



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 185 OF 2016

JOSEPH KINYUA WAITHAKA.....PLAINTIFF

VERSUS

NAIROBI COUNTY GOVERNMENT.....DEFENDANT

RULING

What is before me is the Notice of Motion application dated 1st March, 2016 in which the plaintiff/applicant has sought a temporary injunction restraining the respondent from entering or demolishing the applicant's buildings situated on all that parcel of land known as Plot No. 86, Kariobangi South (Sec V1) Jua Kali (hereinafter referred to as "the suit property") pending the hearing and determination of this suit.

The application is supported by affidavit and supplementary affidavit sworn by the plaintiff on 1st March, 2016 and 4th April, 2016 respectively. The applicant has contended that he was allocated the suit property by the respondent's predecessor, Nairobi City Council in November, 2002 and that he paid all the requisite charges for the property. The applicant has averred that after paying the survey fees, he was issued with a beacon certificate and has since then been in occupation of the suit property awaiting the issuance of a title deed to him in respect of the property by the respondent.

The applicant has averred that he has developed the suit property by putting up a permanent building thereon which he is occupying as his home. He has contended that the respondent has been threatening to demolish the structures that he has put up on the suit property on the allegation that the same is on a road reserve according to the new layout for plots in the area. The applicant has contended that the old layout of plots within Kariobangi South (Sec.VI) Jua Kali should be maintained. He has urged the court to allow the application.

The defendant/respondent opposed the application through grounds of opposition dated 3rd March, 2016. In its opposition to the application, the respondent has denied that the suit property was allocated by the respondent's predecessor, Nairobi City Council to the applicant and questioned the authenticity of the documents of ownership which are attached to the applicant's affidavit in support of the application. The respondent has contended that under the provisions of the Physical Planning Act, any development which has been carried out without the approval of the respondent is illegal. The respondent has contended that the structures which have been put up by the applicant on the suit property were not approved by the respondent. The respondent has contended that the applicant cannot derive a benefit from an illegality and as such he is not entitled to the reliefs sought. The respondent has contended further that the applicant can be compensated in damages in the event he wins the case at the trial. The respondent has urged the court to dismiss the applicant's application.

The application was argued before me on 17th April, 2018. I have considered the application and the grounds of opposition filed by the respondent in opposition thereto. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further in that case that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

I am not satisfied from the material before me that the applicant has established a prima facie case with a probability of success against the respondent. The applicant has demonstrated that the suit property was allocated to him by the Nairobi City Council, the respondent's predecessor in title sometimes on 6th November, 2002. The applicant has also demonstrated that he made payments to the Nairobi City Council on account of stand premium, ground rent, survey fees and beacon certificate fees between 2006 and 2012 in respect of the suit property. The applicant has also demonstrated that he has developed the suit property by putting up a permanent residential building thereon. From the applicant's affidavits in support of the application and the respondent's grounds of opposition, it is clear that what is in dispute is not the ownership of the suit property but the legality of the building which the applicant has put up thereon.

The applicant has not contested the fact that any development on the suit property required the approval of the respondent. Even after the issue of approval of the applicant's structures on the suit property was raised and the applicant allowed to file a supplementary affidavit, the applicant did not place any evidence before the court showing that the permanent structure that he has put up on the suit property was approved by the respondent or its predecessor, Nairobi City Council. I am in agreement with the respondent that under the Physical Planning Act any unapproved development is illegal and is liable to be demolished after appropriate notice is given to the owner thereof. In the absence of evidence that the applicant obtained approval from the respondent in respect of the building that he has put up on the suit property, I am not satisfied that the applicant has established a prima facie case with a probability of success against the respondent. Having reached that conclusion, I am not obliged to consider whether the applicant would suffer irreparable harm if the injunction sought is not granted.

The upshot of the foregoing is that the Notice of Motion application dated 1st March, 2016 is not for granting. The application is dismissed with costs to the respondent.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the Defendant

Catherine-Court Assistant