



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT

ELC. CASE NO. 353 OF 2013

DR. DELANO A. ODONGO OTHIENO.....PLAINTIFF

VERSUS

MUCHAI & PARTNERS.....1ST DEFENDANT

LUCKY SUMMER ESTATE CO. LTD.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 12th March 2013 in which the Plaintiff/Applicant seeks for orders restraining the Defendants/Respondents from interfering, trespassing, transferring, constructing, demolishing and taking any other adverse action on the Plaintiff's parcel of land known as Plot No. 17 also referred to as Plot No. 3 at Lucky Summer Estate Co. Ltd pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for the OCS Ruaraka Police Station, the DO, Ruaraka and the Chief Ruaraka to assist in enforcing the order and that costs of the Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Dr. Delano A. Odongo Othieno, sworn on 13th March 2013 in which he averred that sometime on 2nd September 1981, he registered as a member of the 2nd Defendant/Respondent upon paying membership fee, labour, survey fees and share capital all amounting to Kshs. 6,150/- He further averred that he paid an additional Kshs. 2,000/- on 30th April 1983 as additional capital after which he was issued with a certificate duly signed and stamped by a director of the 2nd Defendant/Respondent. He further averred that the Surveyor of the 2nd Defendant/Respondent showed him the location of his plot on the ground upon which he built a perimeter foundation and slab. He averred that when in February 2013, he went to the plot to commence construction on it he found that his perimeter foundation slab had been demolished and someone had commenced construction thereon. He further stated that upon making enquiries, he was informed that the person building on his plot was the 1st Defendant/Respondent. He stated further that he reported the matter to the area Chief, the DO and directors of the 2nd Defendant/Respondent. He further stated that he asked the 1st Defendant/Respondent to cease construction activities on the plot but that his request was ignored. He confirmed having sent the 1st Defendant/Respondent a demand letter dated 19th February 2013 through his lawyers which was responded to by the lawyers acting for the 1st Defendant/Respondent where he asserted that he was the registered owner of Plot No. 2 and 3 and not Plot No. 17. He insisted that the plot he was given and upon

which he build a foundation slab is the same one that the 1st Defendant/Respondent was constructing on.

The Application is contested. Francis Njagwi Muchai, a partner in the 1st Defendant/Respondent filed his Replying Affidavit sworn on 25th March 2013 in which he averred that his firm registered itself as a member of the 2nd Defendant/Respondent on 22nd February 1977 upon which he made several payments in order to acquire ownership of several plots on L.R. No. 31 Ruaraka. He further averred that one of the plots allocated to his firm was Plot No. 3 whose location is shown in the 2nd Defendant/Respondent's Survey Plan which he attached. He confirmed having fenced that plot and dug a foundation with a view to erect a residential building in future. He further confirmed that he commenced construction thereon in January 2013. He stated that sometimes in February 2013, he received information that the Plaintiff/Applicant had trespassed on to their Plot No. 3 with a view to erecting an illegal structure using their foundation. He reported that matter to the area chief, the DO and the 2nd Defendant/Respondent. He confirmed having received a letter from the Plaintiff's Advocates claiming that he had invaded the Plaintiff's Plot No. 17. He confirmed having instructed his lawyers to respond thereto. He further disclosed that on 14th March 2013, a meeting was held between the Plaintiff/Applicant, himself, the DO Kariobangi, the Chief of Baba Ndogo and the Village Elders at Kasarani whereby the Plaintiff/Applicant was advised to visit the offices of the 2nd Defendant/Applicant so that he could be shown the correct location of his Plot No. 17. He stated further that instead of following that advice, the Plaintiff/Applicant proceeded to file this suit. He further stated that the receipts exhibited by the Plaintiff/Applicant show clearly that Plot No. 17 is not Plot No. 3. He also asserted that it is clear from the 2nd Defendant/Respondent's Survey Map that Plot No. 17 is very far from Plot No. 3.

In response thereto, the Plaintiff/Applicant filed his Supporting Affidavit sworn on 13th June 2013 in which he averred that according to the documents issued to him, his Plot No. 17 is at the location which the 1st Defendant/Respondent alleges to be Plot No. 3. He further added that none of the receipts annexed by the 1st Defendant/Respondent refer to Plot No. 3. He further stated that the Survey Map annexed by the 1st Defendant/Respondent was not signed by the alleged surveyor one George O. Otieno and the person who drew it one Joseph W. Odongo and thus its authenticity was in question. He further stated that the said Survey Map did not also bear the mandatory approvals from the Department of Survey and the Commissioner of Lands or the Planning Department. He also denied having refused to visit the offices of the 2nd Defendant/Respondent to be shown the actual location of his plot on the ground.

The Application was further contested by the 2nd Defendant/Respondent which filed the Replying Affidavit of Festus Wanjohi Rukomia, sworn on 26th January 2015 wherein he stated that he is one of the directors of the 2nd Defendant/Respondent. He averred that according to the records of the 2nd Defendant/Respondent, the plot in dispute in this suit is Plot No. 3 which belongs to the 1st Defendant/Respondent. He annexed a copy of the Certificate of Plot Ownership of Plot No. 3 dated 5th July 1995 issued by the 2nd Defendant/Respondent to the 1st Defendant/Respondent. He further denied that the 1st Defendant/Respondent has trespassed into the Plaintiff's plot. He further asserted that the Plaintiff/Applicant does not know the location of his plot and had not approached the 2nd Defendant/Respondent to help him in the identification of his plot.

The issue that I am called upon to determine is whether or not to issue the Plaintiff/Applicant the restraining orders that he seeks. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, 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.”

Has the Plaintiff/Applicant 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.”

Has the Plaintiff/Applicant made out a prima facie case? In determining whether the Plaintiff/Applicant has established a prima facie case, I must consider whether he has demonstrated his ownership rights over the parcel of land which he claims. This no doubt leads me to an examination of the title documents that he has presented, if any. In this case, there is a question whether or not the parcel of land in dispute is the one being claimed by the Plaintiff/Applicant as Plot No. 17. The 1st Defendant/Respondent has laid claim over the same parcel of land but asserting that it is Plot No. 3. Looking at the documentary evidence adduced by way of affidavit by the Plaintiff/Applicant, none of those documents refer to any particular parcel of land. The documentation is silent on which plot it relates to. However, on the other hand, there has been produced by the 2nd Defendant/Respondent a certificate no. 2128 indicating that the 1st Defendant/Respondent is the registered proprietor of the 1st Defendant/Respondent. This is the Plaintiff/Applicant’s case and it is his burden to prove that he has ownership rights over the parcel in dispute in order to deserve a protective order in the form of a temporary injunction. Overall, the Plaintiff/Applicant has not been able to adduce any evidence, albeit at this interlocutory stage, to demonstrate that he owns the parcel in dispute. Further, the issue of the location Plot No. 17 remains unclear. The upshot of this is that I find that the Plaintiff/Applicant has failed to establish that he has a genuine and arguable case, or a prima facie case with high chances of success at the main trial.

Since the Plaintiff has 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...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

The 1st Defendant also filed a Notice of Motion dated 4th December 2014 seeking for injunctive orders to issue against the Plaintiff who is alleged to be constructing upon the disputed parcel situated in Lucky Summer Estate. Without belaboring the point, I hereby issue an order that neither of the claimants herein shall continue any activity including construction on the disputed parcel of land pending the hearing and determination of this case. It is so ordered.

DELIVERED AND SIGNED IN NAIROBI THIS 27TH DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE

