



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1273 OF 2013

MARY TERESA WACHIRA.....PLAINTIFF

VERSUS

EMBAKASI RANCHING COMPANY LTD.1ST DEFENDANT

FESTUS NJOGAH KIMANI.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 22nd October 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from entering, occupying, destroying, erecting structures, selling, transferring or in any way dealing with the property identified as Plot Number P.5938 and or Plot No. 1309 in Ruai estate, Embakasi (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Mary Teresa Wachira, sworn on 22nd October 2013 in which she averred that sometimes in the year 1994 she purchased Plot No. P.5938 from one Rose Wothaya Gachanja, the original allottee of the said plot from the 1st Defendant. She further averred that the said transfer was approved of by the 1st Defendant and that she was issued with a new Share Certificate No. 810 in her name in respect of Plot No. P.5938. She annexed a copy of that Share Certificate. She further averred that the 1st Defendant showed her the physical location of the said plot and she proceeded to take possession sometimes in the year 1995. She further intimated that the 1st Defendant reassured her that it was in process of obtaining the title deed for the said plot among others. She then confirmed that since 1995 to date she has enjoyed quiet possession of the said plot after fencing the same and building a site office thereon. She further averred that sometimes in July 2013, some unknown people pulled down the site office and fence on the said plot, which she reported to the police. She further stated that upon making enquiries with the 1st Defendant, she came to learn that the 1st Defendant had sold the said plot to the 2nd Defendant while referring to it as Plot No. 1309. She further stated that the 1st Defendant offered to show another plot of land far from the said plot. She added that she is one of the few people yet to develop their plots in the said area and the 1st Defendant is now hoping to unlawfully and unjustly deprive her of the said plot and sell the same to third parties offering more money. She further added that sometimes in October 2013, the 2nd Defendant found her in the said plot and threatened to physically assault her with the sole intention of harassing her and forcefully and irregularly removing her from the said plot.

The Application is not contested.

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 sale agreement dated 2nd September 1994 between herself and one Rose Wothaya Gachanja in her claim over the suit property. She further relies on a Share Certificate No. 810 issued by the 1st Defendant which indicates that there was a transfer of Plot No. P.5938 from the said Rose Wothaya as the Transferor to the Plaintiff/Applicant. The Plaintiff/Applicant has conceded that she does not yet hold a proper title deed for the said plot as the same is still being pursued by the 1st Defendant. The Plaintiff’s claim over the suit property remains unchallenged by either of the Defendants. For now, I make a preliminary finding that the Plaintiff has demonstrated that she 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. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 20TH

DAY OF MARCH 2015.

MARY M. GITUMBI

JUDGE