



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 568 OF 2014

ABDULLAHI ISAK IDOW.....PLAINTIFF

VERSUS

HABIBA HUKA GEDO.....1st DEFENDANT

BAKASI ENTERPRISES LTD.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 9th May 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from further trespassing on, transferring, building, developing, wasting alienating or dealing with the property known as Plot No. 41 (Original Number 43) within L.R. No. 25513, 25514, 25515, 25521, 25522 and 25529 situated within Embakasi, Pipeline Estate (herein after referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff also seeks for the costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Abdullahi Isak Idow, sworn on 9th May 2014 in which he averred that he is the legal owner of the suit property having bought it from the 2nd Defendant at a cost of Kshs. 267,000/- and having been in possession thereof for over 9 years. He annexed the Agreement for Sale dated 1st April 2005. He further averred that the 1st Defendant, who is his ex-wife, has trespassed on the suit property and is continuing construction thereon with her new husband and agents without his permission. He added further that the 1st Defendant even assaulted him and his workers using crude weapons causing a breach of peace. He stated further that the 1st Defendant’s actions are unlawful and have subjected him to untold suffering, prejudice, loss and damage.

The Application is contested. The 1st Defendant, Habiba Huka Gedo, filed her Replying Affidavit sworn on 11th July 2014 in which she averred that the Plaintiff did not buy the suit property as the alleged Agreement for Sale he relied on does not mention the plot number purported to have been purchased. She further stated that the deposit slips and receipts annexed by the Plaintiff date back to the years 2004 and 2005 yet the Plaintiff states that he fully paid for the suit property on 1st April 2005. Further, the 1st Defendant averred that in fact, she is the legitimate owner of the suit property having bought the same from the 2nd Defendant at Kshs. 270,000/- on or about 1st August 2005. She annexed her Sale Agreement

dated 1st August 2005. She further averred that she was subsequently issued with a Certificate of Ownership of the suit property by the 2nd Defendant on 20th February 2010, a copy of which she annexed. She added that the Plaintiff has not annexed any document supporting his alleged ownership of the suit property and has never been in possession thereof. She confirmed that she is the one in possession of the suit property and has commenced some construction activities thereon and further refuted the Plaintiff's claim of being in possession of the suit property.

In response thereto, the Plaintiff filed his Further Affidavit sworn on 9th September 2014 in which he averred that his Agreement for Sale was genuine. He further added that he commenced payment for the suit property in the year 2004. He stated that the 1st Defendant had not shown any evidence of payment for the suit property. He further added that the Sale Agreement exhibited by the 1st Defendant is a forgery due to the fact that no firm of Anthony Burugu & Co. existed on 1st August 2005 to draft it. He added further that the said Mr. Anthony Burugu disowned that Sale Agreement. He also stated that the Certificate of Ownership produced by the 1st Defendant could also not be genuine as the 1st Defendant had not demonstrated that she paid for the suit property and survey fees. He further insisted to being in possession of the suit property which he averred he has developed partly. He also denied having assaulted the 1st Defendant.

In response, the Plaintiff/Applicant filed a Supplementary Affidavit sworn on 27th February 2015 in which he produced his Certificate of Ownership for the suit property issued by the 2nd Defendant.

Both the Plaintiff/Applicant and the 1st Defendant/Respondent filed their written submissions which have been taken in to consideration in this Ruling.

The main issue for my consideration is whether or not to grant the Plaintiff/Applicant with a temporary injunction pending the hearing and determination of this Application and suit. 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.”

In determining whether the Plaintiff/Applicant has a genuine and arguable case, this court must consider the documents produced by him in support of his claim of ownership of the suit property. The first document that the Plaintiff/Applicant produced is a Sale Agreement dated 1st August 2005 between Bakasi Enterprises Ltd and the Plaintiff/Applicant. The property indicated in that Sale Agreement as being sold was named “Plot No. OC8 within L.R. No. 25513, 25514, 25515, 25521, 25522 and 25520 Embakasi”. Further, the same Sale Agreement indicated the registered owners of that property as being one Amin Sherali Mawani and another Asmat Amani Mawan. No explanation was given as to the relationship between these two individuals and Bakasi Enterprises Limited. The other document relied upon by the Plaintiff/Applicant to lay claim over the suit property is a copy of a Certificate of Ownership

issued by Bakasi Enterprises Limited. The 1st Defendant also claims to own the suit property and produced a Sale Agreement dated 1st August 2005 as well as a Certificate of Ownership issued by Bakasi Enterprises Ltd.

To begin with, it is not clear which parcel of land is the subject matter of this suit. The reason for this is that it is not clear where the suit property is located and how it is identified. It is stated to be Plot No. 41 (Original Number 43) within L.R. No. 25513, 25514, 25515, 25521, 25522 and 25529 situated within Embakasi, Pipeline Estate. That description brings confusion as to how it is possible for a single plot of land to be located within 6 different parcels which bear land reference numbers. The second thing that raises doubt in the mind of the court is the Sale Agreement relied upon by both the Plaintiff and the 1st Defendant. The Plaintiff's Sale Agreement refers to a parcel of land known as "Plot No. OC8 within L.R. No. 25513, 25514, 25515, 25521, 25522 and 25520 Embakasi". It also states that the registered owners of that property as being one Amin Sherali Mawani and another Asmat Amani Mawan. It is therefore not clear how the stated parcel of land relates to the suit property and the relationship between the named persons and the 2nd Defendant Bakasi Enterprises Limited. Further, the Certificate of Ownership produced by the Plaintiff/Applicant appears to have been obtained after the filing of this suit. Even if it was not, it is not clear how the same is being issued by Bakasi Enterprises Ltd yet it is alleged that the registered proprietors are the two named individuals Amin Sherali Mawani and Asmat Amani Mawan. In these circumstances, the Plaintiff/Applicant has not demonstrated that he has a "prima facie" case with high chances of success at the main trial.

Since the Plaintiff/Applicant 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..."

Arising from the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 15TH DAY OF MAY 2015.

MARY M. GITUMBI

JUDGE