



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 719 OF 2016

PAUL THUO NJAMBI.....PLAINTIFF/APPLICANT

=VERSUS=

JAMES WAWERU MUTURI...DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 27th June 2016 in which he seeks the following reliefs:-

i. Spent

ii. Spent

iii. That pending hearing and determination of this suit there be a temporary Order of injunction to restrain the defendant by himself, his agents, servants, employees, family and or any person claiming through the defendant from entering, trespassing, occupying, operating, a carwash or any other business, fencing, constructing or in any other way interfering with the plaintiff's quiet and peaceful occupation and or ownership of the parcel of land known as plot No. 675 in Kayole Spring Valley Resettlement Scheme.

iv. That pending hearing and determination of this suit there be an order of mandatory injunction compelling the defendant by himself, his agents, servants, employees, family and or any person claiming through the defendant to forthwith vacate the parcel of land known as plot No.675 in Kayole Spring Valley Resettlement Scheme.

v. That costs of this application be borne by the defendant.

2. The applicant states that on 16th April 2015, he bought plot No.675 at Kayole Spring Valley Resettlement Scheme from its owner Kangiria Self Help Group. The plot (suitland) had been allocated to the group by Kayole Spring Valley resettlement Scheme. Upon purchase, the applicant and the group's officials went to the offices of kayole Spring valley Resettlement Scheme where the record was changed into the applicant's name. The applicant was then given a plot identification card and later given a plot formalization card from Nairobi Housing Development Department of the County Government of Nairobi.

3. The suitland had remained undeveloped since it was allocated to Kangiria Self Help Group. The

Respondent approached the official of Kangiria Self-help group to allow the Respondent operate a car wash on the suitland on temporary basis. The officials of Kangiria Self Help Group agreed to the request. The request was subject to the Respondent moving out when the officials of Kangiria Self Help group decided to occupy it or sell it.

4. The officials of Kangiria Self Help Group sold the plot to the applicant. The applicant moved in and put building materials on the suit land. He asked the Respondent to move out. The Respondent refused to move out. He went and filed a case against the applicant in Milimani Chief Magistrate's Court. He obtained an injunction against the applicant. This injunction was however discharged when the matter was heard inter-partes and it was found that the Respondent was not entitled to any injunctive orders. The Respondent then used hired goons who chased away the applicant's workers from the suit land. As there was an issue whether the lower court had jurisdiction to handle land matter, the applicant decided to file the present suit as the lower Court case had been stood over generally pending resolution of the issue of jurisdiction.

5. The applicant contends that he has all documents to confirm that he is the owner of the suit land. That the document which the Respondent is using to claim ownership was given to him to enable him obtain a business permit from the County Government of Nairobi. The document has been explained by the person who gave it to him and that it does not confer any rights upon the Respondent in as far as the suitland is concerned.

6. The Respondent has opposed the applicant's application arguing that he was allocated the suit land in 2001 as a squatter. That the officials of Kayole Spring Valley Resettlement Scheme later altered the document in their bid to disposes him of the suitland. The Respondent contends that this suit is sub-judice and ought to be stayed.

7. I have carefully considered the applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions by the parties to this application. It is clear that the Respondent is the one in possession. He was in possession before the suit land was sold to him. It will not therefore be appropriate to give orders of temporary injunction. The issue for consideration in this application is whether the applicant has met the threshold for grant of orders of mandatory injunction in terms prayed for in the application.

8. The applicant has demonstrated through documents on how he bought the suit land. He has a plot identification card and plot formalization card. His name was put in the register in place of that of Kangiria Self Help Group who were the allottees of the suit land. Kayole Spring valley Resettlement Group were the ones identifying and allocating the land which then would be formalized of the City County government of Nairobi. This practice is common in informal settlements where groups come together allocate themselves land and then seek formalization from the relevant authorities. The officials of Kayole Spring Valley Resettlement Scheme have confirmed that it is the applicant who is the rightful owner of the suit land.

9. The document which the Respondent is using to claim ownership has been denounced by the officials of Kayole Spring valley Resettlement Scheme who have explained on how he came by that document. That document was only given to him for purposes of getting a business permit from the Nairobi City County to enable him operate a car wash business.

10. The Respondent also annexed a document marked " *JWM 2* " Which is a clearance certificate . This document is dated 17th August 2010 and purports to confirm that the Respondent is owner of Plot 675. When the applicant took issue with this document, the Respondent in his submissions tried to explain that allocation was done in 2001 but documentation of the plot into his name started in the year 2010. This argument is without merit. The chairman of Kayole Spring Valley Resettlement Scheme has explained how these documents came into the possession of the Respondent. They were purely meant to assist him get a business permit from the City County of Nairobi.

11. The principles upon which a mandatory injunction can be given were well set out in Halsbury's

Laws of England Volume 24, 4th Edition para 948 as follows:-

“ A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances , it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied or if the Defendant attempts to steal a march on the plaintiff.... a mandatory injunction will be granted on an interlocutory application”.

12. The above passage has been quoted with approval in a number of decisions by the Court of Appeal as well as High Court and Courts of equal Status. These cases include a decision of the Court of Appeal in Ahmed Ibrahim Suleiman and another Vs Noor Khami Surur (2013) eKLR . In the case of Sharrif Abdi HassanVs Nadhif Jama Adan (Civil Appeal No. 121 of 2006) eKLR the Court of Appeal had this to say:-

“ The Courts have been reluctant to grant mandatory injunction at interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the Court in such cases as those of alleged trespass to the property”.

13. The Respondent had been put in occupation of the suit land on temporary basis to operate a car wash. When the suit land was sold to the applicant, he was asked to move out but he refused. The moment he refused to move out is the time he became a trespasser. The Respondent has instead of moving out tried to lay claim to the property when he has no document. The ex-parte injunction which he obtained in the lower court was dismissed later. In the Respondent’s own submissions, the Respondents concedes that indeed the applicant has established that he has a prima facie case with probability of success. He however argues that the applicant has not met the other two conditions in the Giella Vs Cassman Brown & Co.Ltd case. That since the applicant is seeking general damages, this means that he can be compensated in damages. That further the balance of convenience favours him in that he is the one in possession.

14. The Respondent has clearly admitted that he is a trespasser by conceding that the applicant has a prima facie case with probability of success. The Respondent cannot seek to remain on the suit land on the ground that the applicant can be compensated at the end of the trial. In the case of Jaj Super Power Cash and Carry ltd Vs Nairobi City Council and 20 Others Civil Appeal No.111 of 2002, the Court of Appeal had this to say:-

“ This Court has recognised and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it”.

15. It is clear that the Respondent is seeking to remain on the suit property on the ground that at the end of the day, even if the applicant wins, he can be compensated. The Respondent is a trespasser who has no document to the suit property. He is seeking to have the property by all means including hiring goons to chase away the applicant’s workers. This amounts to stealing a march on the applicant. I find that this is a clear case where a mandatory injunction ought to be issued. I therefore allow the applicants Notice of Motion dated 27th June 2016, in terms of prayer (4). The applicant shall have costs of this application.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 9th day of May 2017.

E.O .OBAGA

JUDGE

In the presence of Mr Mandela for Defendant/Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE