



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 670 OF 2017
(Formerly NAIROBI ELC CASE NO. 605 of 2016)

MARGARET MALU WILLIAM.....1ST PLAINTIFF

SELINE DENU UDI.....2ND PLAINTIFF

VERSUS

RACHEL ANYANGO OGWENO.....1ST DEFENDANT

THE COUNTY GOVERNMENT OF KAJIADO.....2ND DEFENDANT

RULING

The application before Court is the Plaintiffs' Notice of Motion dated 20th December, 2016 brought pursuant to Section 3A of the Civil Procedure Act, Order 51 rule 1 and 40 rules 1 & 2 of the Civil Procedure Rules and all the other enabling provisions of the law.

The application is based on the following grounds which in summary is that the 1st and 2nd Plaintiffs are the registered proprietors of land parcels numbers known as Plot 163'A'/INDUSTRIAL – NOONKOPIR TRADING CENTRE and 163 'B'/INDUSTRIAL – NOONKOPIR TRADING CENTRE (hereinafter referred to as the suit properties) within Kitengela Area. The 2nd Defendant's predecessor Ol Kejuado County Council approved the transfer of the suit properties to the Plaintiffs. The 2nd Defendant has willfully, unlawfully and irregularly issued to the 1st Defendant documents purporting to allocate the suit properties to her knowing fully well the 1st and 2nd Defendants have been registered as the proprietors of the suit properties. The Plaintiffs stand to suffer irreparably as the property is liable to be wasted, damaged and/or interfered with to the detriment of the Plaintiffs.

The Application is supported by the affidavit of SELINE DENU UDI who is the 2nd Plaintiff herein where she deposes that she purchased the suit properties in 2003 from the original allottee one LETEYIO OLE NKOIBONI and paid Kshs. 380,000 as purchase price. She avers that at the time of purchasing the suit parcel, it had some squatters residing thereon who meted violence when she attempted to possess it. She attempted to evict the squatters but in vain. Further that the records as at 2nd December, 2016 confirmed the suit property was still in her name. She learnt of the 1st Defendant's encroachment on the suit land on 30th November, 2016 wherein she commenced constructing illegal structures thereon. She states that on 1st December, 2016 together with the 1st Plaintiff, they reported matter to the Kitengela

Police Station and also confirmed a fence had been erected on the suit land. She confirms shortly thereafter the 1st Defendant came to the suit properties and introduced herself as its owner and stated that she purchased the same from a Mr. Nzioki. She reiterates that the 1st Defendant insisted the illegal construction thereon was to proceed and directed her workers to pull down a ‘mabati’ structure on the suit properties where the Plaintiffs’ caretaker resided. Further that after the disagreement, the dispute was referred to a Mr. Kasuku who was the surveyor but he did not assist them. She reiterates that they sought assistance from the Kitengela Police Station where they were assigned an officer to accompany them to the suit land where they found the fence almost complete and the door to the ‘mabati’ structure ripped open. She reaffirms that on 6th December, 2016, they lodged a complaint with the National Land Commission vide their letter dated the 4th December, 2016. She insists the 1st and 2nd Defendants’ actions are illegal and irregular as she has been paying land rent for the suit properties.

The application is opposed by the 1st Defendant who filed grounds of opposition where she stated as follows: The Plaintiffs are abusing the court process as there is another pending suit on the same subject matter being civil case no. 329 of 2011; The plaintiffs have sought similar prayers as the one in the High Court Civil case number 329 of 2011; There is no evidence adduced by the Plaintiffs that the 1st Defendant has unlawfully and irregularly encroached onto the suit properties being plots nos. 163 ‘A’ and 163 ‘B’; The Plaintiff and/or their agents have trespassed to the 1st Defendant’s suit properties and therefore are not entitled to the orders sought; and the Plaintiffs have neither placed sufficient grounds nor met the conditions set for a grant of injunction.

