



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 705 OF 2016

CYNTHIA WANJIRU GITONGA PLAINTIFF

VERSUS

CHRISTINE NJOKI 1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 2ND DEFENDANT

RULING

1. On 27/6/2016 the plaintiff brought a Notice of Motion Application dated 24/6/2016 seeking orders that the defendants be restrained from developing, constructing on, wasting, alienating, allocating, transferring, disposing, charging and/or in any other way dealing with **Plot No. B55** situated in Umoja Innercore Sector III pending the hearing and determination of this suit. The plaintiff also sought an order directing the defendants to demolish the structures erected on the suit property and an order directing the 1st defendant to vacate the property. The application is supported by the affidavit of James Chege Mwaura [an attorney of the plaintiff] sworn on 24/6/2016.

2. The plaintiff's case is that she was allocated the suit property by the then City Council of Nairobi as evidenced by an annexed copy of allotment letter dated 26/11/2008. The plaintiff stated that in accordance with the allotment letter, she paid the market price of KShs.60,000/- for the plot and a sum of KShs.15,000/- as survey fees. Thereafter, she took possession of the suit property and erected thereon temporary structures which she let out to traders to carry on charcoal business.

3. It is the plaintiff's contention that she made further payments to the 2nd defendant's predecessor which included beacon fees and rates. She adds that in February 2016, the charcoal traders vacated the premises without her knowledge and in March of the same year, one of the traders by the name Kariuki Gatune informed her that an unknown person had ordered them to vacate. The plaintiff thereafter visited the suit property and found construction works taking place. She lodged a complaint with the 2nd defendant and made a report at the Administration Police Camp in Umoja.

4. The plaintiff later learnt that the 1st defendant was the trespasser. She contends that the continued trespass has denied her use of the suit property and subjected her to irreparable loss and damage. The plaintiff is apprehensive that unless restrained by the court, the 1st defendant was likely to continue with the trespass and unlawful construction and wastage and was also likely to alienate the suit property to her detriment. She stated that the 2nd defendant has failed and or refused to take any action against the 1st defendant and has continued to abet the 1st defendant's actions and trespass.

5. Through a supplementary affidavit sworn on 25/5/2017, the plaintiff stated that she is the lawful allottee and or owner of the suit property as confirmed by a plot search certificate attached to her supporting affidavit. The plaintiff denied transferring the suit property and averred that Lilian Wanjiru

Muiruri was a stranger. She contended that any purported transfer of the suit property to Lilian Wanjiru Muiruri and subsequently to the 1st defendant was therefore illegal and fraudulent and null and void. The plaintiff averred that there was need to preserve the suit property pending determination of the rights of the parties.

6. The 1st defendant filed grounds of opposition and a replying affidavit dated 13/4/2010. She stated that the suit property was registered in the Ministry of Lands & Housing as Nairobi/Block 83/1584 and that she purchased the same from Lilian Wanjiru Muiruri in the year 2015 at a consideration of KShs.4,000,000/- [Kenya Shillings Four Million]. The 1st defendant annexed a copy of a Lease purportedly registered on 23/4/2013 between Lillian Wanjiru Muiruri and the City Council of Nairobi for Title Number Nairobi/Umoja Block 83/1584 formerly B55-Umoja Innercore Sector III as well as a Sale Agreement dated 12/5/2015 between her and Lillian Wanjiru Muiruri.

7. The 1st defendant further stated that she and Lillian Wanjiru Muiruri executed a transfer dated 28/5/2015 whose copy was exhibited. She also exhibited a Certificate of Lease dated 23/6/2015 bearing her name. It was the 1st defendant's contention that she has been paying rates as evidenced by a bundle of receipts. She denied knowledge of allocation of the suit property to the plaintiff and averred that there was nothing illegal, fraudulent or untoward about how she acquired the suit property. It is her case that she is not a trespasser and that she has every right to construct on the premises or deal with the premises as any lawfully entitled owner would.

Submissions

8. The application was canvassed by way of written submissions. The plaintiff in submissions dated 25/5/2017 stated that she had proved ownership of the suit property. Counsel submitted that no explanation had been offered as to how the 1st defendant was issued with a lease in the year 2013 when the suit property was already owned by the plaintiff. She further submitted that there was no proof that the 2nd defendant allocated the suit property to any one else other than the plaintiff and therefore, that documents purporting to pass the property to anyone else apart from the plaintiff were invalid and fraudulent.

9. The plaintiff submitted that Nairobi/Umoja Block 83/1584 formerly Plot No. B55 Umoja Innercore Sector III referred to the suit property and that the principles which guide a court in granting an interlocutory injunction are informed by the need to preserve the suit property and maintain status quo as stated in the case of **SAMSON KHASIANI AMUSIBWA V ALPHONSE MUSOTSI AMBAH & 2 OTHERS, (2005) eKLR**. Counsel argued that both the plaintiff and the 1st defendant claimed ownership of the suit property and that there was need to preserve the suit property pending the hearing and determination of the suit.

