



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 902 OF 2013

STEPHEN WANJOHI NJOROGE.....PLAINTIFF

VERSUS

LILIAN WAMAITHA KAMAUDEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 24th July 2013 in which the Plaintiff/Applicant seeks for orders of a temporary injunction restraining the Defendant from trespassing, occupying or transferring the plot of land formerly known as Plot No. 480B and now known as Plot 445 hived out of L.R. No. 8788/6 Kasarani (hereinafter referred to as the “suit plot”) 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/Applicant, Stephen Wanjohi Njoroge, sworn on 24th July 2013 in which he averred that he is the owner of the suit plot having purchased it way back in 1980 from a company known as Ngara Mucokaniriria Company Limited. He further averred that he was issued with a Share Certificate No. 139 which indicates that he was allocated Plot No. 480B. He produced a copy of that share certificate. He further averred that in the year 1996 when he went to develop the plot, he found another person there on who claimed to be the lawful allottee. He further averred that he returned to the said company to inquire of this anomaly but was informed that a fresh survey had been done in the year 1994 and his plot No. 480B was renumbered to Plot No. 445 and allocated to another person known as Willie Kamau Mutaru. He further averred that the Defendant/Respondent stopped him to gaining access to the suit plot claiming to have inherited it from her late husband, Willie Kamau Mutaru.

The Application is contested. The Defendant, Lillian Wamaitha Kamau, filed her Replying Affidavit sworn on 8th August 2013 in which she averred that she is the registered proprietor of the parcel of land known as Ruiru/Kiu Block 12/445 which was leased to her by the Government of Kenya under Certificate of Lease dated 5th March 2004. She produced a copy of her certificate of lease. She averred further that she was registered as the proprietor of the said parcel of land on first registration and that there is no claim by anybody else on the same property. She confirmed that she has been paying the required land rent on the same property. She further stated that initially, that parcel of land had been registered in the books of the company known as Ngara Mucokaniriria Company Limited in the name of her late husband

Willie Kamau Mutaru who later transferred it to her by virtue of Clearance Certificate issued by the said company dated 20th December 1995. She further indicated that she is not aware that her parcel of land has ever been known as Plot No. 480B and that she is a stranger to this claim. She further stated that the Plaintiff/Applicant has on several occasions tried to interfere with her said property but that she has at all times restrained him and he is only a trespasser while she is the owner of that property.

In response thereto, the Plaintiff/Applicant filed his Further Supporting Affidavit sworn on 3rd September 2013 in which he averred that he purchased the suit plot way back in 1980 but was unable to pursue the title from the Government or to develop it due to financial constraints. He further stated that the Defendant's claim that she leased the land from the Government of Kenya does not mean that she is the rightful owner thereof as the land belonged to him.

Both parties filed their respective written submissions which have been read and taken into account in this ruling.

The Plaintiff/Applicant seeks for a temporary injunction in respect of the suit plot. In deciding whether to grant the temporary injunction sought after by the Plaintiff, 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 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.”

Looking at the facts of this case, the Plaintiff asserts that he is the owner of the suit plot which the Defendant is trespassing upon. The Plaintiff asserts that he purchased Plot No. 480B from Ngara Muchokaniriria Company Limited and was issued with a Share Certificate, a copy of which he produced. Indeed, the Share Certificate bears “Plot No. 480B” on the face of it. The Plaintiff goes on to claim that after a fresh survey was done by that company, his plot of land was renumbered to Plot No. 445. This claim that the suit plot was renumbered is unsubstantiated and unsupported by any evidence. The Plaintiff also saw it fit not to sue the company which would have shed more light to this renumbering exercise. Hence, as at this stage, this court is not convinced of the change in the numbering of the suit plot. It is therefore not clear whether the parcel of land the Plaintiff is claiming is in fact the same parcel of land which the Defendant claims ownership of. On the other hand, the Defendant has submitted that Plot No. 445 was purchased by her late husband, Willie Kamau Mutaru, from the same company. She then averred that her late husband transferred that plot to her and that she later obtained a Certificate of Lease over that plot in her name. To support her assertion, she produced to this court a copy of her Certificate of Lease for Ruiru/Kiu Block 12/445. **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.”

Going by this legal provision, this court is duty bound to hold that the Certificate of Lease produced by the Defendant is prima facie evidence that the person named as the proprietor, in this case the Defendant/Respondent, is the absolute and indefeasible owner of the property and that the title of such a proprietor shall not be subject to challenge except on the grounds given. While the Plaintiff did mention in its submissions that the Defendant/Respondent's title was obtained through fraud, this has neither been specifically pleaded nor proved. Further, no evidence is adduced to show that the Defendant/Respondent was party to such fraud, if any. Furthermore, no evidence has been adduced so far by the Plaintiff to show the nexus between the suit plot or plots and the parcel of land identified as Ruiru/Kiu Block 12/445. Arising from the foregoing, I find that at this interlocutory stage of these proceedings, the Plaintiff has failed to establish 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.

DELIVERED AND SIGNED IN NAIROBI THIS 20TH DAY OF MARCH 2015.

MARY M. GITUMBI

JUDGE