



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 126 OF 2017

MARY NYAMBURA KAIMBUPLAINTIFFS

VERSUS

COUNTY GOVT OF MOMBASA

SUSAN WANJIRU HINGA

EDWARD MAINA

ERIC IMBIATHA KHAMAATI..... DEFENDANTS

RULING

1. This is the Notice of Motion dated 10th April 2017. It is brought under Section 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya, order 40 Rule 1, 2 and 4 Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders;

a) Spent

b) Spent

c) That pending the hearing and determination of this suit the Honourable Court does grant a temporary injunction restraining the Defendants/Respondents, their agents and/or servants or any other person acting under their authority from carrying out developments trespassing upon, cultivating, fencing, selling and/or in any other way disposing interfering with the Plaintiffs/Applicants quiet enjoyment of her portion of land within Miritini Mombasa known as Plot No. 784 Miritini Site and Service Scheme.

d) That costs of the application be provided for.

3. The grounds are on the face of the application listed as in paragraph 1-13. I do not need to reproduce them here.

4. The application is supported by the affidavit of Mary Nyambura Kaimbu the Plaintiff/Applicant herein sworn on the 10th April 2017.

5. The application is opposed. There is a replying affidavit sworn by Edward Maina, the 3rd Defendant/Respondent on the 7th June 2017.

6. On the 26th September 2017 it was agreed by the parties that the application be disposed by way of written submissions. On record are the Plaintiff, 3rd and 4th Defendants submissions.

THE PLAINTIFF'S/APPLICANTS SUBMISSIONS.

7. The Plaintiff is the equitable owner and proprietor of Plot Number 784 Miritini having been allocated to her by the defunct Municipal Council of Mombasa. The letter of allotment is dated 24th December 1989 –marked as Annexure 1. She paid Kshs30,000/=. The receipt is marked as annexure 2. The Plot was therefore not available for allocation to the 2nd Defendant.

8. They have put forward the cases of Waas Enterprises Limited –versus- city Council of Nairobi (2014) eKLR, Elijah Wachiuri Ndur –versus- Timothy Githaiga Mwangi (2016) eKLR.

9. The Plaintiff is entitled to an interlocutory injunction. They have relied on the case of Giella –versus- Cassman Brown And Company Limited (1973) EA 358, Mrao Limited –versus- First American Bank of Kenya Limited And 2 Others (2003) KLR 125.

10. The plaintiff being a bona fide equitable and rightful owner of the suit property, she is entitled to an injunction to restrain the 4th Defendant from encroaching on the suit property. She was allocated the suit property first in time. That she has established a prima facie case with a probability of success at the trial and that she will suffer irreparable injury if these orders are not granted. She prays that the orders sought be granted.

THE 3RD AND 4TH DEFENDANTS/RESPONDENTS SUBMISSIONS.

11. The 3rd Defendant/Respondent purchased Plot Number 784 Miritini site and service from the 2nd Defendant/Respondent. That before purchasing it, he conducted a search at the Lands Registry Mombasa. He confirmed that the 2nd Defendant was the registered owner of the Plot. A copy of certificate of official search is annexed and marked EW-3.

The grounds rent arrears amounting to Kshs67,200/= from 1996-2016 were cleared by the 2nd Defendant. The invoice is annexed and marked EW-4.

12. The 3rd Defendant paid the full purchase price to the 2nd Defendant and later sold it to the 4th Defendant. The Plot has now been transferred to the 4th Defendant. The Plaintiff/Applicant has not proved that she has any right to the suit property. they have relied on the case of Philip Ajaya Alucho –versus- Chirspus Nyayo (2014) eKLR.

13. I have considered the Notice of Motion and the supporting affidavit together with the annexures. I have also considered the replying affidavit and the annexures. I have considered the submissions of both counsels and the authorities cited. The issues for determination are;

i) Whether the Plaintiff/Applicant's case has met the threshold for grant of temporary injunction.

ii) Who should bear costs?

14. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of Giella –versus- Cassman Brown And Company Limited (1973) EA 358.

15. In the case of Mrao Limited –versus- First American Bank of Kenya Limited And 2 Others (2003) KLR 125. the Court of Appeal gave a definition of what amounts to a prima facie case.

16. Has the Plaintiff/Applicant made out a prima facie case with a probability of success at the trial? The Plaintiff's/Applicant's contention is that she was allocated the Plot Number 784 Miritini site and service vide a letter dated 24th December 1989. She paid Kshs30,000/= as per the receipt marked Annexure 2. She admits that the balance of Kshs37,000/= was not paid. The 2nd Defendant was allocated the same plot vide a letter dated 22nd May 2007.

17. As at 20th January 2016, the Plot was registered in the 2nd Defendant's name. Outstanding land rent arrears for the period 1996 -2016 was Kshs.67,200/=.

It is therefore not true that the Plaintiff had paid land rent for the said plot.

18. The Plaintiff/Applicant has failed to explain to the court why she did not do anything on the plot for several years. She has been indolent. It was not until March 2017 when she learnt from her neighbours that someone was doing construction on the said plot.

I find that she had failed to demonstrate that she has a prima facie case with a probability of success at the trial.

19. As things stand now the plot is not registered in her name. She says she paid Kshs.30,000/=. This is an amount that can be refunded if she succeeds at the trial. She has failed to demonstrate that she is likely to suffer irreparable injury if these orders are not granted.

20. The plot is now registered in the name of the 4th Defendant who acquired the same for value.

I find that the balance of convenience tilts in favour of the 4th Defendant who is the registered owner.

21. I find that the application herein lacks merit and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED and DELIVERED at Mombasa on the 19th day of December, 2017.

L. KOMINGOI

JUDGE

19/12/2017