



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 45 of 2012

STEPHEN MBURU

SOLOMON CHEPSAT

JAMES WAMAI KAMAU.....PLAINTIFFS

PATRICK M. KAMAU

ROSELYNE MAINA

- VERSUS -

COMAT MERCHANT LTD.....1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENDANT

RULING

1. This is the plaintiffs' notice of motion dated 26th January 2012. The plaintiffs pray for injunction to restrain the defendants from trespassing upon, developing or dealing in any manner with the property known as Buruburu Estate Block 75, Mumias Road. The motion is brought under order 40 of the Civil Procedure Rules 2010 and sections 1A, 1B, 3A and 63 of the Civil Procedure Act.
2. In a synopsis, the 1st, 2nd, 3rd and 5th plaintiffs claim to be the lawful allottees of plots A2, A3, A4 and A6 being subdivisions of the suit land. The 4th plaintiff similarly claims plot A5 having purchased it for valuable consideration from the original allottee, Agnes Njeri. They claim to be in possession and to have paid rates, rents and other outgoings to the 2nd defendant. They have put up semi-permanent structures on the land and leased out the premises. They had also put up a chain link fence around the property. On 14th December 2011, the area chief gave their tenants two days to vacate. On 16th and 17th December 2011, the 1st defendant or its agents, without any colour of right, entered the property and attempted to bring the down the structures. The plaintiffs are thus apprehensive that they may be dispossessed of their property. Those matters are buttressed further by the deposition of Solomon Chepsat sworn on 26th January 2012 and the written submissions dated 16th July 2012.
3. The motion is contested. There is a replying affidavit sworn on 22nd February 2012 by Peter Maina Mugambi, a director of the 1st defendant, and a preliminary objection dated 22nd February 2012. There is then a replying affidavit of K J Ayiecho sworn on 27th March 2011. He is the Chief valuer of the City Council of Nairobi, the 2nd defendant.

4. In a nutshell, the 1st defendant's case is that it is the registered owner of the suit land known as Nairobi/Block 77/398 and 399. It has registered leases for the two properties issued on 30th May 2011. It followed all the steps of allotment, Council approvals, payments and issue of the leases. Fundamentally, the 1st defendant contends that Nairobi/Block 75, where the plaintiffs claim to own subplots, is different from the 1st defendant's properties. The 1st defendant's properties are comprised in Nairobi/Block 77. The 1st defendant submitted that the plaintiffs are laying claims to the wrong property.
5. The 2nd defendant confirms the assertions by the 1st defendant. The 2nd defendant, in particular, states that the subplots known as A3, A2, A4, A5 and A6 are not reflected in its records. The council denies issuing letters of allotment to the plaintiffs.
6. Lastly, there is the preliminary objection of the 1st defendant that I referred to. It challenges the admission into evidence of the exhibits annexed to the plaintiffs' supporting affidavit. It is contended that they offend the Oaths and Statutory Declarations Act.
7. I have heard the rival arguments. The principles for grant of injunction are well settled by the time honoured decision of *Giella Vs Cassman Brown & Company Limited* [1973] E.A. 358. The plaintiff must demonstrate a *prima facie* case with a probability of success; show that he stands to suffer irreparable harm not compensable in damages; and lastly, if in doubt, the court must weigh the balance of convenience. Being a discretionary remedy, there is also ample authority that a person who has misconducted himself in the eyes of equity will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank & another* [2004] 1 KLR 80.
8. The plaintiffs claim to be the lawful allottees of plots A2, A3, A4, A5 and A6 comprised in Buruburu Estate Block 75, Mumias Road. I have taken into account the deposition of K J Ayiecho, the Chief Valuer of the City Council of Nairobi. He avers that the 1st defendant's properties known as Nairobi/Block 77/398 and Nairobi/Block 77/399 are in Nairobi/Block 77 which is in Buruburu Phase II Nairobi. The plots claimed by the plaintiff would fall in a separate block, Nairobi Block 75 which is in Phase I Buruburu Nairobi Block 75 comprises of over 500 units of privately owned properties from Nairobi Block/1 to Nairobi/Block 75/1072 Phase 1 Buruburu. Doubt is then created immediately that the plaintiffs are claiming the wrong physical location of their properties. I am fortified there because the Chief Valuer of the council is unequivocal that the plots known as A2, A3, A4, A5 and A6 do not appear on the 2nd defendant's official records. I am alive that those are matters properly within the province of the trial court. I have in particular looked at the map annexed marked "KJA 1" which creates further doubt about the assertions by the plaintiff. Although the plaintiffs claim there has been double allocation, I am doubtful that the disputed properties fall within the same block of properties. It is possible, but I think it is highly improbable.
9. I have then looked at the letters of allotment annexed to the plaintiffs' supporting affidavit. For starters, they are not marked or identified in the affidavit. On that score, I find the 1st defendant's preliminary objection to be well taken. Rule 9 of the Oaths and Statutory Declarations Act provides that:
- "All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification"*.
- That has not been done by the plaintiffs. The documents are just attached to the affidavit and thrown at the court. I would thus strike out the annexures. See *Express Escorts Limited Vs Securicor Security Services Kenya Limited* Nairobi, High Court, case No 268 of 2002 (unreported). This is not a simple technical objection that would be cured by article 159 of the constitution or sections 1A and 1B of the Civil Procedure Act. It is a fatal flaw to the affidavit of the plaintiffs.
10. But even assuming that the exhibits are admissible, I note that the plaintiffs are relying on letters of allotment, for example the one to Solomon Chepsat dated 27th October 1992. They have not been progressed to a formal lease or title. The 1st defendant on the other hand is relying on two registered

