



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 540 OF 2009

JANE WANJIRU KIBUNJA.....PLAINTIFF

VERSUS

JOHN MUCHOKI KAGWI.....DEFENDANT

RULING

1. By a chamber summons dated 17th October 2009, the plaintiff prays for injunctive relief against the defendant from interfering with her quiet possession of plot 628 Kongo Settlement Scheme. The plaintiff alleges that the defendant has entered into, and erected structures on her plot of land. The plaintiff avers that she is the owner of the suit land. The actions by the defendant are thus unlawful and should be restrained by injunction.
2. The application is contested by the defendant. In a replying affidavit sworn on 23rd May 2012, he avers that he was allocated the same plot in the year 2002. He states that he paid Kshs 8,600 being the stand premium, ground rent and survey fees. The defendant's case is that in view of the competing claims, the truth can only be disentangled by full evidence at the trial. He thus prays that the application be dismissed.
3. I have heard the rival submissions. I take the following view of the matter. I have seen a letter dated 7th December 1995 by one Tabitha Mwaura addressed to the chairman, Kahawa West development project, Soweto village. The writer purported to transfer a ballot numbered 426 from her deceased mother to the plaintiff. That ballot resulted in allotment of plot 628 Kongo Settlement Scheme, Kahawa Soweto. Presumably, the plot belonged to the deceased Lucy Njeri. I have also seen a receipt for payment dated 18th October 1994 for Kshs 400 issued by the City Council of Nairobi to the deceased. There is also a further receipt issued to the deceased by the council on 25th April 2002 for the plot for Kshs 8,600 for stand premium, ground rent and "formalization" of Kongo settlement scheme. No grant of letters of administration intestate have been exhibited and it remains unclear how the daughter of the deceased transferred the property to the plaintiff. But I am also alive to the fact that no formal title has been issued and the proprietary documents and receipts continue to bear the name of the deceased. I am thus of the view that the plaintiff has a beneficial interest in the suit land dating back to 7th December 1995.
4. I am thus surprised that on 25th April 2002 the City Council of Nairobi allocated the same plot to the defendant. The defendant paid the sum of Kshs 8,600 as stand premium, ground rent and survey fees on the same date. It is not lost on me that that is the same date when the plaintiff paid the same amount to the

same council for the same plot. Clearly, there was a double allotment through fraud at the worst or a genuine mistake at best. Either way, the City council was the fulcrum upon which that irregularity turned. It was unjustly enriched by double payment. It is the real defendant for any loss suffered by the disputants.

5. I have thus to interrogate the documentation further to find out priority of ownership of the disputants. I do so with great trepidation as I am not fully seized of the evidence at this interlocutory stage. That will truly be the province of the trial court. But it is necessary to inquire from the evidence whether the plaintiff has made out a *prima facie* case. The deceased, Lucy Njeri Mwaura was the holder of a ballot (**exhibit JWK 2**) number 426 that entitled her to plot 628. That ballot was transferred, albeit irregularly, to the plaintiff by the deceased's daughter Tabitha Wambui on 7th December 1995. The City council, as early as 18th October 1995 was receiving payments from the deceased for conversion of the plot. The defendant on the other hand claims to have been allocated the land only on 25th April 2002. Both parties paid Kshs 8,600 on that date for stand premium, ground rent and survey fees to formalize their respective allotments. The defendant has not disclosed the circumstances under which he was allocated the land or any other form of consideration prior to allotment. I have thus found, that the plaintiff or the deceased were first in time in the allotment of the suit land. As both parties have paid similar consideration to the council, I find that the plaintiff's claim ranks in priority. The defendant is not without a remedy. If well advised, the facts point to liability of the City Council of Nairobi. I wish to make no further comment to avoid embarrassing the trial court. I am well alive that a letter of allotment does not *ipso facto* confer a good title. See Wreck Motor Enterprises Vs Commissioner of Lands and others, Nairobi, Civil Appeal 71 of 1997, Court of Appeal (unreported), Harold Gerald Rurigi Vs Joseph Ougo and others HCCC 1441 of 2005, Nairobi [2008] e KLR. To that extent the true owner of the suit land will be determined at the trial. But considering what I have said, the plaintiff's claim ranks in priority, at least in terms of time, to that of the defendant.

6. When the plaintiff approaches the court for injunction, she must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party who has misconducted herself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80.

7. Applying the law to the facts, and in the interests of justice and preservation of the *status quo*, I find the plaintiff has met the threshold for grant of interlocutory prohibitive injunction. I thus order that an injunction do issue restraining the defendant, his agents, servants or howsoever from entering, trespassing, constructing, erecting structures or in any other manner interfering with the plaintiff's quiet possession of plot 628, Kongo settlement scheme, Kahawa Soweto, Nairobi until the hearing and determination of this suit.

8. I also order that the suit be determined within a period of not more than one year of today's date. In default, the order of injunction shall lapse.

9. As there is disputed ownership, and in the interests of justice, I order that costs of the application shall abide the judgment.

It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of July 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Mr. Musyoka for Pareno for the Defendant.