REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 32 of 2012

JOSPHAT NGANGA GIKURU.....................APPELLANT/APPLICANT

VERSUS

PETER NJENGA KIMANI...................... RESPONDENT/DEFENDANT

RULING

By an application dated 27th February 2012, the applicant, Josphat Nganga Gikuru seeks the following orders:-

(c) pending hearing and determination of the appeal an injunction do issue against the Respondent, his agents, servants from entering, remaining, trespassing and/or in any way interfering with the Appellant\'s peaceful and quite possession of Plot No. 433 Gilgil Site & Service.

(d)Costs of this application.

Prayers (a) and (b) are spent.

The applicant is dissatisfied with the ruling of the Magistrate’s Court in which his application for an injunction was dismissed. The applicant has annexed a draft memorandum of appeal, the order of the lower court and submission of the appellant. He avers that if the orders sought are not granted, he stands to suffer substantial loss as the Respondent had trespassed and put up a permanent house in the suit property.

The appellant stated that he purchased the Plot No. 433 Gilgil Site & Services from one Susan Njeri and she executed a transfer in his favour on 22.04.1998. In 2004, he fenced the plot, dug a pit latrine and covered it with a concrete slab. The Respondent trespassed into the suit property in March 2011 and started to put up a permanent house. The applicant wrote a letter of complain to Nakuru County Council. They responded to it by acknowledging it was an error on their part for re-allocating a plot which did not have any rent arrears (JNG VI). The letter also canceled the erroneous allocation of the plot in favor of the Respondent.

The Respondent opposed the application. He swore a replying affidavit filed in court on 3/7/2012 in which he depones that he is the owner of Plot 433 Gilgil Site & Service. He acquired the plot from County Council of Nakuru after an advertisement dated 4th December, 2010 (PNK 1). The Council issued him with a letter of allotment and has been paying rates for the plot (PNK 4). He began to develop the property which alerted the Appellant who went to court. It is the respondent’s view that if the applicant has any claim it is against the Council.

I must first of all address the objection raised as regards the replying affidavit of the respondent. It is not dated but the other requirements have been followed**. Section 1A** and **1B** of the **Civil Procedure Act** and **Article 159** of the **Constitution** enjoin the courts to administer justice without due regard to technicalities. The respondent will not be locked out of the hearing of this application on that account. The defect is cured by the above provision.

I have considered the application, affidavits sworn in support of each of the rival parties. Being an application for temporary injunction, the strictures enuciated in the famous **Giella v Cassman Brown & Company Limited (1975) EA 358 at 360, E** and later in the **Kenya Commercial Finance Company Limited v Afraha Education Society (2001) 1 EA 8** must be satisfied.

First, the applicant must show that he has a ***prima facie***case with a probability of success, secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the appellant has a *prima facie* case. However, traditionally, courts have always considered all the three principles.

In considering whether the appellant has a *prima facie* case, the court at this stage is not required to consider the merits of the appellant\'s case but merely to see if there are violations of the appellant\'s right which would necessitate the calling for a rebuttal from the Respondent.

The applicant has exhibited a transfer dated 22.04.1998 between an allotee/transferee one Susan Njeri and himself. Part C of the said Transfer clearly shows that at the time of the transfer, the parties to the transaction had paid up the necessary costs which include the plot rent, survey fees, showing fees, administration fees and transfer fees. The applicant therefore satisfied all the requirement for purposes of transfer of plot in his favour.

If there had been any repossession of the plot from the applicant, the Council ought to have complied with **Section 39 (1)** of **Trust Land Act** which states that:-

If, in respect of land which is held under a lease granted under this Act—

(a) any rent is at any time in arrears for a period of twenty-one days after it first became due; or

(b) there has been any breach of any of the lessee's covenants;

the Council may serve on the lessee a notice specifying the rent in arrears, or the covenant or condition broken, or the unlawful possession, as the case may be, and the Council may, at any time after thirty days from the service of the notice, bring proceedings for the recovery of the land in the Resident Magistrate's Court, if the value of the land falls within the limits of that court's civil jurisdiction, and to the High Court if it does not.

There is no evidence that the Council attempted to repossess the plot. There is in fact a letter dated 9.09.2011 written to the applicant which acknowledges that the Council erroneously repossessed this plot which did not have any rent arrears at the time. The Council further proceeded to cancel the reallocation in favour of the Respondent. Where the Council has powers to cancel a reallocation and the procedures it follows are matters that will be looked into during the hearing.

The respondent claims to have constructed a house on the said plot and therefore the orders cannot issue. But the applicant went ahead with construction even after he knew that there was a dispute over the plot and his allocation was revoked. The applicant lodged a complaint with the Council on 1/3/2011 (JNG V) and the Council accepted having made an error and revoked the repossession and therefore allocation of the plot to the respondent on 9/9/2011. Despite that, the respondent went ahead to lodge the application for approval of building plans with the Council on 20/9/2011 (PMK 3). By going ahead to construct, he was trying to steal a match against the applicant which is unfortunate.

The lower court declined to grant the applicant an order of injunction. **Order 42 Rule 6** of the **Civil Procedure Rules** empowers the court to grant an order of temporary injunction in exercise of its appellate jurisdiction if the procedure of instituting an appeal from the lower court has been complied with. In this case the applicant has filed a Notice of Appeal and is therefore properly before this court. The applicant has also demonstrated that he has a prima facie case with high chances of success and I grant prayer (c) of the Notice of Motion dated 27/2/2012 as prayed.

DATED and DELIVERED this 5th day of October, 2012.

R.P.V. WENDOH
JUDGE
PRESENT:
Mrs Mukira for the appellant/applicant
Mr. Maragia for the respondent/defendant
Kennedy – Court Clerk