



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 1475 OF 2013

FRANCIS MUREITHI MUNDIA.....PLAINTIFF

VERSUS

JOHN KAMAU NJAKE.....DEFENDANT

RULING

On 4/12/2013 when the Plaintiff's application dated 28/11/2013 came up for *ex-parte* hearing, the Plaintiff obtained temporary orders of injunction against the Defendant from trespassing on, encroaching upon, digging, excavating, dumping building materials, wasting, constructing thereon or in any other way dealing with or interfering with the property known as Plot No. 900 situate at Kahawa Soweto Estate. The Plaintiff seeks that the said order be confirmed pending the hearing and determination of the suit.

The application is premised on grounds set out in the application and supported by an affidavit sworn on 28/11/2013. The Plaintiff deposes that he is the lawful owner of the suit plot situate at Kahawa West Soweto Estate having been allocated the same by the City Council of Nairobi in 2001. He deposed that on receipt of the allotment letter, he met all the conditions set out thereunder including payment of the requisite fees as well as council rates and rents. It is the Plaintiff's disposition that the Defendant has illegally encroached upon and trespassed on the suit plot from the year 2012 and has remained thereon despite protestations from him and that the Defendant has destroyed his parameter wall fence and structures and commenced construction without his consent. Thus, the Defendant's action is detrimental to his use and enjoyment of the property.

In support of the application, the Plaintiff annexed: a copy of the Letter of Allotment dated 25/4/2001 indicating that the council had approved the formalization of Kongo Settlement Scheme Kahawa Soweto as well as allocation of Plot No. 900 to him; copy of Authorization made by the Town Clerk to the Chief Revenue Officer to receive payment; copies of receipts for payment of council rates; and a letter dated 25/9/2013 from the Council addressed to the Divisional Criminal Investigation, Kasarani Division confirming that the suit plot was allocated to one Christopher Mukirai and later transferred to the Plaintiff.

Defendant's Response

The Defendant swore a Replying Affidavit on 16/12/2013 in opposition of the application, wherein he deposed that he is owner of Plot No. 899 and not No. 900 and neither has he claimed ownership thereof as alleged by the Plaintiff. It is his disposition that he is non-suited and no orders can be obtained against

him. The Defendant however disclosed that he knows the owner of the suit plot, one Catherine Wambui Gitonga, who, he states, has been in possession since 2001. The Defendant deposed that the Plaintiff's claim of ownership of the suit plot is surreal for reasons that all plots in the Kongo Settlement Scheme were allocated by Kahawa West Development Project in 1992 through balloting and neither by the Council nor in 2001 as alleged by the Plaintiff. It is the Defendant's disposition that the Plaintiff's documents purporting to show ownership of the suit plot are forgeries as it is unclear how he obtained them since at the time the Plaintiff claims to have been allocated the property, the said Catherine Wambui Gitonga was already in occupation thereof.

Plaintiff's Response

The Plaintiff swore a Supplementary Affidavit on 7/2/2014 in response to the Defendant's Replying Affidavit, wherein he admitted that the plots were allocated by way of ballots between 1991 and 1992. It was his disposition that upon completion of the ballot exercise and allocation of plots, the council commenced the formalization and demarcation processes when in 2001 he was formally allocated the suit plot vide the allotment letter. The Plaintiff stated that there arose a double allocation over the suit plot between he and Christopher Mukirai but a resolution was reached where the latter agreed to surrender the plot and the same was transferred to him by the scheme.

The Plaintiff deposes that the information he has derived from the Division Criminal Investigation, Kasarani is that the Defendant is in occupation of the suit plot as a representative of Catherine Wambui Gitonga who is his sister and is deceased. The Plaintiff concludes it is thus evident that the Defendant is the one who has encroached onto his property by destroying his structures and commenced construction thereon thus the Defendant is properly sued. He deposes that the only plausible explanation for Defendant holding documents belonging to the alleged occupant of the suit plot is that he is illegally in occupation of the suit plot under the disguise of a deceased person. The Plaintiff referred the court to a letter by the officer bearers of Kahawa Soweto, a list of members and statements made at the Police station marked "FMM4", "FMM5" and "FMM6" and deposed that as confirmed by the Chairman and his deputy, he was the owner of the suit plot and that there was no member to their group known as Catherine Wambui Gitonga. The Plaintiff contends that he stands to suffer irreparable loss which cannot be adequately compensated by damages if the Defendant herein is not restrained from continuing to trespass onto the suit plot.

Defendant's Response

In a short rejoinder, the Defendant swore a Further Affidavit on 27/3/2014 wherein he reiterated that the suit plot was arbitrarily and un-procedurally transferred to the Plaintiff. The Defendant refuted the claims made by the Plaintiff in reference to the letter and statements made by the purported leadership of Kahawa Soweto deposing that the said officials were not in office at the time of allotment and further that the possibility of doctored records could therefore not be ruled out. In respect to being in possession of the deceased's documents, the Defendant deposed that he had been given the same by the family of the deceased, having been neighbors since the date of allotment. The Defendant deposed further that the developments on the suit plot commenced when the deceased was still alive and that her family has continued with the same so as to assist her dependents.

Submissions

The application was canvassed by way of written submissions. Kamau Njomo & Company Advocates for the Plaintiff filed submissions dated 8/5/2014. Counsel submitted that the Plaintiff had set out the circumstances under which he acquired ownership of the suit plot and demonstrated that the Defendant is the one who has encroached onto his property under the guise of a deceased person, therefore in that regard, the he has established a prima facie case with chances of success. On the issue that the Defendant is non-suited, counsel submitted that in the event the court did find that the Defendant was a wrong party, then it be guided by the decision in the case of **Simon Sossion v Kiango General Supplies Limited (2010) eKLR** where the court proceed to grant orders of injunction in view of the claim of misjoinder of parties.

