



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 48 of 2012

SUSAN NYAMBURA GITAU.....PLAINTIFF

VERSUS

JOHN LEMERIA KOOL.....DEFENDANT

RULING

The Plaintiff/Applicant has filed a Notice of Motion application dated 23/1/2012 seeking orders that;

- (i) A mandatory injunction compelling the Respondent to cease forthwith from carrying out excavations, development of buildings or structures temporary or permanent on property title No. Nairobi / Block 132/11 Kahawa West (suit property) and to vacate and put the Applicant in possession of the suit property and to demolish buildings erected by them and remove debris, building materials, equipment from and make good any physical damage to the suit property pending hearing and determination of the suit;
- (ii) A temporary injunction restraining the Respondent from howsoever interfering with the Applicant's quiet possession use and enjoyment of the suit property pending hearing and determination of the suit; and
- (iii) Costs of the application.

The application is premised on the grounds that the Respondent with the aid of fraudulent or irregular letter of allotment emanating from the City Council of Nairobi has acted as law unto himself and forcibly taken possession of the suit property and has commenced expedited development of permanent structures thereon by reason of which the Applicant will suffer irreparable loss and damage unless the Honourable Court grants orders in terms of the prayers on the face hereof. The application is further supported by an affidavit of the same date sworn by the Applicant.

The Applicant depones that the suit property was allotted to her by the City Council of Nairobi, which she paid for ground rent and other requisite charges. That upon payment the suit property was surveyed and a beacon certificate issued confirming dimensions of the suit property. That she took possession of the suit property from the date of the issue of the beacon certificate and was issued with a certificate of title on 1/11/2006. That she has continued to pay rates due to the Local Authority. That sometimes in August of 2011, she discovered that a fence had been erected on her plot by persons unknown to her. She made a report to the Kiamumbi Police Station, Kahawa West and recorded a statement, when after she was given security by the OCS Kiamumbi Police to remove the illegal fencing, which was done on 13/12/2011. That by this time there were no temporary or permanent buildings thereon, nor were there any notices for the persons responsible for the fencing. The Applicant depones that this month (*which I presume is January*

of 2012 when this application was filed) the Respondent moved into the suit property and commenced excavations and constructions thereon. That on contacting the OCS Kiamumbi Police Post, the Applicant was handed documents tendered by the Respondent to show that he owns the suit property. The Applicant alleges that the said documents have discrepancies evident in the dates of the allotment letter (dated 21/9/2001) and approved by an ordinary meeting of the City Council of Nairobi on 6/11/2001. Another discrepancy was the date of the certificate of beacon which was the same date as that of the letter of allotment. That upon enquiry at the City Council of Nairobi, the council confirmed to her that the allocation to the Respondent was an irregularity since an allotment and survey of the suit property had already been completed and crystalized in title number Nairobi/Block 132/11 in her favour. The Applicant contends that the allotment and certificate of beacon produced by the Respondent is irregular and a forgery.

The Application was opposed. The Respondent swore a Replying Affidavit dated 14/3/2012. The Respondent deponed that despite claiming to have been allocated the suit property the Applicant had not demonstrated how she acquired the same. That the City Council of Nairobi has confirmed that he is the lawful allottee of the suit property. He alleges that the certificate of title was obtained by fraud since the same was issued on 1/11/2006 and the receipt for ground of rent was issued on 20/12/2011, hence there is no way possible that title can be issued prior to the payment of the ground rent. He further deponed that there was no lease signed by the City Council of Nairobi before issuance of certificate of lease by the Registrar of Lands which ought to be the case. He contends that he is the lawful allottee of the suit property and his allocation was deliberated upon in the council meeting. That there is a dispute between City Council of Nairobi and Kamuthi farmers' co-operative society limited which is pending over the suit property and the later party holds the mother title, hence it is curious how the Applicant has title subdivision from the mother title. He further depones that the Applicant has no beacon certificate, and she therefore cannot claim possession of the land that was not pointed out to her. The Respondent contends that his allocation was done in a meeting of 16/3/2001 not 6/11/2001 as alleged, that the letter of allotment is dated 21/9/2001 and the beacon certificate is dated 15/9/2001 and do not bear the same date as alleged by the Applicant. He further depones that he has already sold off the property to a 3rd party who has taken possession and developed the same. He avers that the Applicant has not demonstrated that she has a good case with chances of success and the application should therefore be dismissed.

