



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 644 OF 2013

STEPHEN MBUTHIA KIENJEKU..... PLAINTIFF

VERSUS

SIMON MACHARIA NDUHIU.....1ST DEFENDANT

EMBAKASI RANCHING COMPANY LTD.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 29th May 2013 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent.
2. That this court be pleased to grant the Plaintiff an order of injunction against the 1st and 2nd Defendants, their agents, employees and/or servants from trespassing, disposing and interfering with Plot Nos. H324, H324B and H325 Embakasi Ranching, Ruai (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit.
3. That this court do grant an order that the Plaintiff is the owner of the suit properties.
4. That costs be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Stephen Mbuthia Kienjeku, sworn on 29th May 2013 in which he averred that on 13th December 2011 he entered into a sale agreement with the 1st Respondent who sold to him the suit properties at a purchase price of Kshs. 1,800,000/-. He annexed a copy of the said sale agreement. He further averred that the 2nd Respondent’s surveyor confirmed to him the location of the suit properties upon which he took possession of the same. He further averred that the transfer of the suit properties into his name has not yet been effected owing to lack of cooperation from the Respondents.

The Application is not contested. The 1st Respondent, Simon Macharia Nduhiu, filed his Replying Affidavit sworn on 2nd July 2013 in which he averred that he bought 2 shares from the 2nd Defendant Company in the year 1978 upon which he was allocated two plots being Plot Nos. H324 and H325. He

further averred that in the year 1993, he bought two additional plots being Plot Nos. H324B and H325B. He further averred that thereafter, he was informed by the 2nd Defendant's surveyor that those four plots were in a nullified area upon which he was allocated new plots being Plot Nos. 5244, 5345, 5334 and 5335. He further averred that he subsequently met the Plaintiff who was an interested buyer of the plots. He confirmed having received funds from the Plaintiff for the plots and having signed a document surrendering all his rights and interest in the plots to the Plaintiff. He however stated that the 2nd Defendant has never reflected that transfer in their records and stated categorically that he has no interest in the plots having tried his best to assist the Plaintiff transfer them into his name. For the avoidance of doubt, he stated that he has been and is always ready to sign the transfer.

In response thereto, the Plaintiff/Applicant filed his Further Affidavit sworn on 30th July 2013 in which he averred that he is a stranger to the business transactions between the 1st and 2nd Respondent as to the ownership of the suit properties. He confirmed that he became desirous of purchasing the suit properties from the 1st Respondent after checking with the 2nd Respondent to confirm the ownership thereof. He further averred that the 1st Respondent had not demonstrated his desire to transfer the suit properties into his name though he has paid all the requisite transfer fees. He further averred that there was collusion between the two Respondents to delay the transfer thereby depriving him of ownership of the suit properties.

I will first address the prayer for a temporary injunction sought after by the Plaintiff. 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.”

The question whether the Plaintiff/Applicant has demonstrated a genuine and arguable case no doubt leads us to an assessment of the documents of ownership produced by him in this Application. The Plaintiff/Applicant relies on a sale agreement between himself and the 1st Respondent in his claim over the suit properties. He admits that he has not received title documents to the suit properties owing to the lack of assistance from the 1st Respondent. The 1st Respondent on his part admits having sold plots to the Plaintiff but maintains that the plots were not the suit properties but were Plot Nos. 5244, 5345, 5334 and 5335. The 1st Respondent does not therefore oppose the Application. The 2nd Respondent did not bother to file any response to this Application. I am inclined to make a finding in favour of the Plaintiff owing to the admission made by the 1st Respondent. As to the exact plots which are the subject matter of this suit, this is a matter that will await the full trial herein. For now, I make a preliminary finding that the suit properties are the properties the Plaintiff is claiming and that he has demonstrated that he has a prima facie case with high chances of success at the full trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

I further wish to rely on the case of **Jaj Super Power Cash and Carry Ltd versus Nairobi City Council and 2 Others Civil Appeal Number 111 of 2002** (unreported) where the Court of Appeal stated as follows:

“This court has recognized and held that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights. Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

I therefore allow the Application in terms of prayer no. 2. I decline to grant prayer no. 3 which has to await the full trial for a final determination. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE