



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 871 OF 2016

JOHN NGUGI KIBATU.....PLAINTIFF

VERSUS

ZEN REAL CARE LIMITED.....1ST DEFENDANT

JUSTUS WAINAINA NJUGUNA.....2ND DEFENDANT

MARGARET KAARI KITHIINI.....3RD DEFENDANT

CHARLES MWAURA KAARA.....4TH DEFENDANT

RULING

What is before me is the plaintiff's application brought by way of Notice of Motion dated 22nd June, 2016 in which the plaintiff is seeking injunction to restrain the defendants from entering, constructing on, depositing construction materials on and/or in any other manner whatsoever interfering with the status of all that parcel of land known as L.R No. 4953/1952, Thika Municipality (hereinafter referred to as "the suit property"), pending the hearing and final determination of the suit. The plaintiff has contended that he was at all material times the lawful allottee of the suit property. He has contended that the suit property was allocated to him by the Commissioner of Lands on 1st November, 2010 as unsurveyed Industrial Plot No. "B" – Thika Municipality. The Plaintiff has averred that he paid the necessary charges for the suit property on 3rd June, 2011 and was issued with a receipt for Kshs.541,460/= on the same day after which he took possession of the property awaiting the issuance of the title. The plaintiff has averred that while he was waiting to be issued with the title for the suit property, the 2nd to 4th defendants fraudulently acquired the property and proceeded to sell the same to the 1st defendant. The plaintiff has contended that he reported the fraud to the police who arrested the 2nd to 4th defendants and charged them with the offence obtaining registration of land by false pretences contrary to section 320 of the Penal Code in the Chief Magistrate's Court at Thika in Criminal Case No. 6338/2015 which case is still pending.

The Plaintiff has averred that his occupation of the suit property was interrupted in May, 2016 when the 1st defendant entered the property and started excavating it using a tractor. The plaintiff has averred that unless the orders sought are granted, the suit herein would be rendered nugatory and a mere academic exercise thereby subjecting him to irreparable loss.

The plaintiff's application was opposed by the defendants. The 2nd to 4th defendants opposed the application through a replying affidavit sworn on 19th July, 2016 by the 4th defendant. In the affidavit, the 2nd to 4th defendants have averred that the suit property was allocated to them by the Commissioner of Lands on 24th February, 1999 as unsurveyed Industrial Plot "B" Thika Municipality for which allotment they paid a sum of Kshs.615,160/= being the charges that were set out in the letter of allotment. The 2nd to 4th defendants have averred that after making the said payment, they started processing the title for the suit property that was issued to them on 31st August, 2012. The 2nd to 4th defendants have averred that they acquired the suit property lawfully and that the plaintiff does not have a superior claim over the suit property compared to them. The 2nd to 4th defendants have averred that after acquiring the suit property, they sold the same to the 1st defendant through a valid process. The 2nd to 4th defendants have contended that the plaintiff should direct his claim to the Commissioner of Lands who allocated the same parcel of land to multiple persons.

The 1st defendant opposed the application through Notice of Preliminary Objection dated 20th July, 2016 and a replying affidavit sworn by Manoj Shah on the same date. In the preliminary objection, the 1st defendant has contended among others that the suit discloses no cause of action against the 1st defendant. In its replying affidavit, the 1st defendant has contended that the 2nd, 3rd and 4th defendants were allocated the suit property, they accepted the allotment, made the necessary payments and were issued with a certificate of title in respect of thereof. The 1st defendant has contended that in February, 2014, the 2nd to 4th defendants offered the suit property for sale to the 1st defendant and upon carrying out a search on the title of the suit property, it was confirmed by the Ministry of Lands that the suit property was owned by the 2nd to 4th defendants. The 1st defendant has averred that in addition to the official search, it also carried out due diligence which included a

site visit to the suit property during which it noted that the suit property was unoccupied. The 1st defendant has averred that it is after the due diligence that it entered into an agreement for sale with the 2nd to 4th defendants which culminated in the property being transferred and registered in its name on 12th November, 2014. The 1st defendant has contended that it has enjoyed quiet possession of the suit property since the same was transferred to it. The 1st defendant has dismissed the plaintiff's contention that he was in possession of the suit property as false. The 1st defendant has contended that as the registered owner of the suit property it is entitled to enter the same. The 1st defendant has denied that he is a trespasser on the suit property. The 1st defendant has contended that it obtained approvals from the relevant authorities to construct a perimeter wall around the suit property and was in the process of doing so when the plaintiff brought this suit.