The Applicant swore a Further Affidavit dated 23/5/2012 in response to the Respondent's Replying Affidavit. In brief, the Applicant deponed that she acquired a leasehold title to the suit property for valuable consideration described in the lease executed by the City Council of Nairobi (Lease annexed and marked SNG6). That on registration of the said lease, the Registrar of Lands issued the Applicant with a certificate of title. That on the basis of certificate of title she is the proprietor of the suit property and the leasehold title thereof for a period of 99 years from 1/9/1999 hence her title is indefeasible having not been impeached or cancelled on any account by any lawful order of Court as provided by section 143 of the Registered Land Act. With respect to the notice to all allottees in the Newspaper excerpt of 15/4/2011, annexed by the Respondent in support of his claim that there is a suit pending touching on the mother title, the Applicant maintained that she had no knowledge of an existing court order, and that neither she nor the Respondent were parties to that suit. Further that the notice referred to L.R No. 71/7/1 and L.R No. 71/7/10 & 10 which registration systems are applicable under the provisions of Registration of Titles Act whereas the suit property is registered under the Registered Land Act.

The Respondent swore a Further Affidavit dated 12/6/2012 in response to the further affidavit sworn by the Applicant. The Respondent alleged that the lease annexed by the Applicant is a forgery as the execution page is different from the front pages, the numbering of the lease and that the front pages is for RLA lease and the execution page is for RTA lease. That he got an approval from City Council of Nairobi to construct on the suit property which is a clear indication that he owns the property. He averred that the officers whom the Plaintiff claimed to have executed the lease were not in the council either as employees or as signatories. He contended that the Applicant has come to court with unclean hands and hence the application should be dismissed with costs.

Both counsels made oral submissions in support of their arguments. The Applicant seeks mandatory and temporary injunctions. From the evidence in the affidavits and submissions, there are allegations of fraud on the part of the Applicant, and that the procedure of acquiring the lease from the council has been faulted by the Respondent. The Respondent claims ownership of the suit property and has disposed of the same to a 3rd party who is not a party to this suit and which orders if granted would adversely affect the said 3rd party. It is unfortunate that none of the parties has sought to bring in the City Council of Nairobi which both parties in this suit claim to either have acquired allotment or lease from. It is also apparent that none of the parties is in occupation of the suit premises. There are pertinent issues with respect to ownership that can only be properly canvassed at the hearing.

A mandatory injunction, at the interlocutory stage, is normally granted in the clearest of cases and where there are special circumstances. See **Halsbury's Laws of England Vol. 24(4th Edn) Par. 848**. This was also the holding in the case of **Locabail International Finance Ltd – Vs – Agroexport and others (1986) All ER Pg. 901** wherein the court stated, “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.”

The Courts have also held granting a mandatory order of injunction may have the effect of bring the litigation to an end at the interlocutory stage. This was echoed by the Court of Appeal in the case of **Trinity Prime Investments Ltd – Vs – Savings & Loans and another Civil Appeal No. 90 of 1998 (Delivered on 5/11/1999)** that, “Where the Court has granted an interlocutory injunction prayed for it should not grant a mandatory injunction whose effect should be bring the litigation to an end.”

The application herein is not a clear case to warrant the court to grant an interlocutory mandatory injunction. Despite the Applicant having title to the suit property, there are allegations of fraud and forgery leading to the registration of the suit property. Further, granting the mandatory injunction herein will have an effect of ending the suit at the interlocutory stage. In the circumstances, I decline to grant the mandatory injunction as prayed.

It is apparent that none of the parties herein is in possession of the suit premises. The Respondent claims to have transferred the same to a 3rd party. Granting an injunction as prayed will adversely affect the said 3rd party who is not party to this suit and whose interest is unprotected. Moreover, the Applicant admits in her supporting affidavit that there are excavations and constructions being carried out on the suit premises. For an order of injunction to issue, an applicant must prove that he has a *prima facie* case with a probability of success, that he will suffer irreparable loss and if the Court is in doubt it will decide the case on a balance of convenience (**Geilla vs. Cassman Brown E. A. 1973**). The issue of the Applicant's title cannot be decided conclusively at this interlocutory stage. I note that she has not been in possession of the suit property. Though the Applicant may suffer loss, there is a 3rd party who is not joined, thus I find that the Applicant has failed to meet the principles required. Therefore, an order of injunction to restrain the Respondent from interfering with the quiet enjoyment and use of the suit property cannot suffice. It is settled that an injunction cannot be issued in vain. I hereby decline to grant this prayer.

In the interest of justice, I direct that the parties do set this suit for hearing as soon as possible, so that the rightful owner can be take and have quiet and peaceful possession of the suit property.

Orders accordingly

Dated, signed and delivered this 10th day of **October** 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk