



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 638 OF 2012

JOHN KIRORI WAMURANGI.....PLAINTIFF

VERSUS

JOHN MWANIKI KIARIE 1ST DEFENDANT

FERDINARD NDUNGU.....2ND DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 26th September 2012 in which the Plaintiff is seeking for orders of an interlocutory injunction restraining the Defendants from trespassing, entering, remaining upon or in any manner whatsoever interfering with the Plaintiff's possession of the parcel of land known as Nairobi/block 105/5098 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application and suit together with costs.

The Application is premised upon the grounds appearing on the face of it as well as the Supporting Affidavit of John Kirori Wamurangi who swore that he is the registered owner of the Suit Property, having acquired a title deed thereto on 25th July 2012. He produced a copy of the said title document. He further stated that on 19th September 2012, the Defendants, jointly with others forcefully entered the Suit Property claiming that it is a public utility, brought a grader and started digging trenches thereon. He further swore that the Defendants' actions are illegal, unfair and unlawful and that he is entitled to have his right to ownership and protection of private property protected.

The Application is contested. The 1st Defendant filed his Replying Affidavit sworn on 8th October 2012 in which he stated that he is a shareholder of Embakasi Ranching Company Limited ("ERCL"), a public company which owns vast tracts of land which it subdivided into ¼ acre plots and allocated the same to its shareholders leaving certain plots for public utility. He further swore that in recent years, ERCL has been allocating public utility plots to unsuspecting members of the public such as the Plaintiff herein. He further swore that the Suit Property measuring 3 acres is one such public utility plot that was allocated to the Plaintiff, which plot was earmarked for construction of a public primary school called Ndege View Primary School. He further stated that the said Ndege View Primary School was to be funded through the area CDF Committee with CDF money to alleviate the suffering of the area children who have to walk long distances to the nearest school. He further indicated that although the Plaintiff has produced a title to the Suit Property, the same was unlawfully issued.

The 1st Defendant also filed his Notice of Motion dated 11th October 2012 in which he sought for orders of a temporary injunction to issue against the Plaintiff restraining him from trespassing, selling, dealing

with and/or constructing on the Suit Property pending inter-partes hearing and determination of this application and suit together with costs. That application was supported by the grounds appearing on the face of it together with the Supporting Affidavit of John Mwaniki Kiarie sworn on 11th October 2012 in which he stated that the Plaintiff was engaged in unlawful construction on the Suit Property and that the court on 15th February 2012 in ELC Number 395 of 2011 issued an order directed to the Registrar of Lands inhibiting any further dealings and issuance of titles or Certificates of lease in respect of, inter alia, Nairobi Block 105 in which the Suit Property falls and that the Plaintiff did not disclose this fact to this court when it obtained an ex-parte injunction.

The 1st Defendant's Notice of Motion dated 11th October 2012 is contested through a Replying Affidavit of Jack Kamau Wachira, a surveyor with ERCL sworn on 10th December 2012 wherein he stated that the Certificate of Lease produced by the Plaintiff in respect of the Suit Property was duly issued and that the same arose out of subdivision of the larger Nairobi/Block 105 owned by ERCL, which was the allocating authority. He further stated that he was personally involved in the preparation of the scheme of subdivision of Nairobi/Block 105 on instructions from ERCL and also presentation of the same to the Director of Survey and Physical Planning for approval. He further disclosed that when they presented the initial scheme of subdivision for approval to the Director of Survey, they were ordered to amend the same to surrender the public utility plots to the Commissioner of Lands. He further disclosed that ERCL complied with that request and the approvals were subsequently granted. He further disclosed that the Suit Property is not a public utility plot as alleged by the Defendants but a private plot owned by the Plaintiff. He further stated that had the Suit Property been part and parcel of the public utility plots, the Commissioner of Lands would not have issued a title deed for the same to the Plaintiff and that the Plaintiff should be allowed to enjoy the benefit of protection of his private property.

The 1st Defendant filed a Supplementary Affidavit sworn on 30th April 2013 in which he stated that in which he stated that all plots issued to individual shareholders of ERCL were ¼ acres and the Suit Property, being 3.2 acres in size, was not available for allocation as private property and that the process of acquiring title thereto was fraudulent and corrupt. He further stated that he was engaged by ERCL to put up a public school on the Suit Property.

The 2nd Defendant opposed the Plaintiff's application through his Grounds of Opposition dated 13th June 2013 in which he stated that the Plaintiff's Certificate of Lease over the Suit Property was fraudulently obtained, that the land constituted in Nairobi/Block 105 meant for private use was generally ¼ acre and the Plaintiff's plot being 3.18 acres was meant for public utility to build a public primary school and that the Commissioner of Lands issued title notwithstanding the existing inhibition orders.

The Plaintiff filed his written submissions dated 19th June 2013 which have been read and taken into consideration by this court.

In deciding whether to grant the 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 the Plaintiff 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."

Section 24(a) of the Land Registration Act provides as follows:

"Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

Section 26 (1) of the Land Registration Act states as follows:

"The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except

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- a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
 - b. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."***

Looking at the facts of this case, the Plaintiff has produced a copy of his Certificate of Lease to support his claim of ownership of the Suit Property. On the other hand, the 1st Defendant, who also seeks an interlocutory injunction against the Plaintiff, has not produced any documentary evidence to support his claim to the Suit Property. The 1st Defendant's claim is that the Suit Property is a public utility in respect of which he has been engaged to construct a public primary school. The 2nd Defendant also makes a similar claim as the 1st Defendant. Both Defendants have insinuated that the Plaintiff's Certificate of Lease over the Suit Property was obtained fraudulently. However, they have both not supplied particulars of fraud or corruption supported by evidence which this court may rely on to impugn the Plaintiff's title. Going by the above cited legal provisions, I find that the Plaintiff has established that he is the duly registered proprietor of the Suit Property and has established a prima facie case with chances of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. The value of the Suit Property can be ascertained and there is a valid argument that damages would be available. However, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See ***JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR.***

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction. I therefore allow the Plaintiff's application and dismiss the 1st Defendant's application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER 2013

MARY M. GITUMBI

JUDGE

