



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO. 724 OF 2015

JOHN KARUGA.....APPLICANT

=VERSUS=

PETER MUNIU WAIRIMU.....RESPONDENT

RULING

1. The Plaintiff /Applicant filed an amended notice of motion dated 21st April 2016 in which he sought the following reliefs:-

1. Spent

2. Spent

3. That this Honourable Court be pleased to issue an interlocutory injunction restraining the Respondent whether by himself, his agents, tenants, servants, employees and/or anyone acting on his behalf from continuing and undertaking any construction, leasing, trespassing and/or in whatsoever manner continue interfering with the applicant's property, plot No. 479 Kariobangi Light Industries, also known as Plot 193/1 in Kariobangi Light Industries and also known as land Registration number 8285/1259 pending hearing and determination of this suit.

4. Spent

5. That this Honourable Court be pleased to issue a mandatory injunction directing the Respondent's tenants on the applicant's property, plot No. 479 Kariobangi Light Industries also known as Plot No. 193/1 in Kariobangi Light Industries and also known as Land Registration number 8285/1259 to deposit their rent payments with the Honourable Court pending the hearing and determination of this suit.

6. That this Honourable Court be pleased to issue a mandatory injunction directing the Respondent herein to remove from the applicant's property, plot No. 479 Kariobangi Light Industries, also known as Plot No. 193/1 in Kariobangi light Industries and also known as Land Registration number 8285/1259 any building or structure constructed without the express consent and/or authority of the applicant.

2. The Applicant contends that on 28th April 1981, he was allocated plot No. 479 at Kariobangi Light Industries (suit land). He was later given a *beacon certificate* and took possession. In the year 2015 he

was informed that the Respondent had moved into the suit land and started putting up a building. He went and complained to the Nairobi City County who issued an **enforcement notice** against the Respondent. The applicant also filed an application in Court in the same year seeking to stop the Respondent from going on with the construction. The Respondent briefly stopped the construction but later resumed construction. The Respondent has partially completed the building and has let it out to tenants who are paying him rent.

3. The Applicant further contends in the amended notice of motion that the suit land is also known as **Plot 193/1** and at the same time is the one known as **8285/1259**. That he has been paying rent and rates to the Nairobi City County.

4. The Respondent has opposed the applicant's application through grounds of opposition and replying affidavit dated 25th February 2016, and filed in Court on 26th February 2016, as well as a further affidavit sworn on 31st May 2016, and filed in court on 10th June 2016. The Respondent contends that his plot is plot No. 193/1 LR No. 8285/1259. He denies having any interest in plot No. 479 which the applicant claims. The Respondent goes on to state that he has maps showing that plot No. 479 lies in a different area. That the applicant is attempting to take his plot by creating a map showing that plot No. 193/1 is the one known as plot No. 479 and that he has since lodged a complaint with the Land Fraud Department of the Directorate of Criminal Investigations.

5. I have carefully examined the documents in support of the case of each of the disputants in this case. I have also considered the submissions by the two parties to this dispute. The applicant is seeking both prohibitory and mandatory injunctive orders. For an applicant to be granted a prohibitory temporary injunction, he must demonstrate that he has a prima facie case with probability of success. On the other hand, for one to be granted a mandatory injunction at interlocutory stage there must be special circumstances calling for the same. The case must be a simple one which ought to be remedied at once.

6. The first issue to be determined in this application is whether the applicant has demonstrated that he has a prima facie case with probability of success as against the Respondent to warrant issuance of a temporary injunction. The applicant seems not to know the plot he is claiming. When he filed an application dated 27th July 2015, which he later withdrew, he was claiming plot No. 479. He annexed a beacon certificate which is undated and shows that the plot No. is 8285/479. The beacon certificate though witnessed is not signed or dated. He also annexed a survey map showing that plot in issue is adjacent to plot No. 193.

7. In the replying affidavit to the applicant's application dated 27th July 2015, the Respondent annexed a map from the survey office which showed that plot No. 8285/479 lies elsewhere and is not the same as plot No. 8285/1259 which the Respondent claims to be his. The applicant later filed another application dated 3rd February 2016, and filed in court on the same day. This was before he withdrew the earlier one. The applicant later filed an amended notice of motion in which he now claimed that plot no. 479 is the one known as plot no. 193/1 as well as plot no. 8285/1259. This is after he had seen the replying affidavit by the Respondent. What is interesting is that despite the amendments, the applicant is still relying, on the beacon certificate which shows that his plot is 8285/479 and the letter of offer shows that his plot is 479. This is not practically possible. One cannot have a beacon certificate showing that his plot is no. 8285/479 yet he claims that, that is the plot also known as plot 8285/1259. There is no single document produced by the applicant to show that the three different numbers refer to one and the same plot on the ground.

8. The Respondent has shown that he bought plot no. 193/1 from Patrick Njogu Kariuki. He has also annexed a map from the survey of Kenya and other documents confirming that the disputed plot is the one now registered as LR No. 8285/1259. The Respondent has been paying rent and rates to the Nairobi City County as per the documents for the year 2012 and 2015. The applicant annexed documents for rent and rates relating to year 2015. The rents are in respect of plot no. 479. If the applicant contends that his plot is plot no. 193/1 as per the amended notice of motion, then he would have paid the rent on account of plot no. 193/1 and not on account of plot no. 479. I find that on the basis of the documents presented to court, the applicant has not demonstrated that he has a prima facie case with probability of success.

9. The Respondent has already constructed on the disputed property. Even if the court were to consider the balance of convenience, the same will tilt in favour of the Respondent. I therefore find that no injunction can be given in the circumstances. This is not a simple and straight forward case where a mandatory injunction would have been issued. This case has to go full trial where evidence can be tendered to confirm whether plot no 193/1 , is what became plot No. 8285/1259 upon completion of survey or whether it was plot no.479 as alleged by the applicant. As the applicant has failed to meet the threshold for grant of both prohibitory and mandatory injunction, I proceed to dismiss the amended notice of motion dated 21st April 2016, with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on 31st this day of *July*, 2017

E.O .OBAGA

JUDGE

In the Presence of :-

Mr Limo for Supeyo for Applicant

Court Assistant: Hilda

E.O .OBAGA

JUDGE