



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 754 OF 2017

JIM NJUGUNA MUTHAMA.....PLAINTIFF

VERSUS

VERONICA WAIRIMU NJUGUNA.....1ST DEFENDANT

PUBLIC HEALTH OFFICER2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

What is before Court is the Plaintiff's Notice of Motion dated 2nd June, 2017 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1(a), (b) & 4(1) of the Civil Procedure Rules and all the other enabling provisions of the law.

It is premised on the following grounds, which in summary is that the Plaintiff is the beneficial and registered proprietor of plot no. 723 Ongata Rongai hereinafter referred to as the 'suit property' which he bought from one James Gatundu and registered in his name. The Plaintiff built the premises thereon for residential purposes and he currently has tenants. The Plaintiff and 1st Defendant are husband and wife but have an ongoing dispute over matrimonial property. The Plaintiff is in possession of the original letter of Allotment and Sale Agreement over the suit property but the 1st Defendant has fraudulently acquired a parallel letter of Allotment. On 15th January, 2015 the 1st and 2nd Defendant/Respondent colluded and came up with a health report citing the suit property was not habitable and issued a notice to the tenants to vacate it. The 1st Defendant/Respondent was charged with a criminal case Misc Application 26 of 2016 (Ngong Law Courts) citing that the suit property was not habitable and thus an eviction notice was issued and there is real danger that the Plaintiff's tenants will vacate it. The Plaintiff has been collecting rent from the suit property to meet his financial obligations and the 1st and 2nd Respondent want to use intimidatory methods through the Public Health Officer to dispossess him of his property. The 1st Respondent has been trespassing on the suit property claiming to own it and has issued a notice of eviction to the tenants while the 2nd Respondent has carried out an inspection on the property and rendered it not habitable yet the same has been renovated. The Plaintiff took a bank loan to pay for renovations on the suit property and has been having a challenge to collect rents therefrom to service the loan. The National Land Commission Kajiado County Board found that the documents of ownership provided by the 1st Respondent were obtained fraudulently.

The application is supported by the affidavit of JIM NJUGUNA MUTHAMA the Plaintiff herein where he deposes that he built the suit property and that the 1st Respondent is his wife and they are currently living apart due to irreconcilable differences. He avers that with the ongoing tussles between him and the

1st Respondent, the tenants are apprehensive and on the verge of vacating the suit property. He claims that the 1st Respondent and the Public Health Officer are colluding in order to have the tenants evicted from his suit premises.

The application is opposed by the 1st Respondent VERONICA WAIRIMU NJUGUNA who filed a replying affidavit where she deposed that the Plaintiff had filed a similar case vide Kajiado RMCC No. 290 of 2016 seeking similar reliefs which suit is still pending. She avers that in the said suit the Plaintiff filed an application dated 2nd June, 2016 and had obtained interim orders pending the hearing *inter partes* of the said application, but the same was dismissed for non-attendance on 12th July, 2016. Further that the Plaintiff later filed a Notice of Motion dated the 4th August, 2016 seeking orders to reinstate the application dated 2nd June, 2016 but the same has never been prosecuted. She states that she filed a replying affidavit and submissions to the Notice of Motion dated 4th August, 2016. She insists the civil suit No. 290 of 2016 is still pending and the current suit is therefore an abuse of the Court process since the earlier suit is still sub judice and has never been determined nor withdrawn. She claims she is the registered owner of the suit property and that the Plaintiff stole her letter of Allotment in 2009 and obtained parallel documents of ownership without her consent. She reiterates that she purchased the suit property through a loan advanced to her by the United Nations SACCO Ltd in July 1993 and it is her father in law who is the Plaintiff's father that gave her his property title number L2 4953/1175/57 as security. She avers that she reported the loss of the Letters of Allotment over the suit property to the Kajiado County Council vide letter dated 18th January, 2010 and swore an affidavit over the same on 18th January, 2010. She states that the alleged Sale Agreement between the Plaintiff and one James Gatundu does not relate to the suit property since he did not purchase it, with the allegations by the Applicant against her on the fraudulent acquisition of the suit property being baseless, as they were not reported to the Police for investigation.

She further avers that the allegations of collusion between herself and the Public Health Officer Kajiado are baseless as she was actually charged at the Ngong Law Court vide Misc. Criminal Case Number 26 of 2016 and there was an order on 30th May, 2017 giving the tenants 14 days to vacate the suit property. Further that the issues whether the premises is a health hazard has been determined by a competent court and therefore orders granted herein ought to be vacated forthwith. She insists she is the one who stands to be prosecuted if the orders granted in the Ngong Law Court vide Misc. Criminal Case Number 26 of 2016 are not obeyed as she is the accused person and not the Plaintiff. She confirms that the Plaintiff had earlier been charged at Kajiado in Criminal Case Number 900 of 2016 but was discharged under section 87(a) of the Criminal Procedure Code after he informed the Court that he was not the registered owner of the suit property. After a search conducted by the Public Health Officer where it was established that she is the owner of the suit property, she was subsequently charged at Ngong Law Court vide Misc. Criminal Case Number 26 of 2016. She denies she wants to bring new tenants to the suit property but insists she intends to comply with the statutory notice issued by the Public Health Officer. She affirms that the Plaintiff has not furnished proof of the National Land Commission's finding that she obtained the documents over the suit property illegally and in any event she was not charged in regard to the alleged fraud. She further reiterates that she does not want to dispossess the Plaintiff of the suit property as the same belongs to her and that he filed HCCC No. 51 of 2016 (OS) in Nairobi seeking a declaration that the suit property belongs to both of them which suit is still pending.

