



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 722 OF 2013**

**OLIVER NDUNGU CHEGE.....PLAINTIFF**

**VERSUS**

**JOHN KAMAU .....1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING CO. LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

This ruling is on the Plaintiff's Notice of Motion dated 19<sup>th</sup> June 2013 seeking orders of a temporary injunction restraining the Defendant from trespassing and taking possession, commencing construction and continuing to construct, destroying the maize and beans crops and/or in any way dealing with the parcel of land known as Plot No. P 2959 on map C 1188 situated on Embakasi Ranch in Ruai (hereinafter referred to as the suit property), pending the hearing and determination of this suit.

The Notice of Motion is supported by an affidavit and supplementary affidavit sworn by the Plaintiff on 19<sup>th</sup> June 2013 and 23<sup>rd</sup> August 2013 respectively. The Defendant response is in a replying affidavit and further affidavit he swore on 1<sup>st</sup> July 2013 and 30<sup>th</sup> September 2013 respectively.

The Plaintiff and 1<sup>st</sup> Defendant both claim to be the owners of the suit property. The Plaintiff claims that the suit property is plot P2959 on Map C 1188, and he claims to have bought the plot in 2002 for Kshs 250,000/= from one Anastacia Kanini Kitheka, the wife of the original allottee, Simon Kitheka Mutiso, who was deceased. Further, that he followed all the laid down procedures of the 2<sup>nd</sup> Defendant which were detailed in his affidavits, and was issued with certificate of ownership by the 2<sup>nd</sup> Defendant with respect to the said plot, which he attached. He also attached the original allotment documents to the said Simon Kitheka Mutiso, and receipts for fees paid to the 2<sup>nd</sup> Defendant.

The Plaintiff claims that on 17<sup>th</sup> June 2013 the Defendant cause his maize and beans crops on the said plot to be destroyed, and started depositing buildings material on the said plot. Further, that he reported the matter to the police, and the Defendant was arrested and charged with the offence of malicious damage to property.

The Defendant also lays claim to the suit property. He states that the suit property is Plot V6542 (C1118) within Embakasi Ranching Company, and that he is the owner thereof, having purchased the suit for Kshs 470,000/= from the previous owner, Regina Wairimu Magwa, on 12<sup>th</sup> April 2011, and having been issued with a non-member certificate of plot ownership by the 2<sup>nd</sup> Defendant on 17<sup>th</sup> August 2011. He attached the said certificate of ownership and the payment receipt, as well as receipts of fees paid to the 2<sup>nd</sup> Defendant.

The 1<sup>st</sup> Defendant claimed that the Plaintiff started constructing on the suit property in October 2011, even after being asked by the police to cease. Further, that upon inquiry from the 2<sup>nd</sup> Defendant, it was confirmed that the 1<sup>st</sup> Defendant is the bona fide owner of the said plot in a letter dated 6<sup>th</sup> June 2013, which letter was attached. The 1<sup>st</sup> Defendant stated that he thereupon deposited building materials on the plot in readiness for construction of a house thereon.

The 2<sup>nd</sup> Defendant did not respond to the Plaintiff's Notice of Motion.

The parties were directed to file written submissions. The Plaintiff's counsel in submissions dated 23<sup>rd</sup> August 2013 reiterated the arguments made in their pleadings, and stated that the Plaintiff has been in occupation of the suit property since 2002, and stands to lose immensely unlike the Defendant who has never been possession, and therefore has a *prima facie* case. Further, that the transfer of the suit property by the widow of the original allottee was governed by the 2<sup>nd</sup> Defendant's by-laws.

The 1<sup>st</sup> Defendant's counsel filed submissions dated 30<sup>th</sup> September 2013. He argued therein that the Plaintiff had not demonstrated that the person who sold to him the suit property was the legal representative of the estate of Kitheka Mutiso, and that the law governing the estate of a deceased person is exclusively that laid down in the Law of Succession Act. Further, that the alleged wife of the deceased therefore had no capacity to vest any legal or equitable rights in the suit property. The counsel relied on the decision in **Onyuka vs Migwalla (2005) e KLR** in this respect.

The counsel also argued that the 1<sup>st</sup> Defendant was an innocent purchaser for value without any notice of any irregularity regarding the title to the suit property, and that the 1<sup>st</sup> Defendant's equitable rights ranked in priority to the Plaintiff's who obtained his certificate of ownership after the 1<sup>st</sup> Defendant's. Lastly, that the Plaintiff has not demonstrated a *prima facie* case or any loss that he is likely to suffer as the suit property is vacant.

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. It is evident that this is a situation of double allocation of the suit property, and neither the Plaintiff nor the 1<sup>st</sup> Defendant have any legal title to the suit property. The Plaintiff has provided evidence of a plot certificate issued to him by the 2<sup>nd</sup> Defendant with respect to the suit property as his evidence of ownership. The said certificate appears to have been issued in April 2012. He also brought evidence of payments for fees due to the 2<sup>nd</sup> Defendant. He did not bring any evidence of the payment he alleged he made to purchase the property of Kshs 250,000/=.

The 1<sup>st</sup> Defendant has brought evidence of his payment for the suit property of Kshs 470,000/=, in addition to the payment of fees due to the 2<sup>nd</sup> Defendant. He has also brought evidence of a certificate of ownership issued to him by the 2<sup>nd</sup> Defendant on 17<sup>th</sup> August 2011. I find in this regard that the 1<sup>st</sup> Defendant's equitable rights to the suit property in the circumstances not only rank in priority as he was issued with a certificate of ownership before the Plaintiff, but are also supported by evidence of payment for the suit property. The Plaintiff in addition did not bring any evidence of a sale agreement entered into by the legal representative of the deceased Simon Kitheka Mutiso, whose plot he alleged to have bought.

I therefore find that the Plaintiff has not established a *prima facie* case and his Notice of Motion dated 19<sup>th</sup> June 2013 accordingly fails. The Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_29<sup>th</sup>\_\_\_\_ day of \_\_\_\_January\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**