The 1st defendant has contended that the construction that it was undertaking on the suit property was lawful and that the Commissioner had no right to allocate the suit property to the plaintiff having allocated the same to the 2nd to 4th defendants earlier. The 1st defendant has contended that it is a bona fide purchaser for value without notice and that its right over the suit property is superior to the plaintiff's equitable claims over the property.

The plaintiff's application was argued by way of written submissions. I have considered the application together with the submissions on record. I have also considered the authorities cited by both parties. This is my view on the matter. I have noted from the material on record that the suit property was the subject of three (3) letters of allotment, two(2) of which were issued to the plaintiff and the 2nd to 4th defendants. The 2nd to 4th defendants' letter of allotment was issued on 24th February, 1999 while the plaintiff's letter of allotment was issued on 1st November, 2010. Both the plaintiff and the 2nd to 4th defendants accepted the allotments and made the necessary payments to the Commissioner of Lands. The title for the suit property was however issued to the 2nd to 4th defendants and not to the plaintiff. The plaintiff has contended that the letter of allotment that was issued to the 2nd to 4th defendant was fraudulent and the same applies to the certificate of title that was issued to them. The Plaintiff has contended that the 2nd to 4th defendants have been charged in the Chief Magistrate's Court at Thika with the offence of obtaining registration of land by fraud. I cannot determine at this stage whether the letter of allotment that was issued to the 2nd to 4th defendants was fraudulent. I have noted that the Commissioner of Lands who had in a letter dated 18th May, 2012 indicated that the said letter of allotment was not supported with records in his office proceeded to issue the 2nd to 4th defendants with a Grant in respect of the suit property on the strength of the same letter. I am of the view that whether the 2nd to 4th defendants acquired the suit property through a forged letter of allotment is an issue that can only be determined at the trial. The criminal case that the plaintiff has referred has not been heard and determined. There is no sufficient material before me on the basis of which I can make a finding that the title that the 2nd to 4th defendants held in respect of the suit property was fraudulent. I am also concerned that the plaintiff has not found it necessary to join the National Land Commission to this suit as a party so that it may tell the court who as between the plaintiff and the 2nd to 4th defendants was issued with a valid letter of allotment in respect of the suit property and why the Commissioner of Lands received payment from the two parties for the same parcel of land. In the absence of any evidence that the 2nd to the 4th defendants' title was void, the title that the 1st defendant acquired from them cannot similarly be impeached. I am not satisfied therefore that the plaintiff has established a prima facie case with a probability of success.

In view of that finding, it is not necessary for me to consider whether or not the plaintiff would suffer irreparable injury which cannot be compensated by an award of damages of the orders sought are not granted. It follows therefore that the plaintiff's application for injunction must fail.

The application would have failed for another reason even if a prima facie case had been established. I have noted that the plaintiff was aware as at 12th October, 2011 that the 2nd to 4th defendant had been issued with a letter of allotment in respect of the suit property or were purporting to have one but took no immediate court action to challenge the same. The plaintiff waited until the 2nd to 4th defendants had been issued with a title and had sold the suit property to a third party before coming to court to challenge the allotment. I have also noted that the plaintiff's advocates on record were aware as at 26th November, 2012 that the deed plan for the suit property had been issued to the 2nd to 4th defendants. Again, no immediate action was taken by the plaintiff over the matter. The plaintiff brought this suit 4 years later. Injunction is an equitable remedy. I am of the view that the plaintiff is guilty of laches and as such not deserving of the equitable relief.

The upshot of the foregoing is that the Notice of Motion application dated 22nd June, 2016 has no merit. The same is dismissed with costs to be in the cause.

Dated and delivered at Nairobi this 28th day of June 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Catherine Court Assistant