



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 616 OF 2015

NICHOLAS MUCHENE NJAU.....PLAINTIFF

VERSUS

COLLINS ARINGO.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 1st July 2015 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from trespassing, alienating or selling the parcel of land known as Plot Number 297, Kasina Housing Scheme Society situated in Mlolongo along Mombasa Road (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, Nicholas Njau Muchene, sworn on 1st July 2017 in which he averred that he purchased the suit property from Kasina Housing Scheme Society on 27th August 2007 for Kshs. 600,000/-. He added that a Letter of Allotment was issued to him on 5th January 2008. He annexed a copy of the Letter of Allotment. He further averred that the 1st Defendant/Respondent has unlawfully trespassed into the suit property and has dug a toilet pit without any colour of right. He stated that the 1st Defendant/Respondent has continued to harass, intimidate and threaten him and has incited the police to interfere with his peaceable enjoyment of the suit property. On those grounds, he sought for this Application to be allowed.

The Application is contested. The 1st Defendant/Respondent, Collins Alingo, filed his Replying Affidavit sworn on 4th November 2015 in which he averred that he owns the suit property which was given to him by Kasina Housing Scheme Society on 31st March 2005 for work done. He added that he was issued with a Share Certificate No. 191 on 31st March 2005. He added further that the Share Certificate was signed by the Chairman, Treasurer and Secretary of Kasina Housing Scheme Society and given under the common seal of the Society. He annexed a copy of the Share Certificate. He further stated that he did not transfer the suit property to any person and that it belongs to him. He further stated that when he went to visit the

suit property on 23rd June 2015, he found some people fencing it. He added that he immediately proceeded to the Mlolongo Police Station to report the trespass. He stated further that the Letter of Allotment produced by the Plaintiff/Applicant was issued on 5th January 2008 which was long after he had been issued with his Share Certificate. On those grounds, he requested 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. 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 has sought to convince this court that he is the owner of the suit property. As proof of that assertion, the Plaintiff/Applicant produced two documents as evidence of his ownership. The first is a Share Certificate dated 31st March 2005 issued to him by the Kasina Housing Scheme Society. The second document he produced as proof of ownership of the suit property is a Letter of Allotment dated 5th January 2008 issued by the Department of Lands, Nairobi. The Defendant has also claimed to be the owner of the suit property and the proof he has provided to this court is a Share Certificate also dated 31st March 2005 issued to him by Kasina Housing Scheme Society. It is quite clear that both the Plaintiff and the 1st Defendant were both issued with Share Certificates over the suit property on the same date, 31st March 2005. However, the Plaintiff has over and above this Share Certificate, produced a Letter of Allotment issued to him by the Ministry of Lands. The 1st Defendant/Respondent did not produce any other proof of his ownership of the suit property. With the evidence before court at this point, I find no difficulty in finding that the Plaintiff/Applicant has a superior claim on the suit property on account of the Letter of Allotment from the Ministry of Lands that he was able to produce to this court. On that account, I find that the Plaintiff/Applicant has satisfactorily demonstrated that he has a prima facie case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of possession over the suit property pending the hearing and determination of this suit.

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.”

Having established that the Plaintiff/Applicant has a superior right over the suit property vis a vis the 1st Defendant, I have no difficulty in holding that the balance of convenience also tilts in his favour.

In light of the foregoing, I hereby allow this Application. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF MAY 2017.

MARY M. GITUMBI

JUDGE