



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 419 OF 2013

PETER NDUKUTHYO

PATRICK MANGA KAMUNYU

ADAN EIDN MAHAMUD

(Suing as the officials of MAASAI VILLAGE SELF HELP

WOMEN GROUPPLAINTIFF/APPLICANT

VERSUS

LYDIAH WANG'ONDU1ST DEFENDANT/RESPONDENT

MOHAN SHAH.....2ND DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant herein filed this suit against the two defendants/respondents seeking, among other remedies, an order of permanent injunction restraining the defendants/respondents their agents and/or servants or otherwise from remaining on or continuing in occupation of property known as THIKA MUNICIPALITY BLOCK 6/1065. According to the plaint, the genesis of the claim is that at all material times, the plaintiff/applicant is the registered owner of the suit property also formerly known as UNSURVEYED INDUSTRIAL PLOT NO. A – THIKA by virtue of a letter of allotment from the Commissioner of Lands dated 3rd January 1999.

Simultaneously with the filing of the suit, the plaintiff/applicant filed a Notice of Motion seeking injunctive orders against the defendant/respondent restraining them from being or remaining or entering upon the said suit property. The application was supported by the affidavit of PETER NDUKUTHYO the plaintiff/applicant's chairman in which he depones, inter alia, that the plaintiff/applicant is the owner of the suit property and has all along been in possession of the same until sometime in April 2013 when the defendants/respondent without any colour of right took possession of the same. Annexed to the affidavit is a copy of the letter of allotment from the Commissioner of Land, receipts and deed plans – see annexures PN I to PN 4.

The application was opposed and the defendants/respondents filed replying affidavits. According to the replying affidavit of the 1st defendant/respondent the plaintiff/applicant were allocated land Reference Block 6/1065 but being unable to take possession of it, they have now resorted to trespassing upon properties belonging to other persons because the said land is occupied by third parties. She adds that her husband SAMUEL WANGONDU KARUMBA was, until May 2012, the registered proprietor of

land Reference No. 28381 situated in Thika which was sold to Westwood Properties Ltd and it is the said L.R. No. 28381 that she is alleged to have trespassed upon and that following orders obtained in Nairobi H.C.C.C No. 116 of 2012 (ELC), the Thika District Surveyor did point out the location of the said Block 6/1065 which, as indicated above, the plaintiff/applicant have been un-able to take possession of.

In his replying affidavit, the 2nd defendant/respondent takes issue in the manner in which this suit has been instituted by a non legal entity and further, that there exists H.C.C.C No.116 of 2012 pending at Nairobi High Court in respect of the same property and therefore, the applicants have not come to hand with clean hands and are not therefore deserving of the injunctive remedy sought.

Most importantly, the 2nd respondent depones that the allottee of L.R. No. 28381 is one Samuel Wangondu Karumba who sold it to Westwood Property Ltd on 16th March, 2012 and therefore the two defendants/respondents herein have been wrongly sued and that the plaintiff/applicant are not aware of their plot on the ground. That in Nairobi H.C.C.C No. 116 of 2012 at Milimani, the plaintiff/applicants described their land as **UNSURVEYED INDUSTRIAL PLOT A – THIKA MUNICIPALITY** and yet in another case at Thika Court being Thika C.M.C.C. No. 842 of 2011 among the list of documents produced by the plaintiff/applicant is an application from that they filed and which describes their property as parcel No. 4953/2250/50.

I have considered the application herein, the competing affidavits and annexures as well as the submissions by counsels for both parties.

On the preliminary objections raised by the 2nd defendant/respondent that the suit is, inter alia, defective and instituted against the wrong parties, I think the issue of whether the property in dispute is known as the former **UNSURVEYED INDUSTRIAL PLOT NO. A** or **UNSURVEYED INDUSTRIAL PLOT NO. D – THIKA** are really matters for the trial Court which can only be determined on the basis of oral evidence and not by rivaling affidavits. A preliminary objection, as was held in the case of **MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A. 696.**

“..... is in the nature of what used to be a demurrer. It raises a pure point of land which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of udicial discretion”.

