



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. CASE NO. 626 OF 2015

WINNIE NJERI KARIUKI..... PLAINTIFF

VERSUS

FRANCIS MUNGAI NJUGUNA..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 3rd July 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from trespassing or interfering in any way with the parcel of land known as Karai/Lusigetti/T.758 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for an eviction order compelling the Defendant/Respondent to vacate the suit property and demolish the illegal developments thereon.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Winnie Njeri Kariuki, sworn on 3rd July 2015 in which she averred that she is the duly registered proprietor of the suit property since 2nd September 2013. In support of that assertion she produced a copy of her Title Deed, Green Card and a Certificate of Official Search dated 20th September 2013. She further averred that she was waiting to obtain a loan to develop the suit property when the Defendant/Respondent invaded the suit property and started putting up permanent developments thereon claiming to be the rightful owner thereof. She added that when she approached the Defendant/Respondent and showed him her ownership documents, he declined to vacate the suit property and continued with the illegal developments.

The Application is contested. The Defendant/Respondent, Francis Mungai Njuguna, filed his Replying Affidavit sworn on 14th July 2015 in which he averred that he is the owner of the suit property having purchased it from one Josephine Wambui Kinyanjui, the only surviving child of the late Kinyanjui Waweru who died on 21st October 1978 (the “Deceased”). He stated that the Deceased was allotted the suit property by the then County Council of Kiambu by way of Letter of Allotment dated 20th November 1992, a copy of which he produced. He also annexed copies of sale agreements between him and the said Josephine Wambui Kinyanjui. He averred that he took possession of the suit property in the year 1999, constructed a home and lived there with his family to date. He averred further that it is only in the year 2013 that the Plaintiff/Applicant came to the suit property and informed him that she had a title to the suit property and required him to vacate the same. He expressed doubt that the Plaintiff’s title is genuine, arguing that she had not produced any documentation to show how she came to hold the title deed. He added that this prompted him to write a letter dated 18th December 2013 to the Chairman of the National Land Commission requesting him to investigate how the Plaintiff acquired the title deed to the suit

property. On those grounds, he sought for the court to dismiss this Application.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant and further whether to issue an order compelling the Defendant/Respondent to vacate the suit property and remove the developments erected thereon. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the 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? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. 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.”

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. The Plaintiff/Applicant asserts that she is the duly registered proprietor of the suit property and to prove that assertion, she produced copies of her Title Deed dated 2nd September 2013 as well as a Certificate of Official search dated 20th September 2013. The Defendant/Respondent also claimed to be the owner of the suit property having purchased it from one Josephine Wambui Kinyanjui who is the purported sole beneficiary of the Deceased who it is claimed was allotted the suit property by the then County Council of Kiambu. The Deceased’s letter of allotment and the sale agreements were produced by the Defendant/Respondent to prove this assertion. As the holder of a title deed for the suit property, the position of the Plaintiff is superior to that of the Defendant who produced no title document but is solely relying on the Letter of Allotment issued to the Deceased. The position of the law in regard to a title deed holder is to be found in **Section 26(1) of the Land Registration Act** which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

Going by this legal provision, this court is duty bound to hold that the Title Deed produced by the Plaintiff/Applicant as prima facie evidence that the person named as the proprietor, in this case the Plaintiff, is the absolute and indefeasible owner of the suit property and that the title of such a proprietor shall not be subject to challenge except on the grounds given. The Defendant/Respondent has challenged the validity of the title deed produced by the Plaintiff, alleging that the history of acquiring it was not given. However, the Defendant/Respondent would have to demonstrate that the title deed was obtained by way of fraud or misrepresentation to which the Plaintiff is proved to be a party or that the Plaintiff acquired the same illegally, unprocedurally or through a corrupt scheme. I don't believe that the Defendant/Respondent has been able to achieve this feat. In my view, the basis of competing interests between the letter of allotment and a registered title, the holder of a registered title would be superior to that of the holder of an allotment letter over the same property. This is buttressed in the case of **Njuwangu Holdings Ltd vs. Langata KPA Nairobi & 5 others (ELC NO. 139 OF 2013)** where the court held that,

“As matters now stand, the plaintiff who has a registered title over the suit property has a superior title to that of the 1st Defendant who only holds a letter of allotment. I am in agreement with the decision of the court of Appeal in the case of Satya Investments Ltd –Vs- J.K. Mbugua Civil Appeal NO. 164 of 2004, where the court held that a temporary occupation licence could not override a registered title under the Registration of Titles Act Cap 281 Laws of Kenya (repealed). Equally, it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which are yet to crystallize.”

To that extent therefore, I find that the Plaintiff/Applicant has succeeded in demonstrating that she is the bona fide registered proprietor of the suit property notwithstanding the Defendant/Respondent's claims otherwise. A prima facie case with a probability of success at the main trial has been established by the Plaintiff/Applicant.

Has the Plaintiff/Applicant demonstrated that she is bound to suffer irreparable injury which would not be adequately compensated by an award of damages? By definition, an irreparable injury is, in equity, “the type of harm which no monetary compensation can cure or put conditions back the way they were”. In **Alternative Media Limited vs. Safaricom Limited (2004) eKLR**, the court held as follows:

“The second principle established by the Giella case for the grant of an interlocutory injunction is that the Plaintiff will suffer irreparable harm which would not be compensated in damages. Considering this very point in the case of Mureithi vs City Council of Nairobi (1979) LLR 12 Madan JA (as he then was) cited with approval the speech of Lord Diplock in the case of American Cynamid Co. vs Ethicon (1975) 1 ALLER 504 at page 506 where he said:- the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial... if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage.”

In this particular case, the nature of the injury that the Plaintiff claims she is suffering is alleged construction on the suit property by the Defendant. If allowed to continue, the Plaintiff asserts she is suffering irreparable injury which cannot be compensated in damages. I am inclined to agree with her. Indeed, the structure that the Defendant is putting up on the suit property is permanent in nature. I therefore find in favour of the Plaintiff/Applicant that she has demonstrated that if the interlocutory

injunction is not granted, she will suffer irreparable injury which cannot be compensated in damages.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”

In this matter, I have had regard to the assertion by the Defendant that he has been living together with his family on the suit property for a period of about 15 years and that it is only in the year 2013 that the Plaintiff came to request him to vacate. This assertion was not challenged by the Plaintiff. It would then appear to me that what the Plaintiff/Applicant is seeking is in actual fact an eviction order at an interlocutory stage of these proceedings. I consider that in light of these circumstances, the balance of convenience tilts in favour of the Defendant, not the Plaintiff. I believe that having regard to the Defendant’s long stay on the suit property, he should continue to occupy the same until this suit is heard and determined. The Plaintiff has therefore failed to satisfy the third condition for the grant of the temporary injunction and the eviction order.

Having regard to the foregoing, the Plaintiff/Applicant has not satisfied all the three conditions for the grant of an interlocutory injunction enunciated in the celebrated case of *Giella vs. Cassman Brown* cited earlier. On those grounds, this Application is accordingly hereby dismissed and the Plaintiff is directed to set the suit down for pretrial procedures to pave way to the full and final determination of this suit. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF APRIL 2017.

MARY M. GITUMBI

JUDGE