



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 569 OF 2015

PHILIP KAIRU KAHURA.....PLAINTIFF

VERSUS

EMBAKASI RANCHING CO. LTD.....1ST DEFENDANT

LUCY NYOKABI MATHENGE.....2ND DEFENDANT

JAMES MWANGI KARANJA.....3RD DEFENDANT

ANTHONY JAMES MUHORO NJOGU.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 23rd June 2015 in which the Plaintiff/Applicant seeks an order of temporary injunction restraining the Defendants/Respondents from trespassing, taking possession, selling, chagrining or in any other way interfering with the Plaintiff/Applicant's possession of Plot Nos P1930 and P1930B also known as Nairobi/Block 105/5403 and 5404 situated within Embakasi Ranch at Nairobi (hereinafter referred to as the "suit properties") 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, Philip Kairu Kahura, sworn on 23rd June 2015 in which he averred that sometimes in the year 1993, he purchased the suit properties from one Humphrey W. Ngima, an allottee from the 1st Defendant. He added that the said Humphrey W. Ngima handed over to him the original receipts for payments made to the 1st Defendant. He further added that at the offices of the 1st Defendant, a transfer was effected in his favour and he was issued with Share Certificate No. 0053 which was stamped at the back to effect transfer of the suit properties to him upon payment of the transfer fee of Kshs. 6,000/-. He produced a copy of the Share Certificate and the receipts. He further averred that upon the suit properties being transferred to him, he took possession immediately by fencing them and he commenced cultivation and development. He averred further that he constructed a permanent house, a two roomed permanent store and a cow shed and cultivated food crops like maize and beans. He also averred that in the year 2000 his son moved into the suit properties permanently. He added that sometime in June 2014, the 1st Defendant informed them to commence paying rates to the Nairobi County Government which he did. He further confirmed having paid the sum of Kshs. 20,000/- for site visit

pending imminent issuance of title deeds. He annexed a copy of the receipt issued to him. He further averred that in early June 2015, some thugs armed with crude weapons invaded the suit properties, removed and carried away his gate, cut the perimeter wire fence, demolished the two roomed permanent house saying that they had been sent by the 1st Defendant. He averred that he pleaded with them not to demolish his matrimonial home and that he would try to resolve the issue with the 1st Defendant. He confirmed having reported the matter to the Police without any assistance and further having approached the 1st Defendant without any success in resolving the issue. On those grounds, he sought for this Application to be allowed.

The Application is not contested. Despite being duly served, none of the Defendants/Respondents filed any response.

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 asserted that he is the owner of the suit properties. It was his assertion that he purchased the suit properties from one Humphrey W. Ngima. He produced various receipts issued by the 1st Defendant to the said Humphrey W. Ngima and also produced receipts issued in his name. In support of that assertion, he produced a copy of his Share Certificate No. 0053 in respect of the suit properties issued to him by the 1st Defendant. Despite being duly served, none of the Defendants/Respondents challenged the Plaintiff’s assertions. That being the position, I have no difficulty in arriving at the finding that the Plaintiff/Applicant has demonstrated to this court that he is the owner of the suit properties. He has established 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 properties 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 is the party in physical possession of the suit properties, 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 with costs to the Plaintiff.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE 2017.

MARY M. GITUMBI

JUDGE