



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 326 OF 2014

JOSEPH GATUBI KARIUKI.....PLAINTIFF /APPLICANT

VERSUS

KIKUYU SUB COUNTY

(formerly Town Council of Kiambu)1ST DEFENDANT/RESPONDENT

GEORGE MWAI MBURU.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff has filed a Notice of Motion dated 14th March 2014, brought under sections 1A,1B 3A and 63(e) of the Civil Procedure Act and Order 40 Rules 10(1)(a) and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks an order for temporary injunction to restrain the Respondents jointly and severally either by their servants, agents or employees or persons acting under their directions or supervisions from trespassing or interfering with tenants in his plot no. 29 originally 25A Kikuyu Kidfarmaco within Kiambu County (herein after referred to as the suit property). The Plaintiff also seeks a further order to restrain the Respondents from interfering in any way with his peaceful occupation and utilization of the suit property or putting up any structures, developments or otherwise any erections on the suit property pending the hearing and determination of this suit.

The application is supported by the Plaintiff's affidavit sworn on 14th March 2014. The Plaintiff's case is that he is the owner of the suit property having purchased the same on 9th June 1998 from John Njoroge who was the registered proprietor. The Plaintiff has contended that following the purchase, he successfully applied for change of ownership to the 1st Respondent through the defunct local authority. A copy of the application for change of ownership dated 9th June 1998, letter of approval dated 13th November 2012 as well as extracts of the minutes of Works, Town Planning and Markets Committee meeting held on 27th September 2012 in which the change of ownership was approved have been annexed as evidence.

The Plaintiff also exhibited payment receipts for rates issued in his name and averred that he applied for building plan and paid to the 1st Respondent an approval fee of Kshs 51,000/-. The Plaintiff contends that the 1st Respondent has all along accepted payments in his name without raising any issue as to ownership and possession of the suit property. The Plaintiff states that on 22nd May 2013, the 2nd Respondent

without any justification unlawfully trespassed on the suit property and demolished the Plaintiff's erected wooden fence and that the 2nd Defendant subsequently fenced off the suit property with iron sheets which prevented the Plaintiff and his tenant from accessing the property.

According to the Plaintiff, the 1st Respondent indicated that it revoked his ownership of the suit property by making alterations to plot numbers such that the Plaintiff's plot is now referred to as plot 29 and not plot no. 25A. A replying affidavit sworn on 26th September 2013 by Stephen Thenya Mwangi the sub-administrator Kikuyu Sub-County in ELC No. 638 of 2013 has been annexed as evidence. The Plaintiff contends that that he learnt from the 1st Respondent that the 2nd Respondent had been allocated the suit plot and further, that his plot was altered and is now referred to as plot no. 29 instead of plot no. 25A.

The Plaintiff avers that the alterations were done discreetly and without his knowledge and states that the renumbering of the plots was irregular since it undermined his legitimate expectation whereas no party had a title to the suit property. The Plaintiff avers that the continued acceptance by the 1st Respondent of payments in the Plaintiff's name for plot no. 25A defeats the legitimate expectation of good governance in the operation of county and sub-county governments.

The 1st Respondent did not file any response to the Plaintiff's application despite having been duly served as evidenced by an affidavit of service sworn by David Kihia Muraya on 12th June 2014. The 2nd Respondent filed a replying affidavit sworn on 15th September 2014 where he denied knowledge of the suit property or that the same belonged to the Plaintiff.

According to the 2nd Respondent, Plot No. 25A does not exist since it was among plots which the 1st Respondent's predecessors resolved to revoke in a meeting held on 2nd June 1999 as per extracts of minutes of the Works, Planning and Markets Committee of the Town Council of Kikuyu dated 2nd June 1999 annexed to the 2nd Respondent's affidavit and marked "GMM 1"

The 2nd Respondent's case is that he purchased plot no. 29 Kikuyu Kidfarmaco from John Muchiri Mbiriri on the terms and conditions set out in the copy of sale agreement dated 6th June 2011 annexed and marked "GMM 2". While stating that plot no. 29 was legally transferred to him following the purchase, the 2nd Respondent has annexed as evidence a letter dated 18th December 2012 from the Town Council of Kikuyu approving the change of ownership to him. He also exhibited extracts of minutes of meetings held on 10th May 2012 by the full Town Council of Kikuyu and the Works, Town Planning and Markets Committee approving the change of ownership as well as payment receipts issued by the Town Council of Kikuyu in respect to plot no. 29.

The 2nd Respondent further exhibited a map of the area and averred that there is no plot no. 25A. The 2nd Respondent exhibits a letter dated 22nd May 2013 issued by the 1st Respondent confirming his ownership of plot no. 29 and contends that the Plaintiff's claim to his plot is unfounded and states that the Plaintiff's recourse lies in seeking compensation from the person who sold the plot no. 25A to him which does not exist.

According to the 2nd Respondent, no irreparable loss would be suffered by the Plaintiff since the value of the plot can be compensated in damages. Lastly, the 2nd Respondent averred that the instant suit and application were irregular since they were filed when HCCC No. 638 of 2013 was still pending and that the Plaintiff was engaging in parallel litigation over the same subject matter.