On the 24th October, 2017 it is only the Plaintiffs’ Counsel who submitted on the application as the Defendants were absent though duly served. The Plaintiffs’ Counsel presented the copies of evidence of ownership of the suit properties as annexed in the supporting affidavit. He submitted that they have established a prima facie case as established in the case of *Giella Vs Cassman Brown*. He relied on the Halsbury’s laws of England 4th Edition paragraph 801 and 802 on the issue of interlocutory injunction to preserve matters pending trial. He further relied on the case of *Giella Vs Cassman Brown*; *Mrao Vs First American Bank* and case of *George Njoroge Gichie Vs Consolidated Bank of Kenya*. He stated that the Plaintiffs have established a prima facie case with a probability of success. On the issue of damages as an appropriate remedy, he relied on the case of *Lucy Njoki Waithaka Vs ICDC and Kenya Hotels Limited Vs KCB* which dealt with the issue of status quo. He averred that the Plaintiffs are still registered owners of the suit properties and the acts of the 1st Defendant contravened their right to property which is detrimental and cannot be compensated by way of damages. Further that on balance of convenience, the Plaintiffs have satisfied the three limbs of *Giella Vs Cassman Brown* and balance tilts in their favour.

Analysis and determination

The court has considered the materials presented and arguments canvassed by the Plaintiffs in respect to the Notice of Motion dated 20th December, 2016 and analyzed that the following are the issues for determination:

- Whether the Plaintiffs’ are entitled to temporary injunction pending the outcome of the suit
- Whether the 1st Defendant has encroached on the Plaintiffs’ plots.

From the Applicants’ arguments, it is not in dispute that they were allotted the suit properties. Further that as at December 2016 the Certificate of official Searches conducted at the County Lands Office, annexed to the supporting affidavit reveal that the Plaintiffs are still the owners of the two plots. The Plaintiffs exhibited the letters of allotments, Certificate of Official Search, Rate Payment receipts and photographs of the suit properties. The Defendants did not produce any documentation to prove their claim on ownership of the suit properties. Apart from the Grounds of Opposition filed, they did not file a replying affidavit to controvert the Plaintiffs claim of ownership over the suit properties nor the allegations of trespass thereon.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman**

Brown & Co. Ltd (1973) EA 358 as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

Bearing this principle in mind, it is upon this honourable court to interrogate whether the applicant has demonstrated a prima facie case with a probability of success at the trial. First I must say know from a legal stand point that letters of allotment are not documents of title. This position is affirmed by Kimondo J. in **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR** when he had this to say on whether a Letter of Allotment amounts to title to land;

"... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property"

I however note that the 1st Defendant has not produced any evidence to prove the suit properties belongs to her. The Plaintiffs on the other hand exhibited the letters of allotments, Certificate of Official Search, Rate Payment receipts and photographs of the suit properties. It is against the foregoing that I find that the Plaintiffs have indeed established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiffs will suffer irreparable harm, I note the 1st Defendant has not denied encroaching on the suit land. It is also evident from the receipts annexed to the Plaintiffs' supporting affidavit that they have been paying land rates over the suit properties. Secondly, the Plaintiffs had put up a mabati structure to house their caretaker, which structure was interfered with by the 1st Defendant. The 2nd Plaintiff even produced a Sale Agreement relating to the purchase of the suit properties. The photographs annexed to the supporting affidavit show the fence the 1st Defendant allegedly constructed. From the averments in the affidavit, I note the Plaintiffs' have also sought intervention from NLC and the Police but this has all been in vain. In the circumstances, I find that the Plaintiffs will indeed suffer irreparable harm which cannot be compensated by way of damages if the order sought is denied.

On the question of balance of convenience, at this juncture, I find that the balance tilts in favour of the Plaintiffs who have presented documents to prove ownership of the suit land.

The upshot is that the Plaintiff has established a prima facie case that would warrant granting of the orders of injunction sought. . The notice of motion dated 20th December, 2016 is merited and I allow it.

Dated signed and delivered in open court at Kajiado this 20th day of December, 2017.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Parties absent