



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT
Environmental & Land Case 699 of 2011

ISAIAH MUTAHI MARANGAPLIANTIFF/APPLICANT

VERSUS

FRANCIS NGANGA.....1ST DEFENDANT/RESPONDENT

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

JANET NCORORO.....3RD DEFENDANT/RESPONDENT

RULING

1. Before me is a notice of motion dated 8/12/11. The plaintiff/applicant is seeking prayers that:

i. That pending the hearing and determination of the suit, the defendant, his agents, servants, workmen, contractors or anyone else under his direction or instruction be restrained by an interlocutory injunction from trespassing and/or continuing to trespass on the plaintiff land known as L.R. No. 230 Kahawa West Phase II Nairobi.

ii. That pending the hearing and determination of the suit the defendant, his agents, servants, workmen, contractors or anyone else under his direction or instruction be restrained by way of an interlocutory injunction for interfering with the plaintiff quiet enjoyment of the suit land.

iii. That officer commanding Kasarani Police station be ordered to supervise the enforcement of any orders made herein.

iv. That the cost of the application be provided for.

The application is based on the grounds stated on the face of the application.

The plaintiff filed 2 affidavits a supporting affidavit dated 8//12/11 and a supplementary affidavit dated 24/2/12.

2. This is the plaintiff/affidavits case is stated in the 2 affidavit as follows. On or about October 1992 the 2nd defendant allotted L.R. No. 230 Kahawa West phase II Nairobi to the 3rd defendant vide an allotment letter date 27/10/92. Through an agreement dated the 27/7/06 the 3rd defendant assigned her right and interest of the said piece of land to her after she paid a sum of 250,000/-. By then the 2nd defendant had

not issued her with a certificate of lease. That on the 1st December 2011 after she had deposited materials at the said plot the 1st defendant went to the premises and told her that he is the rightful owner and that he said plot had been allocated to her by the 2nd defendant.

3. On the 4/12/11 the 1st defendant forcibly took possession of the suit land and started building and he has continued to do so despite her protests. That unless the defendant is restrained she will suffer irreparable damages. In her supplementary affidavit in response to the defendants replying affidavit she avers that since the 2nd defendant accept payment of a stand premium and ground rent on the 18/7/05 the 2nd defendant is deemed to have waived the condition regarding the period within which the 3rd defendant was to accept the offer and make the payments and it cannot therefore assert it cancelled allotment the 3rd defendant's payments. That is worthy to note that the 2nd defendant made the offer to the 1st defendant on the 21/9/01 and the same was not accepted or paid for until the 11/11/11. That 2nd defendant is estopped from denying the validity of the defendant's allotment yet it accepted the 3rd defendant's payments. That the 1st defendant's payments to the 2nd defendant were therefore irregular. That the 1st defendant claims to have assigned his interest to Peter Kagotho Rimui (who is not a party to this suit) was made in bad faith as by then the dispute between land arisen. He asked this court to note that the 2nd defendant issued bills to the 1st between 30/9/2011 and 15/12/11 and that the date of payment for the application fees survey fees and beacon fees is not shown in the defendant's affidavit and that any payment made by the 1st defendant and his assignee Peter K. Rimui was made for the purpose of defeating the 3rd defendant right and interest are the suit plot. That he is able to compensate the 1st defendant in case he succeeds at the trial in establishing his right and he is ready to give or undertaking on the same.

4. The 1st respondent filed a replying affidavit dated the 30/1/12 and opposes the applicant's application. In brief he avers that he was allocated plot no 230 Kahawa West Phase II vide a letter of allotment dated 21/9/01, he thereafter effected the necessary payments and took possession of the land. That he has been in possession until the 3/12/11 when he disposed of his interest to Peter Kagotho Rimui. That after Peter K. Rimui took possession he complained that someone was claiming ownership over the parcel of land. That Peter Rimui told him he had made payment to City Council of Nairobi. That after this came up he established from 2nd defendant that he said plot was allocated to the 3rd defendant but the allocation was subsequently cancelled by the 2nd defendant from reasons that she did not pay the sum as stipulated in the letter of allotment and that her allocation was done without authority. He averred that the plaintiff bought the suit plot from a party who lacked capacity to dispose off any interest in the parcel of land and that damages would be an adequate remedy.

5. The 3rd defendant in her affidavits avers that the suit plot No.230 Kahawa West II was allotted to her on the 27/10/92 and she made payment as stated in the allotment letter on the 18/7/05 and 4/8/05 as shown in JN2. That by an agreement dated 27/6/06/ she assigned her interest to the plaintiff and by then the 2nd defendant not issued them with a certificate of leave and neither had it cancelled the allotment letter dated 27/10/92. That she has not assigned or transferred her interests to anyone else apart from the plaintiff. In her supplementary affidavit dated 7/12/12 she attached letter a letter from City Counsel of Nairobi dated 27/3/12 after a search at her officers on the ownership of the suit plot. The said letter confirms that she is still the registered owner of the suit plot. That she intends to register the transfer in the near future to reflect the assignment of interest in the said parcel of land to the plaintiff.