leases. The City Council in particular denies issuing the letters of allotment to the plaintiffs.

11. From a legal standpoint, a letter of allotment is not a title to property. It is a transient and often conditional right or offer to take the property. See Wreck Motor Enterprises Vs. Commissioner of Lands and others Nairobi Civil Appeal 71 of 1997 (unreported), Jaj Super Power Cash & Carry Limited Vs Nairobi City Council and others Nairobi, Civil Appeal 111 of 2002, Court of Appeal, (unreported). Mirrored against the 1st defendant's registered interest in the land, and the evidence, the plaintiffs' claim is on a quicksand. It may well be true that the 1st defendant did not pay the stand premium or other charges within the prescribed time in the letter of allotment. But payment was accepted. A registrable interest has been created and two lease titles issued. The registered interest ranks higher than the transient rights in the letters of allotment.

12. I have also considered the plaintiffs' assertions that the 1st defendant's title is irregular or tainted by fraud. I am alive to the cardinal precept of the law of evidence that he who alleges must prove. I am also cognizant that the burden of proof of fraud is very high and beyond a balance of probabilities. See Koinange and 13 others Vs Koinange [1986] KLR 23. The standard of proof approaches but is below proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E A 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR 67. Again, the less I say the better to avoid encroaching upon the province of trial court.

13. I do not have clear or cogent evidence to show there was collusion between the 1st defendant, the 2nd defendant or its councillors. Certainly, the evidence available does not reach the threshold of proof of fraud. The plaint dated 26th January 2012 does not even pray for cancellation of title or a suitable declaration of ownership by the plaintiffs. It simply prays for a permanent injunction and damages.

14. For all the above reasons, I find that the plaintiffs have not established a strong *prima facie* case for grant of interlocutory prohibitive injunction. In the event that the plaintiffs prevail in the suit, I am satisfied that their losses can be computed and are payable in damages. I did not receive any evidence to suggest that the two defendants would not meet such an award of damages. In view of the fact that the 1st defendant holds registered titles to the two properties, even the balance of convenience does not tilt in favour of the plaintiffs. In the result, the plaintiffs' notice of motion dated 26th January 2012 is hereby dismissed with costs to the defendants.

It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of October 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Sitati for Anyoka for the Plaintiffs.

Mr. Wachakana for Kariuki for the 1st Defendant.

No appearance for the 2nd Defendant.