



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 23 OF 2018

MOSES MBUTHIA GITHINJI.....PLAINTIFF

VERSUS

ANDREW MUNGAI MACHARIA.....1ST DEFENDANT

ROSEMARY MUNGAI.....2ND DEFENDANT

NAKURU COUNTY GOVERNMENT (NAIVASHA SUB-COUNTY)..3RD DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff claiming to have purchased the suit land; defendant also claiming to have purchased the same land but through a different allottee; both parties claiming title to the same land through two different allotments; best that the application be decided on a balance of convenience; orders made to have the property preserved as it is pending hearing and determination of the suit and no party to develop or utilize it; all dealings stopped pending hearing of the suit; costs in the cause).

1. The application before me is that dated 30 January 2018, which is an application for injunction, that was filed by the plaintiff contemporaneously with the suit. The application is opposed and I find it prudent to first set out the respective cases of the parties as noted in their pleadings and the application.

2. The case of the plaintiff is that he is the legal owner of the property described as Unsurveyed Residential Plot No. 130 within Naivasha Township having purchased it from the previous owners, namely Margaret Wanjiku Karanja, Juvinalis Nyota Karanja, Ann Wairimu and Joram Kamau Karanja, through a sale agreement dated 9 October 2017, for the consideration of Kshs. 3 Million. The plaintiff avers that he then took possession of the suit property and deposited building materials. It is averred that sometimes in January 2018, the 1st and 2nd defendants, without any colour of right, entered into the suit property and started putting up a fence and also laid claim to the suit property. It is pleaded that the 3rd defendant, wrongfully issued to one Enock Kungu Njogu, an allotment letter to a plot described as Kabati Extension (Kabati Naivasha Township Residential Plot No. 130), (which I presume to be the same as the suit land) and the said person sold the said plot to the 2nd defendant. In the suit, the plaintiff wants the 1st and 2nd defendants evicted from the suit property, a permanent injunction against them, and a declaration that he is the proper owner of the suit property.

3. In his supporting affidavit, the plaintiff has annexed various documents including a Letter of Allotment to the suit plot, dated 1 May 1991, the original allottee being one Gibson Wahome, who later transferred his interest to a Mr. John Mwangi Chege, vide a sale agreement dated 10 November 1999. In the year 2010, the said Mr. Chege sold the suit property to Margaret Wanjiku Karanja, and 3 other persons, who later sold the said property to the plaintiff. John Mwangi Chege had proposed to develop the plot and had some building plans approved. The plaintiff has averred that the plot was partly developed when he purchased it.

4. In the course of hearing the application, it emerged that the 1st defendant was already deceased by the time the case was filed and therefore his name was struck out of the suit.

5. On her part, the position of the 2nd defendant is that the suit plot, identified as Plot NO. 130 Kabati-Naivasha Township (extension), was allocated to Enock Kungu Njogu vide a Letter of Allotment dated 11 March 1982. The 1st defendant, who is the late husband to the 2nd plaintiff, then purchased the said property in the year 1987 and the 2nd defendant contends that the transfer had the approval of the Naivasha Town Council. It is averred that the deceased then paid all requisite charges and has also been paying rates. Various receipts to support this assertion are annexed to the replying affidavit of the 2nd defendant. She averred that in the year 2012, she was alerted of developments on the plot and she found a structure being put up. To assert her rights, she deposited building materials and commenced construction of a wall. It is then that Margaret Karanja, emerged claiming ownership of the plot. A dispute thus ensued which was referred to the Clerk to Council but the same was not fully resolved until January 2018, when the 2nd defendant was given a letter indicating that the plot duly belongs to her late husband. 6. She then resumed work on the ground only to be confronted by strangers. She went back to the County offices where she had

been summoned and met the plaintiff. The County then wrote that all construction should stop until they resolve the matter. She has asserted that she is the one currently in occupation of the suit property.

7. According to the reply filed by the 3rd respondent, the suit property belongs to the National Government and not the County Government. They therefore do not have any records relating to the allocation of the suit property. It is averred that the allocating authority ought to be the Commissioner of Lands and now the National Land Commission.

8. Both Mrs. Muthoni Gathecha, learned counsel for the applicant, and Mr. Karanja Mbugua, learned counsel for the 2nd respondent, did file written submission in respect of the application, all of which I have considered in arriving at my ruling.

9. What is before me is an application for injunction and the principles upon which such an application is assessed were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. It was held that an applicant needs to demonstrate a prima facie case with a probability of success; show that he/she stands to suffer irreparable loss if the injunction is not granted; and where the court is in doubt, it will decide the case on a balance of convenience.

10. What I have seen from the material presented by the parties is that both plaintiff and 2nd defendant claim ownership to the same property in dispute albeit that their titles emanate from different routes. Both parties claim to have purchased the suit property from persons who had title to the same by being purchasers of the original allottees. Two allotment letters, issued to two different persons at different times, have been displayed. Whereas the plaintiff claims that the root of her title is the genuine one, the 2nd defendant also asserts the same thing.

11. In my view, it will be unwise to delve deeply into the issues at this stage of the proceedings. Both parties have tabled evidence to demonstrate that they have good title to the land and this is an issue that can only be determined after fully hearing the parties. It is therefore best that this application be decided straight away on a balance of convenience.

12. In my view, the balance of convenience tilts towards preserving the property as it is and since I am unable to tell, at this stage of the proceedings who ought to own and possess the property, the property should be left vacant until this case is heard and concluded. The parties should also not enter into any dealings until the finalization of the case. On costs, it is best that they be costs in the cause.

13. I therefore make the following orders :-

(a) That pending the hearing and determination of this case, there be no further development or construction of any structures by any of the parties in the disputed land described as Plot No. 130 Naivasha Township or Kabati Extension Residential Plot No. 130.

(b) That pending the hearing and determination of this suit, the disputed property be left vacant and unutilized.

(c) That pending the hearing and determination of this case, none of the parties should sell, lease, charge, or enter into any disposition over the disputed property.

(d) That costs of this application shall be costs in the cause.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 17th day of May 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mrs. Muthoni Gathecha for the plaintiff/applicant.

Mr. Karanja Mbugua for the 2nd defendant/respondent.

No appearance for 3rd respondent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU