



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Case 144 of 2010

DAVID KASAMU MUSEMBI PLAINTIFF/APPLICANT

VERSUS

NYAGOTO INVESTMENTS LIMITED DEFENDANT/RESPONDENT

R U L I N G

Before me is an application dated 19th July 2010 filed by the Plaintiff. It is an application seeking for interlocutory injunction pending the hearing and determination of the suit. The application has grounds on the face of the Notice of Motion. The grounds are that the Plaintiff was allocated the land under the Government Lands Act (Cap 280) in 1993. That in 2002 the Defendant secretly and fraudulently caused the title documents to be issued in its favour, a fact that the Plaintiff discovered in 2010.

The application was filed with a supporting affidavit sworn by the plaintiff on 19th July 2010. It was deponed that after the allocation of the land to the plaintiff in 1994, the plaintiff paid moneys required to be paid under the Letter of Allotment. That the plaintiff had continued to pay land rent to the Government. That the Government however, delayed in issuing title to the plaintiff forcing him to employ a private surveyor to pursue the procurement of title for him. That later, a search revealed that in 2002 the land was surveyed and title documents issued to the defendant through a “**separate file**”. That the plaintiff had been in possession of the land since 1994. That the plaintiff was the *bona fide* owner of the land.

The application is opposed. Both parties filed and served written submissions. Mrs Nzei, for the Plaintiff also highlighted the submissions in court. Mrs Nzei, emphasized that the plaintiff paid the amounts required to be paid under the Letter of Allotment in instalments. By 1999, the plaintiff had paid Kshs.300,000/=. The last payment for stand premium was done in 2006.

The plaintiff in the meantime, took possession of the land and fenced the same. Counsel contended that the parameters for the grant of an interlocutory injunction had been satisfied by the plaintiff.

Mr Mulei, for the defendant, stated that the matter related to two parallel allocations by the Commissioner of Lands who had not been joined as a party. It was the burden of the plaintiff to establish a *prima facie* case and show that he would suffer irreparable loss if the injunction was not granted. Counsel argued that, the plaintiff did not pay the stand premium within 30 days as required. Therefore the property was free for

allocation. In addition, the allocation to the defendant was first registration, which could not be challenged, as it was an allocation under the Registration of Titles Act. Counsel relied on section 23 of the Act.

I have considered the application, documents filed and submissions both written and oral. This is a case of double allocation of land by the office of the Commissioner of Lands. The legality of the double allocation has to be gone into and determined on merits. Suffice to say at this stage that the plaintiff was the first to be allocated the land. He does not appear to have paid stand premiums on time, but he paid somewhat. It appears that he might not have been informed that the Government had decided to allocate the land to a third party. Such an allocation was done, and title issued to the defendant.

The plaintiff claims have been in occupation of the land. This has not been disputed. In view of the fact that the plaintiff was allocated the land first, and the Government received payment of stand premium and did not appear to inform him of the second allocation, I am of the view that the plaintiff has established a *prima facie* case. A *prima facie* case is not a case that will definitely win, but one which might be successful.

Secondly, because it is not disputed that the plaintiff has been occupying the land since 1994, I am of the view that, if an interlocutory injunction is not granted before determination of the suit, the plaintiff will suffer irreparable loss; which cannot be adequately compensated in the form of damages. The plaintiff has satisfied the two main considerations in ***Giella –vs- Cassman Brown Ltd (1973) E 358***. I will grant the injunction. I will however, peg the injunction on provision of an undertaking by the plaintiff as ordered by Waweru J on 21st July 2010.

Consequently, I allow the application and grant prayer 2, subject to the plaintiff providing an appropriate undertaking for damages as ordered by Waweru J on 21st July 2010, which undertaking will remain in force until the determination of the suit.

Costs of this application will be in the cause.

Dated and delivered this 2nd day of **July** 2012.

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George Dulu

Judge

In the presence of:

Mrs Nzei for Plaintiff/Applicant

Mr Nyangau for Defendant/Respondent

Nyalo – Court clerk