In respect to irreparable injury, counsel deposed that the Defendant has commenced construction of structures, digging and wasting the property to the detriment of the Plaintiff and also denying him the use and enjoyment of thereof. Thus he stands to suffer great loss and damage which cannot be adequately compensated by way of damages. Counsel further submitted that the balance of convenience titled in favour of the Plaintiff as it is clear that the Defendant will not suffer prejudice if the orders sought are granted since the suit plot will be safeguarded pending the outcome of the suit.

Agnes Njoroge & Co. Advocates for the Defendant filed submissions dated 14/5/2014 wherein counsel reiterated that the Defendant is non-suited and therefore the orders sought cannot issue. Further, counsel submitted that the Plaintiff had not established a *prima facie* case with chances of success as there is a dispute as to the ownership of the suit plot between the estate of the deceased and Plaintiff, which the Defendant has no involvement.

Determination

The Plaintiff seeks a confirmation of the temporary injunction orders sought obtained at the *ex-parte* stage, pending the determination of the suit. In considering such an application, the Court is required to satisfy itself that the case has met the threshold to warrant the grant of injunction orders as stated in the **Giella vs Cassman Brown & Co Ltd (1973) EA 358** 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. Thirdly, in the event the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

Before I proceed to determine whether the Plaintiff's case has met the aforesaid criteria, the issue of misjoinder of a party has surfaced out of the affidavit evidence sworn by the parties. According to the Plaintiff, the Defendant's knowledge and dispositions over the suit plot and being in possession of the documents of ownership thereto is evidence that the Defendant has trespassed on the suit property under the guise of his deceased sister. The Plaintiff contends that the Defendant is therefore the proper party to the suit and he is therefore entitled to the prayers sought against him. The Defendant on the other hand remains categorical that he is non-suited since he is not the owner of the plot in dispute and neither has he trespassed thereon as alleged. The Defendant states that he has knowledge of the dealings of the suit plot since he has been a neighbor of the deceased owner since they were allocated the plots.

The Defendant avers that he is not an allottee of the plot in dispute and therefore that the prayers sought in the Plaintiff cannot be obtained against him. The claim that he is not an allottee is confirmed in affidavit evidence which reveals that Catherine Wambui Gitonga is the allottee of the same plot the Plaintiff claims to have been allocated. On perusal of this application and the Plaintiff, the Plaintiff has made allegations of trespass against the Defendant, which allegation need not necessarily be made against a registered owner or allottee. I therefore disagree with the Defendant's reasoning that the mere fact that he is not an owner or allottee of the suit plot, he is non-suited. A second issue that emerged from the affidavits is the dispute as to ownership of the suit plot between the Plaintiff and Catherine Wambui Gitonga. In view of this development, I find that it is proper that the alleged allottee be joined to the suit.

This court has discretion pursuant to **Order 1 Rule 10(2) of the Civil Procedure Rules** either on an application by either party or on its own motion to order the addition of a party who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. In this situation, however, the purported allottee is deceased. It is trite that the dead cannot sue or be sued except through their legal representatives. Consequently, it is my finding that the estate of the deceased be joined to the suit so as to protect the proprietary interests, if any, of the deceased over the suit property. In the same vein, the Defendant cannot purport tender a defence on behalf of the deceased unless he has authorization to do so. The court is informed of such authorization when it is furnished with letters of administration taken out, even if limited, for purposes out defending a suit.

I now turn to the gist of this application. Has the applicant established a *prima facie* case with chances of success? In support of his claim as to ownership, the Plaintiff has availed to this court a copy an allotment

letter in his favour, copies of receipts for payment of council rates, letters by officials stating that he is a member of the scheme and owner of suit plot. The Plaintiff also annexed photographs to show the extent of the alleged trespass by the Defendant. The Plaintiff's claim is vehemently opposed by Defendant who on behalf of the deceased allottee, avers that the deceased is the owner having been allocated the suit plot in 1992. The Defendant has also availed an allotment letter in favour the deceased together with receipts showing payment of the requisite fees. As regards the construction, the Defendant admits that construction is ongoing but states that the same is not undertaken by him but by the deceased's family members.

From the foregoing, it is evident that there is a dispute as to the ownership of the suit plot. In that regard, I find that the Plaintiff has not succeeded in demonstrating a prima facie case. Nevertheless, I take note that the parties have an interest over the suit property, and a determination as to which party has a bona fide claim can only be done at the hearing. In the meantime, this court has a duty to protect the interests of the parties pending the determination of the suit. I say so notwithstanding that neither of the parties is in possession of a title which prima facie confers proprietorship to the title holder.

As to the whether the Plaintiff will suffer irreparable loss, I opine that with the continued construction on the suit property, the Plaintiff will suffer substantial loss that may not be adequately compensated by damages. The court is not in doubt, but even if it were, then the balance of convenience tilts in favour of preserving the property pending the outcome of the decision.

The orders of this court are as follows:

1. ***The estate of Catherine Wambui Gitonga be joined to this suit as a Defendant.***
2. ***Until any further orders by this Court, Status quo is hereby entered to the effect that there shall be no further digging, excavating, dumping building materials, wasting, constructing thereon or in any other way dealing with or interfering with the property known as Plot No. 900 situate at Kahawa Soweto Estate by the Plaintiff, the Defendant or the deceased's family as well as their servants and agents.***
3. ***Parties to amend their pleadings accordingly.***
4. ***Parties to comply with the provisions of Order 11 of the Civil Procedure Rules and the Plaintiff to take steps to set down the suit for hearing without delay.***
5. ***Costs of this application be in the cause***

Dated, Signed and Delivered this 25th day of June 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

..... Court Clerk