The application is further opposed by the 2nd Respondent who filed a replying affidavit sworn by JACOB OIDI AMAKE the Public Health Officer of Nkaimurunya Ward of Kajiado where he deposes that the Plaintiff denied ownership of the suit property in Criminal Case No. 900 of 2016 which he withdrew and the Court ordered him to conduct a Search to establish its true owner. He avers that he conducted a search which revealed that the 1st Respondent was the true owner of the suit property, after which he served her with a notice under section 115 of the Public Health Act, which she failed to comply to, culminating in his instituting a legal process vide Misc. Criminal Case Number 26 of 2016, with orders being issued to the tenants to vacate it, so as to facilitate abating of the nuisance. He states that the Plaintiff is misleading the court with a mistaken belief that his fiduciary interests override those of his tenants whom he has a mandate to protect by law. He insists that the Misc. Criminal Case Number 26 of 2016 had nothing to do

with ownership of the suit property and imputes malice by the Plaintiff who terms lawful acts sanctioned by the court as violation and conspiracy against him.

The Plaintiff and 1st Respondent submitted on the Notice of Motion on 13th July, 2017 which submissions I have considered.

Analysis and Determination

Upon perusal of the notice of motion dated the 2nd June, 2017 including the supporting and replying affidavits as well as the annexures thereon, the main issue for determination at this juncture is whether the Plaintiff is entitled to interlocutory injunction pending the outcome of the suit.

The Plaintiff contends he is the owner of the suit property and the 1st Respondent has fraudulently obtained letters of Allotment over the same. He claims he has tenants thereon but the 1st Respondent in collusion with the 2nd Respondent has served them with an eviction notice and he stands to suffer irreparable loss and damage as he uses the proceeds therefrom to service a loan he had obtained to undertake renovations on the said suit property. The 1st Respondent insists she is the registered owner of the suit property and that in 2009, the Plaintiff stole her letter of Allotment and obtained parallel documents of ownership without her consent. She avers that she reported the loss of the Letters of Allotment over the suit property to the Kajiado County Council vide letter dated 18th January, 2010 and swore an affidavit over the same on 18th January, 2010. The 2nd Respondent on the hand claims the Plaintiff denied he was owner of the suit property in 2016 when he was charged under the Public Health Act at Kajiado vide Criminal Case Number 900 of 2016 but was discharged under section 87(a) of the Criminal Procedure Code. He confirms that upon doing a Search, he realized it was the 1st Respondent who was owner of suit land.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well 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."

In line with this principle, I wish to interrogate whether the Plaintiff/Applicant has made out a prima facie case with a probability of success.

The question we need to ask is whether the Plaintiff is the owner of the suit land. The Plaintiff claims ownership to the suit property and that it is the 1st Respondent's documents of title that were obtained fraudulently. He further averred that even the National Land Commission found that the 1st Respondent's documents were obtained fraudulently. I note the Plaintiff denied that he is the owner of the suit property when he was charged, and he has not controverted these allegations. He also instituted a suit vide Nairobi HCCC No. 51 of 2016 (OS) seeking declaratory orders from Court to declare that he jointly owns the suit property with the 1st Respondent. Further it is the 1st Respondent who has been charged under section 115 of the Public Health Act vide Misc. Criminal Case Number 26 of 2016, with orders being issued to the tenants to vacate to facilitate abating of the nuisance.

The averments by the 1st and 2nd Respondents have not been controverted by the Plaintiff. I note that the Plaintiff instituted Kajiado RMCCC No. 290 of 2016 which is similar to the instant suit and is still pending. From the facts above and the annexures to the respective affidavits, I find that Plaintiff has been engaged in forum shopping by filing a multiplicity of suits over the suit property. Instead of forum shopping and abusing the court processes, the Plaintiff should set the Kajiado RMCCC No. 290 of 2016

and Nairobi HCCC No. 51 of 2016 (OS) for hearing and final determination. In the foregoing circumstances, I find that the Plaintiff has not established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiff/ Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. In the instant case, both I note it is the 1st Respondent who has been charged as the owner of the suit property after the Plaintiff denied owning it. The allegations of the Plaintiff that the 1st and 2nd Respondents colluded to evict his tenants smells of malice as he already denied he did not own the suit property when charged over it. I find that the Plaintiff will hence not suffer irreparable loss that cannot be compensated by an award of damages.

On a balance of convenience, from the facts and materials presented, I find that the finds that the 1st and 2nd Respondents are likely to suffer more inconvenience if the injunction is allowed than what the Plaintiff will suffer if the injunction is disallowed.

From the above, it is clear that Plaintiffs' have not established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently dismiss the Plaintiffs' Notice of Motion dated 2nd June, 2017 with costs.

The interim orders issued herein on 2nd June, 2017 be and is hereby vacated.

Dated, signed and delivered in open court at Kajiado this 4th day of December, 2017.

CHRISTINE OCHIENG

JUDGE

Present:

Arboro holding brief for Uvyu & Co., Advocates for 1st Defendant

N/A for Plaintiff

N/A for 2nd Defendant

CC Mpoye