



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 151 OF 2014

KENYA AFRICAN NATIONAL UNION.PLAINTIFF

VERSUS

PATRICK GITAU MBUGUA..... 1ST DEFENDANT

GEORGE KIBINDU MAHIA.....2ND DEFENDANT

ANN WANJIRU KABOCHI.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 14th February 2014 in which the Plaintiff/Applicant seeks for orders of a temporary injunction restraining the Defendants/Respondents from trespassing onto, interfering or dealing with Plot No. 29082 Kasarani (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit, that the Officer Commanding Police Division Kasarani do enforce compliance with the orders issued herein and costs of these proceedings be met by the Defendants/Respondents.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Nicholas Kiptoo Arap Salat sworn on 14th February 2014 in which he averred that he is the Secretary General of the Plaintiff. He further averred that sometimes on 14th May 1999, the Plaintiff was allocated the suit property by the Government of Kenya for which it duly paid the stand premium and facilitated survey of the suit property awaiting issuance of a title deed. He produced a copy of the Letter of Allotment. He further averred that the Plaintiff/Applicant has been in possession of the suit property since then and has faithfully paid annual rent and rate due to the Nairobi City County. He stated further that the Plaintiff has erected some structures on the suit property which are let out to tenants who pay rent to the Plaintiff. He further stated that sometimes around September 2013, he was informed by the tenants that some people whom the Plaintiff later learnt to be the Defendants were occasionally trespassing onto the suit property to fraudulently impersonate the officials of the Plaintiff and collect rent from the tenants while threatening to evict them. He further stated that the Defendants are neither its members nor its officials to warrant their interference with the Plaintiff’s property. He further averred that after going underground, the Defendants resurfaced on 13th February 2014 when they attempted to trespass onto the suit property but were repulsed by the Plaintiff. He also stated that the Defendants promised to come back again in the company of the illegal and proscribed “Mungiki sect” to invade the suit property. He further averred that there was a real likelihood of massive breaches of the law with a possibility of bloodshed

being visited on innocent people by the Defendant's illegal activities.

The Application is contested. The Defendants filed the Replying Affidavit of Patrick Gitau Mbugua, the 1st Defendant, sworn on 21st March 2014 in which he averred that he has never collected or received rent from the Plaintiff's tenants on the suit property through impersonation as branch officials of the Plaintiff. He further averred that he has never lived, trespassed or been an occupant of the suit property and that he is a stranger to the suit property and to any proceedings against him. He further stated that this Application lacks merit and should be dismissed with costs.

Both the Plaintiff and the Defendants 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/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.”

Looking at the facts of this case, the Plaintiff has based its claim of ownership over the suit property on a Letter of Allotment dated 14th May 1999 issued by the Department of Lands, a copy of which was annexed to this Application. The Defendants on their part lay no claim to the suit property whatsoever and in fact state that they have no dealings whatsoever with the suit property. In the circumstances, I find that the Plaintiff has indeed established a *prima facie* case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are now always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR** .

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction. I therefore allow their application with costs to the Plaintiff/Applicant.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 20TH

DAY OF JUNE 2014.

MARY M. GITUMBI

JUDGE