



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 1284 OF 2013

PETER KAMAU MIHINGO.....PLAINTIFF

VERSUS

EUNICE WANJIKU.....1ST DEFENDANT

LAND REGISTRAR – THIKA.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 25th October 2013 in which the Plaintiff/Applicant seeks an order of temporary injunction restraining the 1st Defendant/Respondent and or her servants, agents or otherwise howsoever from transferring, alienating, disposing, trespassing onto or continuing with the construction on the parcel of land known as Juja Komo Block 2/1198 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Peter Kamau Mihingo, sworn on 25th October 2013 in which he averred that on 2nd July 2009, he entered into a Sale Agreement with one Peter Gakwa Njendu for the purchase of the suit property for a total consideration of Kshs. 250,000/-. He further averred that he paid the total consideration, obtained Land Control Board consent and lodged transfer documents. He averred that a title deed was subsequently issued to him, a copy of which he annexed. He further averred that he has been in possession of the suit property since 17th August 2009 and hoped to commence construction of his matrimonial home thereon from January 2014. He averred that on or about 13th September 2013, he went to the suit property for a routine check when he found a group of men engaged in various construction tasks thereon. He stated that they informed him that they were constructing a house on instructions of the 1st Defendant. He stated that he called the 1st Defendant to tell her that he was the registered owner of the suit property and that she told him that she too had ownership documents for the suit property. He stated that he proceeded to conduct a search at the Thika Lands Office where he received a copy of the green card and obtained search results both of which he annexed. He stated that upon engaging the Land Registrar he was informed that there was an anomaly as the 1st Defendant should not have been registered as the owner of the suit property as the same was registered on 24th March 1999 and transferred to him in 2009. He averred that the 1st Defendant declined to return her title deed for cancellation but had instead accelerated her construction activities on the suit property. On those grounds, he sought for this Application to be allowed.

The Application is contested. The 1st Defendant/Respondent, Eunice Wanjiku, filed her Replying Affidavit sworn on 3rd March 2014, in which she averred that she is the registered proprietor of the suit property. She averred that the suit property as initially Parcel No. 1198 registered in the name of Gatundu Mixed Farmers Company Limited and was subsequently allocated to one Alice Wangui Ngigi using ballot number 685. She added that the suit property remained in the possession of the said Alice Wangui Ngigi until 15th August 2013 when she purchased it for an amount of Kshs. 680,000/- pursuant to the Sale Agreement dated 15th August 2013, a copy of which she annexed. She further averred that according to the records of Gatundu Mixed Farmers Company Limited, the Plaintiff’s parcel of land is Parcel No. 984 bearing ballot number 447 initially owned by Peter Gakwa Njendu who was the seller to the Plaintiff. It was her averment that the suit property belongs to her and the same was allocated to the Plaintiff by mistake. She stated further that the Plaintiff did not come to court with clean hands as he is guilty of material non-disclosure. On those grounds, she urged the court to dismiss this Application with costs.

The issue arising for determination in this Application is whether or not to issue an order of temporary injunction restraining the 1st Defendant/Respondent and or her servants, agents or otherwise howsoever from transferring, alienating, disposing, trespassing onto or continuing with the construction on the suit property pending the hearing and determination of this suit. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? In this case, both the Plaintiff and the 1st Defendant each claim to be the registered proprietors of the suit property and each has displayed their title deeds to support their claims. This court cannot at this interlocutory stage decipher which of the two title deeds is genuine and which is invalid. This is the main issue for determination by this court at the full hearing. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

This being the case, this court finds that the Plaintiff has not satisfied the court that he has a prima facie case with a probability of success at the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

In light of the foregoing, I hereby dismiss this Application but do order that the status quo currently prevailing at the suit property be maintained until this suit is heard and determined. Costs shall be in the cause.

DATED AND SIGNED AT NAIROBI BY LADY JUSTICE

MARY M. GITUMBI THIS 19TH DAY OF JUNE 2018.

MARY M. GITUMBI

JUDGE

DELIVERED BY HON. JUSTICE BERNARD EBOSO ON THIS 21ST DAY OF JUNE 2018

BERNARD EBOSO

JUDGE