



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC. CASE NO. 1272 OF 2015

KYANJAU FARMERS CO-OP LTD.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 24th November 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction to issue against the Defendant/Respondent restraining it from trespassing, entering, constructing and or interfering with the parcel of land known as Land Reference Number 21213 within Thika Municipality (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 Magugu Watene, the Treasurer of the Plaintiff, sworn on 24th November 2015 in which he averred that the Plaintiff purchased the suit property in the year 1996 and was issued with a title deed, a copy of which he produced. He further averred that in October 2015, the Defendant trespassed and entered the suit property with an intention of constructing a waste management plant without its lawful authority or without following the laid down procedures in acquisition of the suit property. He added that the main intention of the Plaintiff/Applicant, a co-operative society with a membership of about 360 citizens, was to subdivide the suit property and distribute the plots to its members for purposes of improving their livelihood and economic status. He stated that the Defendant’s activities on the suit property shall result in a breach of the Plaintiff’s right to private property and deprive the entire membership of their investment. On those grounds, he sought for this Application to be allowed.

The Application is contested. The Defendant/Respondent filed the Replying Affidavit of David K. Gatimu, the Defendant’s Chief Officer in charge of Land, Housing and Physical Planning, sworn on 15th January 2016 in which he averred that the Defendant has not entered or trespassed on the suit property but that they had constructed a waste management plant on its Thika garbage dump site next to its sewage disposal site, both of which are on public land. He added that the waste management plant and the sewage disposal site sits on an expansive open space which has no fencing or survey beacons. He further added that the waste management plant is surrounded by garbage. He further averred that the Defendant is the successor of the previous local government established under the repealed Local Government Act and is the custodian and manager of the public land and has no knowledge of any subdivision of the public land and issuance of titles such as the Plaintiffs. He added that that title was procured fraudulently.

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 it is the registered proprietor of the suit property and has produced a copy of its title deed. The law is very clear as regards the position of a title holder of land. **Section 26(1)** of the **Land Registration Act** 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.”

The Defendant/Respondent has alleged that the title deed held by the Plaintiff/Applicant was obtained by way of fraud. To that assertion, I will be guided by **Section 107** of the **Evidence Act Cap 80** which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I am further guided by the finding of the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** which stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

The onus was upon the Defendant to demonstrate that the title deed to the suit property held by the Plaintiff was acquired fraudulently or by misrepresentation to which they have been proved to have been a party and neither has it been demonstrated that that title were acquired illegally, unprocedurally or through a corrupt scheme. So far as I can tell, at this juncture, the title deed held by the Plaintiff/Applicant is prima facie evidence that it is the absolute and indefeasible owner of the suit property.

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.”

While I note that the Defendant’s illegal structures lie on the suit property, there is no indication whether the plant is in use. It is my finding that the Plaintiff/Applicant is in possession of the suit property. In these circumstances, I have no difficulty in holding that the balance of convenience also tilts in favour of the Plaintiff/Applicant.

In light of the foregoing, I hereby allow this Application with costs to the Plaintiff.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE