



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 645 OF 2013

JUDDY MATETAI.....PLAINTIFF

VERSUS

JAMES CHARO.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 30th May 2013 in which the Plaintiff/Applicant seeks for orders of a temporary injunction restraining the Defendant from entering into, chasing away workers, blocking, erecting structures or in any other manner interfering with the Plaintiff's property identified as LR No. 22383 situate in Nairobi (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for an order directing the OCS Kabete Police Station to ensure compliance of those orders and that costs of this Application be in the cause.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Juddy Matetai, sworn on 30th May 2013 in which she averred that she is the registered proprietor of the suit property. She annexed a copy of her title deed. She further averred that on 24th May 2013, she instructed her agents to erect a fence around the suit property to prevent animals from destroying her maize and beans. She further stated that she bought posts and wire mesh and proceeded to the suit property with two agents. She stated that while erecting the fence, the Defendant came and ordered her and her agents to stop digging holes but she insisted and proceeded with the work. She further averred that the Defendant left and returned thirty minutes later with a group of around eight young men who chased her and her agents away after which he pulled down the fence and filled the wholes which had been dug. She added that she promptly reported the matter at Kabete Police Station. She stated further that she did not know the Defendant personally neither did she know what his claim on the suit property was. She further indicated that the conduct of the Defendant amounts to trespass and an affront to her constitutional right to enjoy peaceful and quite possession of her property.

The Application is contested. The Defendant, James Charo, filed his Replying Affidavit sworn on 1st July 2013 in which he averred that he is a civil servant employed by the Public Service Commission and is currently working with the Ministry of Agriculture, Livestock and Fisheries stationed at Kabete Veterinary farm as manager in charge. He further averred of having received information from the

Director of Veterinary Services to the effect that the Kabete Veterinary land belongs to the Government of Kenya and was alienated to the Ministry of Agriculture, Livestock and Fisheries. He further averred that this suit involves the ownership of L.R. No. 189R which belongs to the Government and that the parcel of land over which the Plaintiff claims ownership is the suit property. He further stated that he has no interest in the land as the same belongs to the Government of Kenya. He added that for that reason he should not have been sued in this matter as he is a mere employee of the Government of Kenya. He further stated that the restraining orders sought by the Plaintiff should be directed at the relevant Government Ministry instead. He also pointed out that the land which the Plaintiff claims to be hers has been under the use of the staff members of Kabete Veterinary Farm where they have planted maize, beans and potatoes and that the Plaintiff's claim that she is the one who planted those crops therein is false and misleading. He added that since the Plaintiff had lied to the court under oath, she ought not to be granted the reliefs she seeks from this court. He stated further that the Government had registered a caution against the suit property.

The Plaintiff filed written submissions dated 13th November 2013 and Reply to the Defendant's written submissions dated 18th March 2014 which have been read and taken into account in this ruling. In her submissions, the Plaintiff stated that the suit property is outside the land belonging to the Kabete Veterinary Farm and that she has no claim against the Government of Kenya. She emphasized that her claim is against the Defendant in his personal capacity who trespassed on the suit property.

The issue emerging for my determination is whether or not to grant the 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 her in this Application. The Plaintiff/Applicant relies on a copy of a certificate of title which was annexed to her Supporting Affidavit. The title is issued under the provisions of the **Registration of Titles Act** Cap 281 Laws of Kenya (now repealed). **Section 23(1)** of the **Registration of Titles Act** (repealed) provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer ... shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof ... and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The Land Registration Act No. 3 of 2012 under **section 26(1)** more or less reproduces the provisions of **section 23(1)** of the **Registration of Titles Act** (supra) save that it extends the grounds on which a registered title could be challenged to include where the title has been acquired illegally, unprocedurally

or through a corrupt scheme.

Section 26(1) of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The Defendant/Respondent has challenged the Plaintiff’s certificate of title on the ground that it relates to land owned by the Government of Kenya. However, the Defendant/Respondent has not supported that assertion with any documentary evidence. He has further stated that the parcel of land occupied by the Kabete Veterinary Farm where he works is L.R. No. 189R but still insists that the actual location on the ground is the land which the Plaintiff claims to be the suit property. He argued that the land being claimed by the Plaintiff is land which has been farmed by other members of staff. He has also stated that he has no personal claim over the suit property. As to whether or not the suit property is separate and distinct from the land referred to as L.R. No. 189R, this is a matter to be determined at the main hearing of this suit. However, at this interlocutory stage, I am clear in my mind that the land being claimed by the Plaintiff is the same parcel of land the Defendant is referring to. The Plaintiff has produced her certificate of title to claim the same. The Defendant has produced nothing. That title has not been challenged by the Defendant in any of the ways cited in the laws set out above. No fraud or misrepresentation to which the Plaintiff is proved to be a party has been presented. Further, the Defendant has not challenged the Plaintiff’s title on the ground that the same was acquired illegally, unprocedurally or through a corrupt scheme. To that extent therefore, at this interlocutory stage, I am inclined to believe the Plaintiff’s assertion that she is the registered proprietor of the suit property and do find that she has established a prima facie case with high chances of success at the main 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. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 13TH

DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE