares in the 2nd Defendant company.

The provisional letter of allocation dated 28.2.83 produced as evidence by the Plaintiffs also shows that the deceased was allocated two plots namely S 405 and 406, and they also produced various receipts evidencing payments made to the 2nd Defendant with respect to the said plots. The 1st Defendant has on the other hand produced a copy of a certificate of plot ownership number 010400 dated 6.12.2006 parts of which are not legible, including the reference to the plot number. He however produced copies of receipts evidencing payments made to the 2nd Defendant with respect to a plot number V5150.

To the extent that the Plaintiffs have brought evidence to show that they were allocated and have made payments to the 2nd Defendant with respect to two plots namely S405 and 406, I find that they have established a *prima facie* case. The 1st Defendant has disputed the location of the Plaintiffs' plots stating that they are different from his plot. If indeed they are, then he will not be prejudiced by any injunction orders that may be granted in favour of the Plaintiffs. If on the other hand the Plaintiffs' and Defendant's plot are one and the same, I still find that the Plaintiffs' have established a *prima facie* case as they have shown their allocation to be earlier in time and therefore prevails for the time being. The issue of the location of the disputed plots is however one that can only be definitively determined at full trial. It is also for this reason that the mandatory injunctions sought cannot be granted at this stage.

The Plaintiffs' Notice of Motion dated 20th January 2012 is therefore allowed to the extent that the Defendants, their servants, agents, employees and any other person(s) claiming title through the Defendants are hereby restrained from selling or purporting to sell, transfer, alienate or otherwise dispose of Plot Numbers S 405 and S 406 and/or plot 5150 situated on LR 10904/, and from continuing with further construction on the said plots pending the hearing and determination of the suit or until further orders.

The costs of the application shall be in the cause

Dated, signed and delivered in open court at Nairobi this 11th day of

April, 2013.

P. NYAMWEYA

JUDGE