



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. NO. 09 OF 2020

AMINA KARAMA.....PLAINTIFF

VERSUS

NJAGI GACHANGUA.....1ST DEFENDANT

DAVID MUCHIRI KAMAU.....2ND DEFENDANT

THE LAND REGISTRAR EMBU.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

A. INTRODUCTION

1. By a Complaint dated 2nd March, 2020 the Plaintiff sought recovery of **Title No. Embu Municipality/1112/834 (the suit property)** from the 2nd Defendant who is the current registered owner thereof. The Plaintiff contended that the 1st and 2nd Defendants had acquired the suit property through fraud, misrepresentation and concealment of material facts and that the 3rd Defendant had transferred the suit property to the 2nd Defendant without her knowledge or consent.

2. Simultaneously with the filing of the suit the Plaintiff filed a notice of motion dated 2nd March, 2020 expressed to be based upon **Sections 3A, 63 (c) & (e) of the Civil Procedure Act (Cap. 21), Order 40 Rules 1, 2, 3 & 9 of the Civil Procedure Rules** and **all other enabling provisions of the law** seeking the following orders:

(a) Spent

(b) Spent

(c) That an order do issue restraining the Defendants, their servants and/or agents or anyone claiming through them from interfering with tenants distraining and/or taking rent from the tenants at Title No. Embu/Municipality/112/834 pending hearing and determination of this suit.

(d) That the Defendants by themselves or through their agents, servants, employees and/or any persons claiming through them be restrained by way of a temporary injunction from transferring, developing or in any other way dealing with Title No. Embu/Municipality/1112/834 pending the hearing and final determination of this suit.

(e) That the OCS Embu West Police Station to provide security and/or ensure compliance with the court orders.

(f) That costs of this application be provided for.

B. THE PLAINTIFF'S CASE

3. The said application was based upon the various grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 2nd March, 2020 and the annexures thereto.

4. The Plaintiff contended that she was the legitimate proprietor of the suit property which she bought for valuable consideration from one Mutahi Wachira in 1983. She stated that she had developed the suit property by constructing rental houses which were let out to tenants.

She contended that the 1st and 2nd Defendants had fraudulently and illegally acquired the suit property without her knowledge or consent and that the 2nd Defendant had directed the tenants to pay the rent to him instead.

5. The Plaintiff further contended that the rental income derived from the suit property was her source of livelihood and that she might suffer irreparable loss should the interim orders sought be declined. She further contended that unless the orders sought were granted she might suffer mental anguish due to the 2nd Defendant's harassment.

C. THE DEFENDANTS' RESPONSE

6. The 1st Defendant filed a replying affidavit sworn on 7th September, 2020 denying the Plaintiff's claim in its entirety. He stated that he bought the suit property from one Mutahi Wachira who was the original allottee for valuable consideration in 1998. He further stated that the suit property was later transferred to him after all outstanding dues were paid to the concerned authorities after which he sold and transferred the same to the 2nd Defendant.

7. The 2nd Defendant filed a replying affidavit sworn on 24th July, 2020 in opposition to the said application. He refuted the Plaintiff's claim and stated that he bought the suit property for valuable consideration from the 1st Defendant in 2019. He contended that he bought the suit property after due diligence and upon being satisfied that the 1st Defendant had all the necessary documents in support of his title such as a letter of allotment and a lease.

8. The 2nd Defendant pointed out that the copies of payment receipts for rates exhibited by the Plaintiff actually bore the name of the 1st Defendant hence the Plaintiff was guilty of undue delay in seeking legal redress. The 2nd Defendant further contended that the Plaintiff had failed to exhibit any ownership documents with respect to the suit property hence she was not entitled to the interim orders sought.

9. There is no indication on record of the 3rd and 4th Defendants having filed a response to the Plaintiff's said application although the Attorney General entered appearance in the suit on behalf of the 3rd and 4th Defendants on 27th July, 2020. The material on record also reveals that the Attorney General filed a written statement of defence on behalf of the 3rd and 4th Defendants on 7th September, 2020.

D. DIRECTIONS ON SUBMISSIONS

10. When the application was listed for hearing on 30th September, 2020, it was directed that it shall be canvassed through written submissions. The Plaintiff was granted 14 days to file and serve her submissions whereas the Defendants were granted 14 days upon the lapse of the Plaintiff's period to file and serve theirs. The record shows that the 1st Respondent filed his submissions on 12th November, 2020 whereas the 2nd Defendant filed his on or about 5th November, 2020. However, there were no submissions on behalf of the Plaintiff and the Attorney General by the time of preparation of the ruling.