10. The plaintiff further submitted that she had met the requirements set out in **GIELLA V CASSMAN BROWN & CO. LTD, (1973) EA 358** and had established a *prima facie* case as defined in **MRAO LIMITED V FIRST AMERICAN BANK LIMITED & 2 OTHERS, (2003) KLR 125**. It was further submitted in this regard, that the plaintiff had proved that the 1st defendant commenced construction on the suit property thereby infringing on her rights to the suit property. In respect to irreparable damage, the plaintiff stated that unless restrained by the court, the 1st defendant could alienate or dispose the property to defeat her claim thereby causing her irreparable loss. She further submitted that land was unique and irreplaceable and could not be adequately compensated in damages. Lastly, the plaintiff submitted that the balance of convenience was in her favour since her allocation made on 26/11/2008 was first in time while the 1st defendant's purported certificate of lease was issued on 23/6/2015.

11. The 1st defendant filed submissions on 22/5/2017. She argued that she is the registered proprietor of the suit property having acquired it as a bona fide purchaser for valuer. She contended that her title is not subject to challenge. She added that the plaintiff had not tendered any evidence to prove fraud or misrepresentation on her part. She urge the court to reject the plaintiff's application.

Determination

12. The plaintiff has sought both prohibitory and mandatory interlocutory injunctions. The issue for determination therefore is whether the plaintiff has met the requirements for the grant of temporary and mandatory injunctions.

13. The principles upon which the court exercises its discretion in applications for temporary injunction were spelt out in the case of *Giella v Cassman Brown & Co Ltd, (1973) EA 358 [supra]*. An application for interlocutory injunction must demonstrate a *prima facie* case with a probability of success. Secondly, the applicant must demonstrate that he might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. If the court is in doubt, the application is to be determined on a balance of convenience.

14. A *prima facie* case was aptly defined by the Court of Appeal in the case of *Mrao Limited v First American Bank of Kenya Limited & 2 Others [supra]* as follows:

“...a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

15. The definition of a *prima facie* case was expounded in the case of *NGURUMAN LIMITED V JAN BONDE NIELSEN & 2 OTHERS, (2014) eKLR*, as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

16. The plaintiff’s claim to the suit property is based on an allotment of the suit property made to her by the defunct City Council of Nairobi. In this regard, the plaintiff brought before court evidence of an allotment letter dated 26/11/2008, payment receipts made to the City Council of Nairobi in respect of the property, receipts for rates payments made to the 2nd defendant as well as Nairobi City County Search Certificate dated 23/3/2016 confirming her ownership.

17. The 1st defendant on the other part claimed that she bought the suit property from Lillian Wanjiru Muiruri. She brought evidence of a lease supposedly registered on 23/4/2013 between Lillian Wanjiru Muiruri and the City Council of Nairobi for Title Number Nairobi/Umoja Block 83/1584 formerly B55-Umoja Innercore Sector III, a sale agreement dated 12/5/2015 between her and Lillian Wanjiru Muiruri, a transfer between her and Lillian Wanjiru Muiruri dated 28/5/2015 and a Certificate of Lease in her name dated 23/6/2015. Also brought before the court were copies of payment receipts for rates paid by the 1st defendant to the 2nd defendant.

18. The plaintiff and the 1st defendant are laying claim to the same property. The 2nd defendant who is the predecessor of the City Council of Nairobi which allocated the suit property did not file any response which would have shed light on the ownership of the suit property.

19. The 1st defendant has presented what would appear to be an undated lease supposedly presented for registration and registered on 23/4/2013 between Lillian Wanjiru Muiruri and the City Council of Nairobi. It is a matter of law that all local authorities which existed prior to the general election held on 4/3/2013 under the Constitution of Kenya 2010 were dissolved and ceased to exist upon conclusion of the elections of 4/3/2013. The lease which forms the foundation of the 1st defendant’s title was allegedly

presented for registration on 23/4/2013 by the City Council of Nairobi and one Lilian Wanjiru Muiruri. This was at the time when the City Council of Nairobi had ceased to exist.

20. Taking into account the unique circumstances of this case, I will preserve the suit property and fast track the hearing of this suit. I will accordingly make the following orders in disposing the plaintiff's Notice of Motion dated 24/6/2016:

a) There shall be no dealings or registration of any instrument in the land register relating to the suit property, formerly Plot No. B55 – Umoja Innercore Sector III and now titled as Title Number Nairobi/Umoja Block 83/1585 pending the hearing and final determination of this suit.

b) There shall be no developments on the suit property pending the hearing and final determination of this suit.

c) A copy of this order shall be served on the Chief Land Registrar and the County Secretary of Nairobi City County.

Dated, signed and delivered at Nairobi on this 22nd day of November, 2017.

B M EBOSO

JUDGE

In the presence of:

Botany h/b for Kangethe: Advocate for the Plaintiff

Kuna: Advocate for the 1st Defendant

Halima Abdi: Court Assistant