It was also held in the same **MUKHISA** case (supra) that a preliminary objection consist of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued, may dispose of the suit. In my view, the objection that the suit is against the wrong parties or the issue of what exactly is the identity of the dispute property are matters for trial and are in dispute so they cannot be issues for disposal by a preliminary objection. Similarly, the issue as to whether the suit is properly instituted in the names of **MAASAI SELF HELP WOMEN GROUP** is a matter best left for the trial Court. On the issue of sub-judice, the plaintiff/applicant pleaded in paragraph 6 of their plaint ***“that there is no other suit pending”*** nor has there

“been no previous (sic) proceedings in any Court between the plaintiff and defendant in respect of the subject matter of this suit”. It is of course true that there have been two other suits over the same property being H.C.C.C No. 116 of 2012 Milimani Nairobi and Thika C.M.C.C No. 842 of 2011. The first case involved the plaintiff herein and one Peter Mbuthia Mwaura as 1st defendant and Westwood Properties as 2nd defendant. The Thika Court case involved the plaintiffs herein and Mohan Shah as 1st defendant and Peter Mwaura as the 2nd defendant. Therefore, while the subject matter in the two other cases and this case may be the same, the parties are different.

In view of all the above, the preliminary objection has no merit and is accordingly dismissed.

I now turn to the substantive application for injunction the principles of which have now been well settled from the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.** The first

principle is that the applicant has to show a prima facie case with a probability of success.

Having looked at the pleadings and other documents both in this case, the Nairobi H.C.C.C No. 116 of 2012 and the Thika C.M.C.C No. 842 of 2011, this Court cannot determine with any certainty at this stage where exactly the dispute property is. The confusion is not made any better by the fact that in all the three cases, there are different persons being sued. In the circumstances, this Court cannot say that the plaintiff/applicant has established a prima facie case with a probability of success to warrant the grant of the remedy of injunction sought against the defendants/respondents. A prima facie case is established when the applicant produces enough evidence to satisfy the Court that it can infer the fact in issue and rule in the applicant's favour. In other words, the applicant's evidence should be sufficient enough to establish a fact or raise a presumption, unless disproved or rebutted. Indeed my finding that the suit property herein is not well defined is fortified by the fact that in Nairobi H.C.C.C No. 116 of 2012, the parties did by a consent order dated 30th May 2012 stay the proceedings and refer the matter to two surveyors appointed by the parties who, together with the Thika District Surveyor, were to establish whether THIKA MUNICIPALITY BLOCK 6/1065 and L.R. No. 4953/2193 THIKA MUNICIPALITY do exist on the ground and their boundaries and whether in fact the defendant therein was in occupation of the same land claimed by the plaintiff. On the basis of the above, I am not satisfied that the plaintiff/applicants have established a prima facie case to warrant the orders sought and I would decline to grant such orders.

The second limb of the ***GIELLA*** case (supra) is that the applicant should show that if the remedy sought is not granted, then irreparable loss that cannot adequately be compensated for in damages would follow. Apart from a bare averment in paragraph 8 of the supporting affidavit of PETER NDUKUTHYO that the applicant stands to suffer irreparable loss and damage if the defendant/respondents are not restrained, it is not shown what type of loss and damage will be suffered by the plaintiff/applicant and which cannot be atoned for in damages should they succeed in their claim. On my part and bearing in mind the facts surrounding this dispute, I am not prepared to find that any loss of harm that would ensue cannot be compensated in damages.

In the circumstances, the order that commends itself to me having considered all the above material before me is to dismiss the plaintiff/applicant's Notice of Motion dated 15th April 2013. Costs shall be in the cause.

Finally, it is evident that there is H.C.C.C No. 116 of 2012 pending in Nairobi involving the same subject matters and it is my intention to transfer this suit to Nairobi to be heard together with the other suit but before I do so, I would like to hear counsels views on that proposal.

B.N. OLAO

JUDGE

4/7/2013

4/7/2013

Before B.N. OLAO – JUDGE

CC – Muriithi

Mr. Kebongo for Plaintiff absent

Miss Karumba for 1st Defendant present

Mr. Gathoga for 2nd Defendant present

COURT: Ruling delivered this 4th day of July 2013 in open Court.

B.N. OLAO

JUDGE

4/7/201