



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 882 OF 2015

JOHN MWANGI MWACHARIA PLANITIFF/APPLICANT

VERSUS

RICHARD ODIEK AYUSA.....1ST DEFENDANT/RESPONDENT

NAIROBI CITY COUNTY.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 15th September 2015 brought under order 40 rules 1 and 2, order 51 rule 1 of the Civil Procedure Rules, Section 1, 1A, 3 and 3a of the Civil Procedure Act, Chapter 21 Laws of Kenya.

2. It seeks orders:-

1. Spent

2. Spent

3. That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction to restrain the 1st defendant by himself, his agents, servants and/or assigns from constructing on, erecting structures, building or in any way developing the suit property being Plot No. A3-270, Kayole Nairobi.

4. That cost of the application be provided.

3. The grounds are on the face of the application and are set out in paragraphs (i) to (viii).

4. The application is supported by the affidavit of John Mwangi Macharia, the plaintiff/applicant herein sworn on the 15th September 2015.

5. The application is opposed. There is a replying affidavit sworn by Richard Ondieki Ayusa the 1st defendant/respondent sworn on the 26th October 2015. The 2nd defendant/respondent filed grounds of opposition dated 8th September 2016.

6. On the 6th September 2016, the court directed that the application be canvassed by way of written submissions.

7. It is the plaintiff/applicant's submissions that he has a genuine and arguable case. He annexed a sale agreement to show that he purchased plot No. A3-270 from Charles Ndungu Wambugu on 2nd March 1999. The said Charles N. Wambugu was an employee of the City Council of Nairobi having obtained the said plot under the staff purchase scheme. He has relied on the case of **Salome Warware vs George Muna & Another [2015] eKLR**. Further that the 1st defendant is in occupation of the suit premises and has now put up permanent structures. He will suffer irreparable damage as the 1st defendant may dispose of the suit property. He prays that the application be allowed.

8. The 1st defendant on the other hand submitted that he has a beacon certificate issued to him on 10th February 2004. He complied with the requirements of the 2nd defendant and has constructed on the suit property. The plaintiff has not demonstrated that he purchased the suit property from Charles Ndungu Wambugu. He prays that the application be dismissed.

9. The 2nd defendant submitted that it is not privy to the alleged sale agreement between the plaintiff/applicant and the said Charles Ndungu

Wambugu. Further that it did not allocate the suit property to Charles Ndungu Wambugu. The plaintiff/applicant has not produced any letter of allotment to the said Charles Ndungu Wambugu. It has put forward the case of **United Five Company Limited v Hellen Kirumba & Another [2013] eKLR**. It further submitted that the plaintiff has no legal, beneficial or proprietary interest in plot no. A3-270 Kayole in Nairobi County. He prays that the suit be dismissed with costs.

10. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, and the annexures, the grounds of opposition, the written submissions of counsel and the authorities cited. The issue for determination are:-

(i) Whether the plaintiffs/applicants' application meets the threshold for grant of temporary injunction.

(ii) Who should bear costs?

11. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were out in the precedent setting case of **Giella Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

12. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

13. It is the plaintiff's case that he purchased the suit property from Charles Ndungu Wambugu. He did not annex the letter of allotment issued by the 2nd defendant to the said Charles Ndungu Wambugu. The 2nd defendant has denied allocating the plot to Charles Ndungu Wambugu. It is also not privy to the alleged sale agreement between the plaintiff and the said Charles Ndungu Wambugu. The 1st defendant on the other hand has all the documents. He said he bought the plot from the 2nd defendant. The same has been repossessed. He has annexed all the relevant documents. I am satisfied that he is the genuine owner of the suit property and not a trespasser. The documents he relies on were not challenged by the plaintiff.

14. I am not satisfied therefore that plaintiff/applicant deserves any kind of protection. It is not in doubt that the 1st defendant is in possession of the suit property. He has put up a permanent structures. I find that the plaintiff/applicant has failed to establish a prima facie case with probability of success at the trial. I find that the balance of convenience tilts in favour of the 1st defendant who has the relevant documents and is in possession.

15. In conclusion, I find no merit in this application and it is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 9th day of October 2019

L. KOMINGOI

JUDGE

In the presence of:-

Ms Gitau for Njenga for the Plaintiff

No appearance for the Defendants

Kajuju - Court Assistant