



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 202 OF 2013

VIRGINIA KATHAMBI MAINGI.....PLAINTIFF

VERSUS

NICHOLAS MWATIKA MULEI.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 5th February 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from transferring, disposing off or in any other manner interfering with the parcel of land known as L.R. No. 337/935 located in Mavoko (hereinafter referred to as the “Suit Land”) pending the hearing and determination of this Application and suit together with costs.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Virginia Kathambi Maingi, sworn on 5th February 2013 in which she averred that she is the duly registered proprietor of the Suit Land. She produced a copy of her certificate of title. She further averred that the Suit Land was initially allocated to her as an unsurveyed commercial plot measuring 0.187 Ha vide Letter of Allotment dated 2nd January 1997. She produced a copy of the said Allotment Letter. She further averred that the unsurveyed plot was subsequently surveyed and an indent for the same issued. She further stated that a deed plan thereof was issued on 23rd August 2002. She further stated that she has been paying all outgoings for the Suit Land to the Government of Kenya. She then stated that when she proceeded to develop the Suit Land, the 2nd Defendant claimed ownership over the same and showed her a copy of the certificate of title to the same land.

The Application is contested. The 1st Defendant filed his Replying Affidavit sworn on 25th March 2013 in which he stated that he is the legal, rightful and lawful owner of the Suit Land and produced his Certificate of Title. He further stated that the Suit Land was allocated to him on 30th October 1996. He produced a copy of his Letter of Allotment. He further stated that 13 years lapsed since that date without payment of any premium and that he received a fresh letter of allotment from the Commissioner of Lands on 4th February 2010. He produced a copy of that Letter of Allotment. He further stated that he was

issued with the Certificate of Title after duly complying with the conditions listed in the said Letter of Allotment. He also swore that he has been in possession of the Suit Land since 1996 to date. He further averred that the Plaintiff's documents of ownership of the Suit Land are mere forgeries.

The Application is further contested by the 2nd Defendant which filed Grounds of Opposition dated 11th April 2013 to the following respect:

1. The 1st Defendant is the registered proprietor of the Suit Land by virtue of Grant No. 128765 issued on 11th February 2011;
2. The 2nd Defendant as the Chargee thereto has a superior proprietary right over the subject property to that of any third party;
3. An injunction cannot issue against a Chargee limiting or interfering with the Chargee's rights over the Suit Land in respect of the loan advanced and secured by the property;
4. The Plaintiff has failed to satisfy the requirements for issuance of an injunction as set out in the case of **Giella vs Cassman Brown**;
5. The Application lacks merit, is bad in law, misconceived and an abuse of the due process of this Honourable Court; and,
6. The entire suit discloses no reasonable cause of action as against the 2nd Defendant.

Both the Plaintiff and the 2nd Defendant filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction, 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.”

In this case, the Plaintiff is claiming to be the proprietor of the Suit Land. To prove her claim, she has produced a copy of her title deed which shows that she is duly registered as the proprietor of the Suit Land. However, the 1st Defendant has similarly claimed ownership over the Suit Land and has equally produced a copy of his title deed to the Suit Land. With this kind of scenario, it is obviously not possible for the court to determine at this interlocutory stage, which of the two titles supercedes the other. This is a matter to be determined after the trial has been conducted. Hence, I find that the Plaintiff has failed to establish that she has 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 2ND DAY OF MAY 2014

MARY M. GITUMBI

JUDGE