



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 899 OF 2013

JULIA MUTHONI NYAMU.....PLAINTIFF

VERSUS

MAHIIRA HOUSING COMPANY LIMITED.....DEFENDANT

RULING

The Plaintiff in a Notice of Motion dated 23rd July 2013 is seeking orders of a temporary injunction restraining the Defendant from evicting her from the parcel of land known as Plot No 225 within L.R. No. 10901/36 (hereinafter referred to as the suit property), or from demolishing or fencing in her buildings or interfering with her possession of the same, or alienating transferring, disposing off or dealing with the suit property in any manner whatsoever pending the hearing and determination of this suit.

The Notice of Motion is supported by an affidavit and further affidavit sworn by the Plaintiff on 23rd July 2013 and 2nd September 2013 respectively. She states therein that she bought the suit property in 1987, and she attached a plot certificate issued to her by the Defendant with respect to the suit property on 3/8/1987, and receipts for the payments made with respect to the said plot. She further stated that she commenced construction of a permanent structure on the suit property in January 2013, whereupon strangers came to the property claiming to own it. Further, that the Defendant has written to her disowning that she is the legal owner of the suit property and threatening to evict her from the same.

The Defendant opposed the Plaintiff's Notice of Motion in a replying affidavit sworn on 14th August 2013 by Peter Githuka, the Defendant's Director and Treasurer. He stated that property referred to by the Plaintiff is the property L.R No. RUIRU KIU BLOCK 10(Mahiira)/45 which is duly registered under the repealed Registered Land Act in the name of the Beatrice Waceke Ndungu, and that a title deed has been issued to her. Further, that there are resolutions governing the farms at L.R. No. 10901/36 and L.R No. 10901/37 at Mahiira passed by the Company on the 5th November 1986 where it was resolved as follows:-

- a. That any purchaser and/or member who purchases a plot in either of the properties and fails to pay the purchase price in full and/or remain in debt for a period of four(4) years from the date of purchase, such a person or persons shall lose the plot and the purchase price refunded in full.
- b. That if any purchaser purchasing a plot does not occupy or develop the same within a period of eight years from the date of purchase then the purchaser shall have no claim.

The deponent attached a copy of the said minutes and of the title issued to Beatrice Waceke Ndungu on 13th June 2012 with respect to RUIRU KIU BLOCK 10 (MAHIIRA)/45.

The parties were directed to file written submissions, which they relied upon for the ruling herein. The Plaintiff's counsel in submissions dated 11th September 2013 argued that the Plaintiff has produced

documents that shows that she bought the suit property from the Defendant and was issued with a plot certificate, and has thus exhibited a triable case. Further, that she has put up a structure on the suit property and will therefore suffer irreparable loss if the structure is not protected, and the balance of convenience tilts in her favour as a result. The counsel relied on various judicial authorities in this regard.

The Plaintiff's counsel also challenged the validity of the minutes produced in evidence by the Defendant, and submitted that they were not signed by all members entitled to notice, and were not communicated to the Defendant's shareholders. Lastly, the counsel also challenged the validity of the title issued by the Defendant with respect to the suit property, and submitted that it was fraudulently issued as the said property was already owned by the Plaintiff.

The Defendant's counsel filed submissions dated 2nd October 2013 and argued that the tests set out in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** for the grant of an injunction had not been met. Further, that the Plaintiff has not shown a *prima facie* case as the suit property is non-existent and is now registered as L.R No. RUIRU KIU BLOCK 10 (Mahiira)/45, and the title deed issued to Beatrice Waceke Ndungu.

Further, that the Plaintiff had not brought any evidence of her payments for the suit property in accordance with the Defendant's resolutions, or of a letter of allocation or title issued to her. The counsel relied on **Njilux Motors Ltd. vs Kenya Power & Lighting Co Ltd, (2000) 2 E.A. 466** and **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** in this respect. The counsel also argued relying on the decision in **Pioneer General Assurance Society Ltd & Another vs Aulfikarali Nimji Javer & Others, Nairobi High Court Case No. 120 of 1999** that the 1st Defendant had acted within its Memorandum and Articles of Association and their acts were *intra vires*.

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of a plot certificate dated 3rd August 1897 issued to her by the Defendant with respect to the suit property as her evidence of ownership. She also brought evidence of her payments for the suit property. The Defendant has on the other hand brought evidence of a title deed issued to the one Beatrice Waceke Ndungu with respect to L.R No. RUIRU KIU BLOCK 10(Mahiira)/45 which it claims to be the suit property, and which is not disputed by the Plaintiff.

I note that the Plaintiff in her Complaint dated 23rd July 2013 is seeking a declaration that she is the lawful owner of the suit property, and I find that she has not established a *prima facie* case in this regard, as there is already a title issued with respect to the suit property to a third party. I am in this respect guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation a party who has been issued with a good title takes precedence over other equitable rights to the title.

The issue of whether the title issued by the Defendant with respect to the suit property is good title will have to be determined after full trial. Likewise, the issue raised as to whether the resolutions and decisions made by the 1 Defendant were valid can only be determined after the court has had the benefit of examining further evidence. However, these findings notwithstanding, I note that there are structures built on the suit property by the Plaintiff, and there will be irreparable damage caused if the said structures are demolished pending the hearing and determination of the suit herein. It is thus in the interests of justice that the said structures are protected.

The Plaintiff's Notice of Motion dated 20th May 2013 is accordingly only allowed to the extent of restraining the Defendant, its agents, servants or assigns from demolishing any structures constructed by the Plaintiff on the parcel of land known as Plot No 225 within L.R. No. 10901/36 and/or L.R No. RUIRU KIU BLOCK 10(Mahiira)/45 pending the hearing and determination of this suit or until further orders.

The costs of the Plaintiff's Notice of Motion dated 23rd July 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____28th____ day of ____January____, 2014.

P. NYAMWEYA

JUDGE