6. The 2nd defendant did not file any replying affidavit. It filed grounds of opposition dated the 27/2/12. In the said grounds it depones that the plaintiff/application is incompetent, vexatious, frivolous and for abuse of the Court process, that the applicant has no absolute right of ownership of LR No. 230 Kahawa West Phase II Nairobi as the original owner was a mere allottee and she defaulted to pay within the stipulated time hence then thereafter elapsed therefore she cannot convey title which she had not acquired; that the applicant has not met the mandatory conditions of granting an order of injunction; that the applicant has not established a cause of action against the 2nd respondent and that the application be dismissed with costs.

7. The Plaintiff filed a list of authorities dated 24.02.12. Briefly, the authorities are summarised below :- In the case of **Wairimu Mureithi –vs- City Council of Nairobi, Nairobi CA. No. 5 of 1979** where the appellant was aggrieved by the High court’s ruling denying her injunction on the basis that the council could adequately compensate her if the council derogated from the grant. In finding that the learned judge was right in refusing the injunction, the court of appeal found inter alia that the defendant would be in a financial position to pay any damages that may be awarded to the Plaintiff if she succeeded in her action.

8. The Plaintiff also relied on **American Cynamid Co. –vs- Ethicon Ltd (1975)1All ER 504** where the Plaintiff brought an action against the defendant seeking an injunction to restrain a threatened infringement of their patent. The trial judge held that the Plaintiff had made out a prima facie case and that on a balance of convenience, an interlocutory injunction, on an undertaking in damages by the plaintiff should be granted pending trial. On appeal, the decision was reversed with the court of appeal finding that the Plaintiff had not made out a prima facie case on infringement and that there was a well established rule of law that a court was precluded from granting the parties an interlocutory injunction or from considering the balance of convenience between the parties unless the evidence adduced at hearing satisfied the court on the balance of probabilities that, at the trial, the plaintiff would succeed in establishing his right to a permanent injunction. The Plaintiff successfully appealed and the House of Lords where it was held inter alia that there was no rule of law that the court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the Plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action.

9. Further, the plaintiff relied on **E.A. Industries Ltd –Vs- Trufoods Ltd (1972) EA 420** where the appellant applied to the High Court for an interlocutory injunction to restrain the passing off of the respondent’s product as the appellant’s. On appeal, the court found that on the balance of convenience, the application was properly refused and the appellant would suffer no loss which could not be compensated in damages.

10. Parties filed written submissions which I have read and considered together with the affidavits and annexures filed. Counsels also highlighted the said submissions in Court. The 2nd Defendant filed contradictory grounds of opposition and submissions. In its grounds of opposition dated 21.02.12, the 2nd defendant states that the applicant has no absolute ownership of the suit property as the original owner was a mere allottee who defaulted to pay within the stipulated time hence the offer lapsed and that she could not convey title which she did not have. In its submissions dated 11.06.12, the 2nd defendant acknowledges that as per annexure JN1 of the 3rd Defendant’s supplementary affidavit, the plot still belongs to the 3rd defendant and that the 2nd defendant has never allotted the same to the 1st respondent. JN1 is a copy of a letter dated 27th March 2012 from the 2nd defendant showing that according to their records, the suit plot was allocated to the third defendant vide allotment letter CP&ARCH/005450 dated 27.10.92. This letter was not rebutted by the 1st Defendant.

11. The Plaintiff has shown that she bought the suit plot from the 3rd defendant (IMM 2) and has made out a prima facie case by showing that she has an interest in the suit property. I am therefore inclined to grant the injunction sought to safeguard his interest.

12. Although the 1st defendant has submitted that he disposed his interest to Peter Kagotho Rimui on 03.12.11, apart from receipts annexed as FN III, there is no proof of the transfer. Without any other evidence, I am unable to find that the 1st defendant transferred his interest to the said Peter Kagotho Rimui. Secondly, the 1st defendant’s proprietary interest has been denied by the 2nd defendant

13. The 2nd defendant has sought to be struck out of the proceedings and has made lengthy submissions to the effect that no cause of action has been established against it. The application for consideration before court is whether or not an interlocutory injunction ought to be granted pending the hearing and determination of the suit. The 2nd defendant should move the court appropriately for any other relief sought.

14. The upshot of this ruling is that the application dated 8th December 2011 is allowed in terms of prayers (d) and (e) against the 1st defendant. The said orders are not granted against the 2nd and 3rd defendant as there is no interference from them. The plaintiff shall give an undertaking as to damages within 21 days from date of this ruling. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 5th October 2012

R. OUGO
JUDGE

In the presence of:-

..... **For the plaintiff**

..... **For the 1st Defendant**

..... **For the 2nd Defendant**

..... **For the 3rd Defendant**

..... **Court Clerk**