



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENTAL & LAND DIVISION
ELC CASAE NO. 1531 OF 2014

DOROTHY KAMAAN.....PLAINTIFF

-VERSUS-

ELVIS WACHIRA MARANGA.....DEFENDANT

RULING

1. On 11th March, 2015 at the conclusion of the brief hearing and submissions by the parties on the application dated 8th December, 2014, I dismissed the same. I was satisfied that the application did not merit the granting of an injunction at the interlocutory stage and I now give my brief reasons.
2. To be entitled to an injunction the plaintiff needed to satisfy the conditions outlined in the case of **Giella –v- Cassman Brown & Co. Ltd [1973] EA 356**. Besides the conduct of the Plaintiff also needs to be considered as injunction are equitable reliefs and conduct is always critical in equity, if not just relevant.
3. The simple view I took is that the Plaintiff on the basis of the documents availed did not satisfy me that she had made out a prima facie case with the chances of success as required under the first of the three conditions stated in the **Giella –v- Cassman** case. I held the view as the plaintiff laid ownership on only two documents. Firstly the plaintiff submitted that she bought the property from one Stephen Otieno in November 2014. The Plaintiff attached a copy of the Sale Agreement. The purchase was also accompanied with a power of Attorney. The power of Attorney was attached to the supporting affidavit. Also attached were rates payment receipts.
4. On the other hand the Defendant also allegedly bought the suit property being plot No. 88 from one Stephen Daniel Otieno Ogada who has sworn an affidavit to like effect. The sale to the Defendant was in the year 2008. The Defendant has attached documents as well as a sale agreement in support of the contention that it bought the property.
5. Curiously both the Plaintiff and the Defendant have annexed allotment letters from the Nairobi City Council indicative of the fact that the property was allotted to them in the year 2003. To be more precise, both letters which are identical in all respects save the names of the allottees are dated 17th July, 2003. In both cases there is no evidence that the original owner whether it is Stephen Otieno or Stephen Daniel Otieno Ogada ever surrendered the original letter of allotment or the property itself to the County government who is the holder of the title paramount. It is difficult to understand how the said owner Mr.

Stephen Otieno or Stephen Daniel Otieno Ogada could have sold the property and surrendered the original allotment letter to the Plaintiff or to the Defendant and the Plaintiff as well as the Defendant issued with a fresh allotment letter.

6. Conveyance practice does not allow that. In the circumstances it is not difficult to end up with the inference, which is plausible in the circumstances, that both the Defendant as well as the Plaintiffs are wrong and equally to blame. None can safely say that his or her respective title in the form of the documents cannot be impeached. In the circumstances too, as it was for the Plaintiff to prove a prima facie case and she has not done so, she has to fail as far as the application for injunction is concerned.

7. I would also then state that I arrived at my *ex tempore* decision by invoking the latin maxim “*pari delecto, potior est conditio possidentis*”. This maxim stands for the saying “where both parties are equally to blame or wrong, the person who is in possession of the suit land will retain possession”. In the instant case, both parties appear to share an equal blame: no proper documentation that can assist the court trace the root of title has been availed. At this interlocutory stage both parties appear culpable as far as documentation is concerned and yet that is what is critical when one is dealing with unregistered land. The result would be that the court should not engage in finding that one has a case warranting an answer by the other. I am unable to find that the plaintiff has a prima facie case. For that reason and following on the aforestated maxim, I return the verdict that the possessor’s condition and status is currently better and ought not to be interfered with.

8. As already admitted the Defendant is in possession and he will have the benefit of the maxim so long as this suit remains unresolved. I am unable also to find that the Plaintiff will not be compensated adequately in damages should the Plaintiff succeed ultimately at trial. Unique as land may be, the same could be easily valued in the circumstances of this case and payments effected by the Defendant.

9. I needed not consider the balance of convenience as I was under no doubt that the Plaintiff’s case for an injunction had not been made out.

10. Perhaps, I may add that either of the parties should move with expedition and join the alleged vendors who are readily available. One sold the property hardly four months ago whilst the other just swore an affidavit in opposition to the application for injunction. They ought to be joined to these proceedings as should the County Government of Nairobi. This will help the court determine the case with all facts before it.

11. I made no orders as to costs and there will still be no order as to costs.

Dated, signed and delivered at Nairobi this 12th day of March, 2015.

J. L. ONGUTO

JUDGE

Read in the presence of:-

Mr. Kahuthu for the Defendant

No appearance for the Plaintiff