E. THE ISSUES FOR DETERMINATION

11. The court has perused the Plaintiff's application dated 2nd March, 2020, the replying affidavits in opposition thereto and the submissions on record. The court has also considered the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the Plaintiff has satisfied the requirements for the injunctive orders sought.

(b) Who shall bear the costs of the application.

F. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff has satisfied the requirements for the grant of injunctive orders

12. The court has considered the submissions and material on record on this issue. Both the Plaintiff and the 1st Defendant claimed to have bought the suit property from the late Mutahi Wachira at different times. Whereas the 1st Defendant obtained a letter of allotment, lease and certificate of lease after the alleged purchase, the Plaintiff has not exhibited any documents which were issued to her after the alleged purchase.

13. The court is not at this interlocutory stage required to determine which of the two sale agreements is valid or genuine. That shall be the function of the trial court. Similarly, the court is not required at this stage to determine whether or not the 1st and 2nd Defendants, or any one of them, acquired the suit property through fraud, misrepresentation or concealment of material facts. All that the court is required to do is to examine the material on record to determine whether or not the Plaintiff has made out a *prima facie* case with a probability of success at the trial as enunciated in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358.**

14. The court has weighed the relative strengths of the parties' claims and counter claims. Unlike the 1st and 2nd Defendants, the Plaintiff has no documents to support her claim of ownership apart from a copy of an agreement for sale whose date is incomplete. On the contrary, the 1st Defendant appears to have been issued with a letter of allotment, lease and certificate of lease with respect to the suit property. The court has noted that even the receipts for payment of rates which the Plaintiff exhibited in a bid to establish her claim to the suit property are all in the name of the 1st Defendant.

15. Although the Plaintiff shall still be at liberty to prove her claim at the trial, the court is not satisfied at this interlocutory stage that she has demonstrated a *prima facie* case with a probability of success at the trial. The mere fact that she may have erected some buildings on the suit property does not necessarily mean that she has a legitimate claim thereto. For instance, if a person puts up a building on another's land due to a mistake of fact or inadvertence he does not thereby acquire a legal interest in the property.

16. The nature of a *prima facie* case was described in the case of Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 where Bosire J.A. stated as follows;

“So what is a *prima facie* case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter ...

... But as I earlier endeavored to show, and I cited ample authority for it, a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

17. The court has also considered the material and submissions on record on the second principle for the grant of an injunction. An injunction will not normally be granted unless the applicant has demonstrated the risk of irreparable injury which cannot be adequately compensated by an award of damages. The Plaintiff has asserted that she has some rental houses on the suit property from which she draws some rental income. She exhibited a considerable volume of copies of payment receipts running into 120 pages.

18. The court is of the opinion that there is no evidence of irreparable loss in this matter. Whatever loss or injury the Plaintiff may suffer appears to be primarily financial in nature which can be calculated to the last cent. The court does not accept that anxiety and mental anguish arising from the risk of financial deprivation would constitute irreparable injury. The court is thus of the opinion that the Plaintiff has failed to demonstrate irreparable loss within the meaning of the law.

19. There is another reason why the Plaintiff is disentitled to the equitable relief of injunction. The material on record indicates that as far back as 2006 and 2008 the Plaintiff was being issued with rates payment receipts bearing the name of the 1st Defendant as the rate payer or plot owner. There is no plausible explanation as to why the Plaintiff took more than 14 years to seek legal redress. Although the Plaintiff averred in the application that her tenants were asked to start paying rent to the new owner in September 2019, there was no plausible explanation for the delay in not filing the application until March 2020, about 6 months later.

20. It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99:

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

(b) Who shall bear costs of the application

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful party should normally be awarded costs of an action unless, for good reason, the court directs otherwise. The court finds no good reason why the Defendants should not be awarded costs of the application. Accordingly, the 1st and 2nd Defendants shall be awarded costs since they opposed the application.

G. CONCLUSION AND DISPOSAL ORDER

22. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for interim orders. Accordingly, the Plaintiff's notice of motion dated 2nd March, 2020 is hereby dismissed with costs to the 1st and 2nd Defendants.

It is so ordered.

RULING DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this 18th of December, 2020.

In the presence of:

Mr. Ali for the Plaintiff

Ms. Koki for the 1st Defendant

Mr. Kinini for the 2nd Defendant

Ms. Njenga holding brief for Mr. Siro for the Attorney General for the 3rd & 4th Defendants

Court Assistant – Carol

Y.M. ANGIMA

JUDGE

18.12.2020