



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1169 OF 2013

NYAWIRA KINYANJUI.....PLAINTIFF

VERSUS

SAMWEL MANGERA MAYENGA.....DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff seeks the following orders in her application by way of a Notice of Motion dated 30th September 2013:

1. Pending the hearing and determination of this suit, the Defendant be restrained from being or remaining on, entering or profiting from all that piece of property known as Title number Block/105/4543 and Nairobi Block/105/4544 (hereinafter referred to as "the suit properties").
2. Pending the hearing and determination of this suit, the Defendant be restrained from interfering howsoever with the Plaintiff's quiet enjoyment, use possession and occupation of the suit property.
3. Pending the hearing and determination of this suit, the Defendant be ordered to vacate the tenants from the suit premises immediately.

The grounds for the application are stated in the supporting affidavit and further affidavit sworn by the Plaintiff on 24th September 2013 and 6th March 2014 respectively. The Plaintiff avers that she has owned the suit properties since 1982 and was sold the properties by Embakasi Ranching Company and allocated the same by the Government of Kenya. She attached copies of lease certificates issued to her with respect to the suit properties. The Plaintiff claims that the Defendants have evicted her from the said properties, taken possession of the same and remained in possession thereof. Further, that she has reported the matter to several government institutions and organizations offering free legal assistance, but that the Defendant has failed and/or neglected to return the land back to the Plaintiff. She informed that court that there is a case pending in Makadara Criminal Law Courts over the suit properties against the Defendant.

The Defendant's Response

The Defendant swore a Replying Affidavit on 19th November 2013 in response to the Plaintiff's application, wherein he deponed that he was allocated plots title number Nairobi Block/105/4543 and Nairobi Block 105/4544 respectively by Embakasi Ranching Company Limited on or about 2001, and

that share certificates which were issued to him and his wife on 2nd May 2003 and 4th December 2006 respectively. He annexed copies of the said share certificates. Further, that he occupied the said properties without interference from 2001 to 2012 when the Plaintiff commenced criminal proceedings against him.

The Defendant claimed that his original certificate were retained by his surveyor for purposes of finalizing the transfer of lease, which surveyor alleged that he had misplaced them and could not trace them. Further, that his efforts to regularize the transfer of lease documents have been frustrated by the Embakasi Ranching Company Limited officials, who have colluded with the Plaintiff and have transferred lease documents to her so as to deny the Defendant the said properties.

The Submissions

This Court issued directions that the parties do file and exchange submissions, and the Advocate for the Plaintiff filed submissions dated 6th March 2014. The counsel argued that the Plaintiff had shown a *prima facie* case with a probability of success, as she had attached copies of her lease certificates to the suit property, and the Defendant had failed to produce any evidence of title to the same. The Plaintiff relied on the decision in in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 1215** in this regard.

The Plaintiff's Advocate also submitted on the requirement of the balance of convenience, that the Defendant's continued occupation of the suit properties was a violation of the Plaintiff's legal and equitable rights. Lastly, that financial compensation would not be a sufficient remedy to the Plaintiff as the Defendant will be unlikely to pay for any damage that may arise, and the compensation would be difficult to assess. The Advocate cited the decision in **Kennedy Mollo Ligilae vs Peter Lokol and County Government of Turkana, Kitale ELC No 173 of 2013** in this regard.

The Advocate for the Defendant filed submissions dated 29th April 2014, wherein he argued that the Plaintiff has not demonstrated that she has met the threshold for the grant of a temporary injunction, as the Plaintiff is not in possession of the suit property, and her claim that she bought the suit properties is not supported by any evidence, thus her ownership documents are fraudulent.

The Advocate urged the court to apply the decisions in **James Ndeda vs Dorine Aluoch, Civil Case No. 136 of 2007** and **Douglas Muindi Kangethe & Another vs Michale Karuku Gatura (2014) e KLR** that the balance of convenience tilts in favour of the person in actual possession of the land. Lastly, that eviction of the Defendant would lead to him suffering irreparable loss unlike the Plaintiff.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made. The issue to be determined is whether the Plaintiff has met the threshold for the grant of the temporary and mandatory orders of injunction she seeks. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and also to determine if the Plaintiff has in addition shown any special circumstances to entitle him to the mandatory injunctions sought as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction 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. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** 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.”

The Plaintiff has availed title documents to prove ownership of the suit properties. The Defendant on the other hand relies on copies of non-member certificates of plot ownership issued by Embakasi Ranching Company showing his and his wife’s entitlement to plots V4154 and V2586. He did not brought any evidence to show that the said plot are the same as the suit properties. In the circumstances I find that the Plaintiff has established a *prima facie* case. However, this finding notwithstanding, I note from paragraph 5 of the Plaintiff’s Further Affidavit sworn on 6th March 2014 that she states as follows therein:

“That the contents of paragraph 4 are false, the defendant does not reside in the said parcels of land that he had sold the land to one Mr. Cyprian who resides there.”

The Plaintiff has not joined the said Mr. Cyprian as a party to these proceedings, yet she is aware that he is in possession of the suit property. In addition all the orders the Plaintiff seeks are essentially orders of evictions even though some prayers are couched in the terms of a temporary injunction, as she has admitted that she is not in possession of, and was evicted from the suit properties. Further, the result of the said orders if granted would be the removal of the said Mr. Cyprian from the suit properties.

This court in this regard is cognizant of the legal principle that injunctions are an equitable remedy, and one must come to court with clean hands to be availed the same. I note that the Plaintiff in the circumstances of this application has not done so. In addition, this court cannot grant the temporary injunctions sought for the reasons that it will be acting in vain, since it is evident the Defendant is not the one in actual possession of the suit properties.

The question as to whether the Plaintiff has met the threshold for the grant of orders of the mandatory injunction sought is therefore also moot. It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. As explained in the foregoing, the mandatory orders sought will affect a third party who is not a party in this suit, and will have the effect of determining the suit herein with finality without giving that party an opportunity to be heard.

I accordingly decline to grant the prayers sought in the Plaintiff’s Notice of Motion dated 30th September 2013 for the foregoing reasons, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____17th ____ day of ____June____, 2014.

P. NYAMWEYA

JUDGE