The application was canvassed by way of written submissions. The Plaintiff filed submissions dated 28th October 2014 where he reiterated the facts of the case as pleaded and argued that there was a variance regarding the 1st Respondent's records as to the proper position of the suit property. It is the Plaintiff's submission that the minutes of 2nd June 1999 that allegedly revoked the suit property were signed by the Town Clerk, Mr. Wanyoike, who also signed the minutes of 13th November 2011 approving the transfer

of plot no. 25A.

The Plaintiff submits the revocation constituted a breach of trust and legitimate expectation and the Plaintiff's Counsel argued that the 1st Respondent failed to communicate the revocation to the Plaintiff and continued to receive payment of rates for the plot and approved building plans while knowing that the plot was nonexistent. Further, the Plaintiff submitted that there were no parallel proceedings since suit no. 638 of 2013 was withdrawn on 3rd April 2014 for reasons that it had been filed by an advocate who was not qualified.

Counsel submitted that the Plaintiff was already on the suit property by the time the 2nd Respondent sought to interfere with his occupation and utilization of the suit property. It is the Plaintiff's submission that he has a justifiable claim arising from the irregular change of his plot from plot 25A to 29 and he is apprehensive of an intended and threatened eviction. On the facts, the Plaintiff submits that he has a prima facie case and would suffer irreparable harm if the injunction sought is not granted.

The Plaintiff submits that he stands to be greatly prejudiced if he is evicted as he had developed wooden rental structures on the sui property. It was submitted that the 2nd Respondent slept on his right since he acquired the property in 2011 and only attempted eviction in May 2013. Lastly, Counsel stated that the balance of convenience tilts in favour of issuing an injunction since there are serious issues that necessitate a hearing.

The 2nd Respondent filed submissions dated 6th November 2014 where he argued that the Plaintiff had not placed sufficient material before the court to satisfy the conditions for grant of the relief sought as set out in the case of **Giella -vs- Cassman Brown(1973)EA358**. Counsel submitted that the Plaintiff's documents were in reference to plot no. 25A and that no document supported the allegation that the Plaintiff owned plot no. 29. It is the 2nd Respondent's submission that whereas the Plaintiff sought restraining orders against plot no. 29, no documents showing the nexus between plot no. 25A and 29 had been tendered.

It was also submitted that sufficient material to confirm and establish that the 2nd Respondent was the owner of plot no. 29 had been tendered. Counsel argued that since the Plaintiff had not questioned the authenticity of the 2nd Respondent's documents, no prima facie case had been established against the Respondents. It was further submitted that the Plaintiff had not questioned the 2nd Respondent's resolutions. Counsel contended that the orders sought cannot be issued since they would reverse the 2nd Respondent's resolutions whereas no such matters had been pleaded and therefore, that the court cannot grant relief on matters not pleaded.

Lastly, it was submitted that the Plaintiff had not pleaded that he would suffer loss which cannot be compensated by damages or that the Respondents were not in a position to make compensation for the value or loss of plot no. 25A if found liable.

The issue for determination is whether the Plaintiff has fulfilled the conditions for grant of a temporary injunction to enable the court to exercise its discretion in his favour. The Plaintiff has shown how he acquired plot no. 25A in 1998. He however claims that following alterations of the numbering of plots by the 1st Respondent, his plot is now referred to as plot no. 29. This claim has been highly contested by the 2nd Respondent who has sought to show how he acquired plot no. 29 in 2011. In my view, parties herein are contesting the location of their respective plots with each party laying prove that their ownership was approved by the Works, Planning and Markets Committee of the Town Council of Kikuyu on varying dates.

A review of the documents tendered by both the Plaintiff and the 2nd Defendant/Respondent shows that the 1st Defendant sanctioned the transfer of plot no. 25A to the Plaintiff and further, that the said 1st Defendant approved a revocation of plot no. 25A among other plots but the same council meeting of 2nd June 1999 also adopted a new plan of the area which may have changed the plot numbers. Were the

owners of the revoked plots notified of the revocations? There is no evidence that they were and in my view, they are entitled to know what became of their plots.

The 1st Respondent who is the successor of the Kikuyu Town Council which made the allocation to the parties has not filed any response to shed light on the dispute herein. A full trial will be necessary to determine whether plot no. 25A is the same as plot no. 29 and the rightful owner thereof. It has been held in the case of **Shivabhai Patel -vs- Manibhai Patel (1959)EA 107** that it is not only right that the court should attempt to preserve property which may be in issue, but that the court has a clear duty to do so. In the present matter, I am of the opinion that the suit property should be preserved. In order to preserve the suit property, the existing status quo where the Plaintiff is in occupation shall be maintained. The Plaintiff shall however not effect any further constructions until the suit is determined. Parties are also directed to comply with Order 11 of the Civil Procedure Rules and have the matter fixed for pre-trial conference within 60 days. I order the costs of the application to be in the cause.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI

THIS5th..... DAY OFFebruary.....2015

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendants