



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL CASE NUMBER 1058 OF 2015
GOLDEN VALLEY PROPERTIES LTD.....PLAINTIFF/APPLICANT
=VERSUS=
LEONARD GITHAE.....DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the *Notice of Motion* dated **26th October 2015**, filed by the Plaintiff/Applicant herein ***Golden Valley properties Ltd*** , against the Defendant /Respondent ***Leonard Githae***. The application is premised under **Section 13 and 19**, of the ***Environment and Land Court Act, 2011*** and has sought for these Orders:-

- 1. That this application be certified as urgent and be heard ex-parte at first instance.***
- 2. That the Defendant/Respondent , his agents and/or servants be restrained from entering, causing acts of waste and/or conducting illegal business on Plaintiff's/Applicants Land Parcel No.RUIRU EAST BLOCK 1/T.900 pending the hearing and determination of this application and or further orders of the Honourable Court.***
- 3. That the Officer in charge Ruiru Police Station do enforce compliance.***
- 4. That costs be provided for.***

The application is based on the grounds stated on the face of the application and on the Supporting Affidavit of ***Mary Wambui Njihia*** . These grounds are:-

- i. That the Plaintiff/Applicant is the lawful registered proprietor of plot Number RUIRU EAST BLOCK 1/T.900.***
- ii. That the Defendant, his agents or servants have been unlawfully entering and without any colour of right been conducting illegal business on the said plot.***
- iii. That the Respondent has been trespassing on the said land without the applicant's consent.***
- iv. That the Plaintiff may suffer irreparable loss and damage.***

In the supporting affidavit, **Mary Wambui Njihia** averred that she is one of the Directors of the Plaintiff/Applicants. She further averred that the registered proprietor of land parcel **Number RUIRU EAST BLOCK 1/T/900** is their Company **GOLDEN VALLEY PROPERTIES LIMITED** (annexture marked "MWN-1). Further that the Defendant his agents and/or servants have been illegally entering the above said land committing acts of waste and also conducting illegal business thereon.

It was her contention that the Defendant/Respondent has even been summoned by the Area Chief to stop his illegal activities on the said land but he had refused and/ or ignored to make amends as per annexture marked "MWN2". She alleged that the Respondent had been denying the Plaintiff its right of use of the said land and further that the Respondent had got no color of right over the applicant's said parcel of land. It was her further averment that it was only fair and just for the Defendant/Respondent, their servants and/or agents to be restrained from illegally entering, conducting the said illegal business, and committing acts of waste on the said Parcel **Number Ruiru/Ruiru East Block 1/T.900**. That he also prayed for the Officer in Charge **Ruiru Police Station** to enforce compliance.

The application is contested. **Leonard Githae**, the Defendant/ Respondent filed his Replying Affidavit on **29th February 2016**, and averred that there was an apparent conspiracy between the applicant and the person through whom he got into occupation of only a very negligible portion of **RUIRU EAST BLOCK 1/T900**, and that the proceedings herein are premised on a conspiracy between the Plaintiff and his landlord one **Japheth Mbuthia**. He also averred that there was pending case before the Rent Restriction Tribunal and a complaint in **Business Premises Rent Tribunal Cause No. 69 of 2015, (Thika)** in which one **Japheth Mbuthia** his landlord had admitted before the Rent Inspector appointed by the Tribunal that he too was a tenant at the premises subject of those proceedings as per annexture marked "LG2" and report marked "LG2(a)". From the annexture marked LG3 (the replying affidavit of one **Japheth Mbuthia** to his complaint at the Business Premises Rent Tribunal, it is clear that he too had an issue with one **Mr Njenga**, whom he suspected to be a Director in the Plaintiff. It was his further averment that if there were no landlord/tenant relationship between, the Plaintiff herein and the Respondent in his complaint at the Business Premises Rent Tribunal, it is fool hardly for him not to have been subjected to Criminal Proceedings by the Plaintiff or the Respondent in the proceedings deliberately refusing the comply with the orders issued by the tribunal especially the Order issued on **22nd July 2015**. (Annexture marked **LG5**).

It was his allegation that from the foregoing, it was clear that the proceedings therein were subjudice as there already subsists proceedings between himself and the party from whom the Plaintiff claims/obtains rent and he urged the Court not to be persuaded by the conspiracy of the Plaintiff and the Respondent at the Business Premises Rent Tribunal to rule on a biased application.

The application was canvassed by way of written submissions. The Law Firm of **Nganga Ngigi & Co. Advocates** for the Plaintiff/Applicant filed their written submissions on **7th April 2016**, and urged the court to allow the application. The Defendant in person, **Leonard Githae** filed his submissions on **26th April, 2016**, and urged the court to dismiss the instant application.

The Court has considered the instant application, the annexures thereto, the provision of law and the written submissions and the court finds as follows:-

The applicant herein is seeking for orders of injunction which are equitable reliefs granted at the discretion of the court. See the case of **CMC Motors Group Ltd and Another vs. Evans Kangeche Boro, Civil Appeal NO. 295 of 2007**, where the court held that:

"In granting the injunctory reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the court of Appeal can only interfere with the judicial discretion of the learned Judge, if it is satisfied that the learned Judge did not exercise is discretion Judicially....."

Further in deciding whether to grant or not to grant the orders sought, the Court will be guided by the principles laid down in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358**.

These principles are:-

- a. The applicant must establish that he has a prima facie case with probability of success.*
- b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c. When the court is in doubt, to decide the case on a balance of convenience.*

The applicant therefore needed to firstly establish that it has a prima facie case with probability of success prima facie case has been described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125**, the Court described prima facie case as;-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

From the available evidence, the suit property is **Ruiru East Block1/T.900**. The applicant has alleged that the Defendant has been unlawfully entering into the said premises and conducting illegal business. The Defendant has not denied that he has been entering into the suit premises but he alleged that he entered into the said premises by virtue of being a tenant of one **Japheth Mbutia** who is also a tenant of the Plaintiff herein. The Defendant has therefore not denied that he has occupied the suit premises. He only said that the Plaintiff herein have colluded with the new tenant to have the Defendant evicted from the suit premises to defeat the matter at the Business Premises Rent Tribunal. From the title deed annexed to the application, the suit property **Ruiru/East Block 1/T.900**, the same is registered in the name of the Plaintiff herein. The Plaintiff being the registered owner of the suit property, then its rights are protected under Section 24(a) of the Land Registration Act which provides that;-

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Further Section 25(1) of the said Act also provides that the rights of such registered proprietor cannot be defeated except by operation of Law.

1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

Such right of a proprietor includes use, enjoyment and access to the property. The Defendant is in occupation of the suit property without the authority of the plaintiff herein. The Defendant has therefore denied the Plaintiff the enjoyment of its rights as protected by **Section 25(1)** of the Land Registration Act. The Plaintiff/Applicant being the registered owner of the suit property is deemed to be the ***absolute*** and ***indefeasible owner*** of the suit property. Therefore the applicant has a prima facie case with probability of success. By occupying the suit property without the authority of the Plaintiff, the Defendant/applicant has infringed on the right of the Plaintiff to use and access its property.

The Plaintiff/Applicant being the owner of the suit property should be allowed to use it as it so deem fit and either lease it to a person of their choice. The balance of convenience herein tilts in favour of the

Plaintiff/Applicant herein who are the registered owner of the suit property.

Having now carefully considered the Instant Notice of Motion dated **26th October 2015**, the Court finds it merited and it is allowed in terms of prayers **No.2 and 3**. The applicant is also entitled to costs of this application. The Orders herein will remain in force pending the hearing and determination of the suit herein.

It is so ordered.

Dated, Signed, and Delivered this **26th** day of **September, 2016**.

L.GACHERU

JUDGE

In the presence of

Cheloti holding brief Nganga Ngigi for the Plaintiff/Applicant

Defendant in person : Present

Court Clerk : Hilda

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above stated persons.

L.GACHERU

JUDGE