



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 1295 OF 2014

NELSON IRUNGU KAMAU..... 1ST PLAINTIFF
MARY MUTHONI KABIRU..... 2ND PLAINTIFF
SAMSON OERI ONDEYO..... 3RD PLAINTIFF
ESTHER WANJIRU NDUATI 4TH PLAINTIFF
PETER KAMAU KARIUKI..... 5TH PLAINTIFF
MICHAEL MAINA KAMAU.....6TH PLAINTIFF
FRANCIS KAMAU NGERE..... 7TH PLAINTIFF
JACKSON MAINA THIONGO.....8TH PLAINTIFF
MORRIS KASYOKI NZELU..... 9TH PLAINTIFF
KIAMBU DANDORA FARMERS CO. LTD. 10TH PLAINTIFF

VERSUS

SIGMA ENGINEERING CO. LTD.....1ST DEFENDANT
JOGANDRIES AUCTIONEERS.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 6th October 2014 in which the Plaintiffs/Applicants seek an order of temporary injunction restraining the Defendants/Respondents from entering into, remaining on or erecting any buildings or structures on the parcel of land known as Zone 13 in Land Reference Number 11379/3 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 the 9th Plaintiff, Morris Kasyoki Nzelu, sworn on 6th October 2014 in which he swore that he and his co-Plaintiffs are allottees of their respective plots from the 10th Plaintiff as follows:

- a) Nelson Irungu – Plot Nos. Z13/1849 and 1850
- b) Samson Oeri Ondeyo – Plot No. Z13/53
- c) Peter Kamau Kariuki – Plot Nos. Z13/1861 and 1862
- d) Francis Kamau Ngere – Plot No. Z13/1795
- e) Morris Kasyoki Nzelu – Plot Nos. Z13/1552 and 1553
- f) Mary Muthoni Kabiro – Plot No. Z13/1545
- g) Esther Wanjiru Nduati – Plot No. Z13/52
- h) Jackson Maina Thiongo – Plot No. Z13/220
- i) Michael Maina Kamau – Plot No. Z13/1551

He averred that the above plots which they occupy belong to the 10th Plaintiff. He further stated that they are in possession of their respective plots and have constructed permanent and semi-permanent structures thereon where they carry on their businesses and also reside there. He averred further that sometimes in April 2014, they were served with a notice to vacate by the 2nd Defendant addressed to “All Illegal Occupants on L.R. No. 209/9479 Dandora Nairobi” allegedly in execution of a court order in **CMCC No. 2988 of 2012 Sigma Engineering Co. Ltd versus Francis Macage Kimuhu and Nicholas Gatimu**. He further averred that on 10th April 2014 they filed an application in that suit to be joined in the proceedings but in her ruling given on 15th August 2014, the Resident Magistrate refused their application to be joined since there was a judgment against the two defendants. He further averred that sometimes in September 2014, the 2nd Defendant again served them with another notice giving them 14 days to vacate L.R No. 209/9479. He stated further that the land they occupy is L.R No. 11379/3 which belongs to the 10th Plaintiff and not L.R No. 209/9479 which the Defendants claim. He further added that the dispute concerning L.R No. 11379/3 is pending in **High Court Constitutional Petition No. 47 of 2011**.

The Application is contested. The 1st Defendant/Respondent filed the Replying Affidavit of its Director, Robin Thiga, sworn on 16th October 2014 in which he averred that the 1st Defendant/Respondent is the registered proprietor of all that land known as L.R. No. 209/9479 measuring 0.8677 situated in Dandora area. He annexed a copy of title deed in support of this assertion. He added that the 1st Defendant has been dutifully paying the requisite land rent to the government of Kenya since 1981 and annexed copies of the various receipts. He also stated that the 1st Defendant has been paying the applicable land rates and annexed various receipts as proof. He further averred that on 23rd June 2011, the 10th Plaintiff/Applicant and some of the members thereof filed a suit against the 1st Defendant being **HCCC No. 318 of 2011** claiming that the 10th Plaintiff’s members are owner of L.R No. 209/9479 and that the suit is still pending determination. He added that the 1st Defendant also filed a suit on 6th June 2012 being **CMCC No. 2988 of 2012** to evict Francis Kimuhu and Nicholas Gatimu from L.R. No. 209/9479 and the court granted the said orders on 27th September 2012. He confirmed that the Plaintiffs/Applicants applied to be enjoined in that suit and opposed the orders of eviction but the court dismissed their application. He further averred that he has had opportunity to look at the survey map showing the location of the Plaintiffs’ alleged property known as L.R. No. 11379/3 and that of the 1st Defendant known as L.R. No. 209/9479 and confirmed that the two properties are not the same.

