



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 190 of 2012

KARIGE KIHORO.....PLAINTIFF

-VERSUS-

BENSON IRUNGU MBARIA.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

I have before me three matters that are the subject of this ruling namely:-

(i) The Notice of Preliminary Objection filed by the Plaintiff on 15th November, 2012 to the effect that the Defendants defence filed herein and the subsequent application by the Defendant filed on 25th September, 2012 were filed after the plaintiff had obtained interlocutory judgment against the Defendant on 11th July 2012 and therefore are a nullity and should be struck out of the record.

(ii) The 1st Defendant's Notice of Motion application dated 25th September, 2012 seeking to strike out the plaintiffs' suit, and,

(iii) The plaintiff's Notice of Motion application dated 10th April, 2012 seeking an injunction to restrain the defendant from interfering with Plot No. 360 L.R No. 8285/1260 Kariobangi Light Industry, Kariobangi till this suit is heard and determined.

When the parties appeared before me on 21st November, 2012 for the hearing of the matter I directed that the parties canvas the two applications for injunction on the part of the plaintiff and striking out the plaint on the part of the 1st Defendant by way of written submissions. The parties have filed written submissions.

The plaintiff by his notice of motion application dated 10th April, 2012 seeks inter alia the following order:-

“This honourable court further be pleased to restrain by a temporary injunction the defendant, their agents and/or servants or any other person under them from entering into or in any manner interfering with the plaintiff's Plot No. 360 L.R. No. 8285/1260 Kariobangi Light Industry, Kariobangi till this suit is heard and finalised”.

The plaintiff claims to have purchased the Plot No. 360 from one Ndirangu Wahome in March, 2006 who

in turn had purchased the plot from Kibeni Maina Mwangi the original allottee in December, 1998. The plaintiff has annexed various documents to establish his ownership including a copy of allotment dated 29th May, 1979 to Kibeni Maina Mwangi, copies of receipts to the City Council and Copies of agreements for sale and a copy of beacon certificate dated 21st March, 2012. The plaintiff avers that on the 17th February, 2012 the defendant in the group of several persons invaded his said plot and prevented the plaintiff from carrying out any developments on his plot.

The plaintiff reported the matter to the local administration and the police but all attempts to have the ownership of the plot settled finally have failed necessitating the institution of this suit.

For his part the 1st Defendant filed a replying affidavit sworn on 8th June 2012 wherein he also claims ownership of the suit property. The 1st Defendant claims to have purchased the suit property from one Mina Zakaria Kamiri on 20th July, 1989 as per agreement of sale exhibited and marked "B1M2". The Defendant claims the said Miana Zakaria Kamiri was using his alias name of Kibeni M. Mwangi when he was allocated the plot. Mr. Maina Zakaria Kamiri has sworn a replying affidavit dated 8th June 2012 confirming he was the person allocated the plot under the alias name of Kibeni M. Mwnagi and that he sold the plot to the 1st Defendant.

The 1st defendant subsequently was issued with a beacon certificated dated 31st October 1995 and by a letter by the City Council to pay the ground rent and the stand premium to facilitate the processing of the title documents. The 1st Defendant subsequently was issued with a lease to the suit plot by the City Council of Nairobi dated 24th October, 2008 which was registered at the lands office on 8th December, 2008 as per annexure "B1M1" Of note however is that the registered lease is in respect of L.R. No. 8285/1148 as delineated on survey plan (Deed Plan) number 288349 annexed as "B1M8" to the 1st defendants replying affidavit. The plaintiff for his part claims that the plot 360 has a L.R No. 8285/1260 but has not exhibited any evidence to show that indeed plot 360 is the same as L.R. No. 8285/1260 and it is therefore unclear how he picked on this land reference number to represent what he claims to be his plot.

The totality of the evidence adduced by the two opposing parties is that each claims ownership of the suit property and each has produced a set of documents to prove their ownership. Each of the parties claims the documents tendered by the other are not genuine. The court cannot at this interlocutory stage make findings on the genuineness or otherwise of the documents tendered without the benefit of oral evidence whereby the witnesses give evidence and are cross examined.

The application by the 1st Defendant dated 25th September, 2012 is inviting the court to strike out the plaint dated 10th April, 2012 on inter alia the following grounds:-

- (i) The Plaintiff's alleged vendor does not exist
- (ii) The alleged signatory of the Plaintiff's sale agreement and power of attorney are factitious.
- (iii) That plaintiff's suit is premised on fictitious signatories and persons
- (iv) The person who was allocated the suit property by the 2nd defendant used his alias to be allocated the suit plot.

I have considered the application and in my new the application is inviting the court to make findings of fact to reach the conclusions and this cannot be done on the basis only of affidavit evidence and evidence needs to be presented at the trial when each party will have the opportunity to cross examine the witnesses presented by the other party.

In the present circumstances it is my finding that there is a conflict as to who between the plaintiff and the

1st defendant is entitled to ownership of Plot No. 360 Kariobangi Light Industry described by the plaintiff as L.R No. 8285/1260 and by the 1st Defendant as L.R. 8285/1148 despite of the variations in the Land Reference Numbers the court is satisfied the parties are referring to the same plot on the ground having regard to all the other documents tendered by the parties.

The court in instances such as the present one where there is conflict as to ownership of the suit property has a duty to conserve the property until the dispute is determined so that the party that is ultimately decreed to be the owner has access to the property.

In the premises the order that would comment itself in the particular circumstances of this case is that the parties do maintain the present status quo until the matter is heard and finally determined.

On the matter of the preliminary objection I would in the light of what I have stated above decline to uphold the same as I consider that the ends of justice will only be met when the parties are allowed to and they ventilate their respective positions in the matter. In this regard and with a view to doing substantive justice as the court is enjoined to do under Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159(2) (d) of the Constitution of Kenya 2010 I admit the 1st defendant's defence filed out of time as properly on record and served on the plaintiff. However, I will grant the plaintiff 14 days leave from the date of this ruling to file a reply to the defence if he so wishes.

In the premises and for the reasons herein above as stated the court makes the following orders:-

- (i) The parties to maintain the present status quo such that no party will undertake any new developments and/or dispose of or alienate the suit plot until the suit is heard and determined.
- (ii) The preliminary objection by the plaintiff is overruled.
- (iii) The defence by the 1st Defendant is admitted out of time and the plaintiff has 14 days to file a reply to the defence from the date of this ruling if he so desires.
- (iv) The costs of this application to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant