



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 437 OF 2010

LEONARD NZIOKA MWEKE..... PLAINTIFF

VERSUS

EDWARD MUTULA.....1ST DEFENDANT

JEREMIAH MWANZIA.....2ND DEFENDANT

SAMSON MUTAMBAUKI.....3RD DEFENDANT

RULING

The Application

The application before the court is a Chamber Summons dated 20th September 2010 filed by the Plaintiff, seeking the following orders:

1. That the 1st, 2nd and 3rd Defendants be restrained from constructing and/ or building, disposing of by way of sale and or transfer, charging and/or leasing or in any manner interfering with the current registration of all those parcels of land known as Plots Nos. 551 and 552 off Kangundo Road Saika Makonge until this suit is heard and determined.
2. That the 1st, 2nd and 3rd Defendants be inhibited from effecting registration of any instrument of transfer, charge, or lease or any other dealing with the land known as Plots Nos. 551 and 552 off Kangundo Road Saika Makonge until this suit is heard and determined.
3. That an order do issue compelling the 1st, 2nd and 3rd Defendants to vacate forthwith those parcels of land known as Plots Nos. 551 and 552 off Kangundo Road Saika Makonge (hereinafter referred to as “the suit properties”) pending hearing and determination of this suit.

The grounds for the application are that the Plaintiff is the registered owner and has a beneficial interest in the suit properties, and that the 1st, 2nd and 3rd Defendants have unlawfully effected a registration of ownership of the said properties to an unknown person who is constructing a building on the said properties. Further, that the Plaintiff is apprehensive that the 1st, 2nd and 3rd Defendants are likely to dispose of the said properties to an unknown person, and should that happen the Plaintiff is likely to suffer irreparable loss and damage.

The Plaintiff in his supporting and further affidavit sworn on 20th September 2010 and 27th October 2010 respectively stated that he bought plot No. 552 from one Kisau Alphah Mutinda who is a member of the Saika Makonge Jua Kali Association by way of a sale agreement dated 13th December 2008, and paid Kshs.205,000/= as the purchase price. Further, that on the 29th December, 2008 he bought plot No. 551

and paid Kshs.215,000/= by way of a sale agreement dated 29th December 2008, and that the Defendants witnessed the same and issued him with a certificate of ownership. He annexed the said sale agreements and certificates of ownership.

The Plaintiff further stated that he later visited the said plots and found someone who refused to disclose his name erecting a building thereon, and that the said person claimed ownership of the two plots by virtue of an alleged purchase of the same from the Defendants. That upon seeking an explanation, the Defendants claimed that the said plots were sold to the person who was erecting the building by the officials of Saika Makonge Jua Kali Association, and declined to stop the said person from constructing on the said plots.

The Plaintiff averred that this suit is properly before the Court and the Defendant are sued as the officials of Makonge Jua Kali Association and not as individuals as outlined in the Plaint dated 20th September 2010. Further, that the Defendant have not shown him any alternative plots, and that if they are desirous to do so then they should give him two plots that adjoin each other and not separate plots, and which are located near Nairobi-Kangundo tarmac road. Furthermore, that since the Defendants have acknowledged that there was double allocation then they should compensate him using current market rates to enable him buy another plot elsewhere in order to carry out his construction plans.

The Defendants' Response

The Defendants responded to the Plaintiff's application in a replying affidavit sworn by the 1st Defendant on 6th October 2010, wherein they stated that the suit is against the Defendants as individuals, and that they have never been involved in plot Nos. 551 and 552 in that capacity. Furthermore, that the Defendants are not the current officials of the Saika Makonge Jua Kali Association, and their inclusion of the suit makes it fatally defective.

The Defendants further stated that plot number 552 is readily available for the Plaintiff to take possession of the same, thus all the allegations by the Plaintiff touching on plot No. 552 are baseless. With respect to plot number 551, the Defendant's stated that there was double allocation, and that unknown to the officials of the association, it had been allocated by the past and deceased chairman of the association to one Mr. Kingee even before the Plaintiff purchased it. Further, that the association's officials called the Plaintiff and advised him of the developments with a proposal that he gets an alternative plot or a refund of his monies for plot No. 551.

However, that the Plaintiff responded by insisting that the alternative plot should be at a site acceptable to him or that the refund should be at the current market value. It was averred that the current officials have pointed out several plots to the Plaintiff who has refused to take any of them on the basis that they are near the river/sewage. Further, that the Plaintiff is asking for Kshs.350,000/= as the current market value refund for the plots which is unrealistic.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel at the hearing of the application on 12TH November 2014 submitted that they had filed and served submissions dated 8th September 2014. However upon a perusal of the said submissions, I note that they are on the Plaintiff's later application dated 12th September 2013 seeking orders for the adoption of a survey report by the Court, which application was dispensed of and allowed by the Court on 20th May 2014. I will therefore proceed to give this ruling on the basis of the pleadings filed by the parties herein, and the requirements as to the grant of temporary and mandatory injunctions.

The principles for the grant of temporary and mandatory injunctions are settled. The requirements for the grant of temporary injunctions are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and that these are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two

requirements are not satisfied, it may decide an application on the balance of convenience.

For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

Lastly, as to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR stated 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.”

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR 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.”

The Plaintiff in the Complaint filed herein dated 20th September 2010 is seeking orders of general damages, permanent injunction, and eviction against the Defendants, as well as a declaration of ownership with respect to the suit properties. He has brought evidence of sale agreements and certificates of ownership with respect to plots plot no 551 and 552 entered into with, and issued by Saika Makonge Jua- Kali Association. He also relies on the amended survey report dated 19th December 2012 which he asked to be adopted by the Court.

I note that the Plaintiff has not brought any evidence of title documents issued to the said Association to show its capacity to sell the said plots, particularly in light of the objection raised by the Defendants that they are not the officials of the said Association. There is thus the possibility that the Plaintiff may have sued the wrong parties. In addition, the party that is constructing on the suit property referred to by the Defendants as a Mr. Kingee is not a party to these proceedings, yet the orders sought will certainly affect him.

The Court also noted that the survey report the Plaintiff relies upon does not attach any title documents or approved survey plans to show the existence of the said plots. Lastly, the said survey report establishes that there is already construction of a four-storeyed building on the suit properties, and in light of the possibility of double allocation and compensation raised by the Defendants, I am of the view that the Plaintiff can be adequately compensated by way of damages.

In the premises it is my finding that the Plaintiff has not shown a *prima facie* case and can in any event be adequately compensated by way of damages. The prayers he seeks in his application by way of Chamber Summons dated 20th September 2010 are therefore accordingly denied. The costs of the said Chamber Summons shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 27th day of January, 2015.

P. NYAMWEYA

JUDGE