In response thereto, a director of the 10th Plaintiff, John Mburu Karega, filed his Affidavit sworn on 21st

April 2015 in which he averred that the 1st Defendant fraudulently filed **CMCC No. 2988 of 2012** concerning their land L.R. No. 11379/3 comprising 818 acres and from which L.R. No. 209/9479 has been excised without informing them or the magistrate that the 10th Plaintiff has an interest in the subject matter. He further stated that at the time, the dispute involving their land parcel L.R. No. 11379/3 and L.R. No. 209/9479 was pending in the High Court in **HCCC No. 318 of 2011**. He added that the 1st Defendant purported to use the Judgment so fraudulently obtained to evict members of the 10th Plaintiff using the services of the 2nd Defendant. He added that L.R. No. 11379/3 is the property of members of the 10th Plaintiff by a judgment and decree given in **HCCC No. 1348 of 1972**. He stated further that the 10th Plaintiff has a duty to settle its members in their land over which they have a title issued on 8th April 1970 and was held by their trustees on their behalf. He also stated that the 10th Plaintiff and the trustees have filed a **Constitutional Petition No. 47 of 2011** seeking the cancellation of all land titles fraudulently issued and carved out of their land by the former Commissioner of Lands. He added that the 1st Defendants title to L.R. No. 209/9479 is one of the titles that is affected by the petition and is due for revocation or cancellation.

Both the Plaintiffs/Applicants and the Defendants/Respondents filed their respective written submissions which were also highlighted on 28th October 2015.

The issue that I am called upon to determine is whether or not to grant the Plaintiffs/Applicants the temporary injunction they seek pending the hearing and determination of this suit. 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.”

Have the Plaintiffs/Applicants 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.”

Do the Plaintiffs/Applicants 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 warn 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 observe that the Plaintiffs/Applicants seek a temporary injunction to protect them from eviction by the Defendants/Respondents from the parcel of land they occupy. It is their contention that the parcel of land they occupy is L.R. No. 11379/3 out of which L.R. No. 209/947/9 was excised. The threatened eviction is pursuant to orders issued by the court in **CMCC No. 2988 of 2012** filed by the Defendants. The Plaintiffs/Applicants claim that they were not parties to that suit and their efforts to be enjoined thereto were unsuccessful following the dismissal of their application for joinder. It

has also emerged that the Plaintiffs/Applicants do have two other pending suits on the same issue being **HCCC No. 318 of 2011** involving their land parcel L.R. No. 11379/3 and L.R. No. 209/9479 and High Court **Constitutional Petition No. 47 of 2011** seeking the cancellation of all land titles fraudulently issued and carved out of their land by the former Commissioner of Lands. On their part, the Defendants/Respondents contend that they are the bona fide owners of L.R. No. 209/9479 and produced a copy of their title deed. They also went ahead to demonstrate that they have been paying the applicable land rent and rates to the government as required. They are seeking to enforce orders issued by the court to obtain vacant possession of L.R. No. 209/9479.

At this juncture, the court makes a finding that it has not been demonstrated that the parcel of land being claimed by the Defendants, being L.R. No. 209/9479, was in fact excised out of the larger parcel of land being L.R. No. 11379/3 claimed by the Plaintiffs/Applicants, particularly the 10th Plaintiff. It is therefore not clear at this interlocutory stage whether the court is faced by two different parcels of land or the same parcel of land. Secondly, the Plaintiffs/Applicants have admitted that they have two other suits filed by them being **HCCC No. 318 of 2011** involving their land parcel L.R. No. 11379/3 and L.R. No. 209/9479 and **High Court Constitutional Petition No. 47 of 2011** seeking the cancellation of all land titles fraudulently issued. Both of these suits are said to be pending hearing and determination. It is not clear to this court why the Plaintiffs/Applicants chose to file this suit knowing very well that they could have sought the court's audience on their threatened eviction in the two other pending suits which I have mentioned above which were filed by them and which seek to address the very same issues being raised herein. The court is keen to guard against a multiplicity of suits which can result in conflicting court orders being issued. Overall, I am of the view that the Plaintiffs/Applicants have failed to satisfy me that they have a prima facie case with high chances of success at the main trial.

Since the Plaintiffs/Applicants have failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 1ST

DAY OF JULY 2016.

MARY M. GITUMBI

JUDGE