



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT
AT NAIROBI
CIVIL SUIT NO 833 OF 2013

NANCY WANGUI GATHU.....PLAINTIFF

VERSUS

MICHAEL KIARIE DANIEL.....1ST DEFENDANT

EVANSON ICHARIA WAINAINA.....2ND DEFENDANT

MARGARET WAMBUI3RD DEFENDANT

MARGARET FAITH WAIRIMU MUTHONI.....INTERESTED PARTY

RULING

The application for consideration by this court is the Notice of Motion dated 10th July 2013 brought **under Order 40 Rule 1,2 & 3 of the Civil Procedure Rules** seeking for orders that a temporary injunction be issued by this court restraining the defendants, their servants and or agents or any person acting by or through them from constructing, erecting or putting up any buildings, structures or developments on plot no. **1506** and **1507** of Kiambu Dandora land Zone 13 in **LR 11379/3** or any part thereof and from surveying, beaconing, alienating the aforesaid land or demolishing any structures or buildings erected thereon by the plaintiff and from evicting the plaintiff therefrom till the hearing and determination of this suit.

This application is premised on the grounds that have been stated on the face of the application and the supporting affidavit of **Nancy Wangui Gathu** stating that she was the allottee from **Kiambu Dandora Farmers Co.Ltd** of plots No 1506 and 1507 which is situated in Zone 13 of **Kiambu Dandora Land LR No 11379/3** which she purchased in July 2011. She added that previously in 2004 she had paid **Ksh 100,000/=** to a group called umoja II Settlement Scheme for the same plot before they discovered that the group was fraudulent since they were not the true owners of the property but for Kiambu Dandora Farmers Ltd. She further averred that in the year 2004 she constructed a permanent house on her plot where she has been residing since then however in 2012 the 1st and 3rd defendants came into her plots in the company of Mungiki men and dug up plots and started putting structures. That they also issued written notices not to associate with Kiambu Dandora Farmers Ltd. The deponent avers that she reported the matter to Buruburu police station but no action took place forcing them to seek the assistance of the provincial Commissioner and Director of CID but no action has been taken. She stated that on 10th June 2013 her crops were destroyed by the 1st and 3rd Defendant claiming that the plaintiff was a trespasser on the suit property. She avers that the defendants have now embarked on the construction of houses on her piece of land even after being asked to stop by the DCIO Dandora and now seeks the help of this court by

granting the prayers sought in her application.

This application is opposed. The 1st Defendant filed his Replying Affidavit on 15th October 2013 stating that he has never set foot on the suit property, never issued any notice to the plaintiff and never trespassed on the suit property at all.

The 2nd Defendant filed his replying affidavit on 9th December 2013 stating that the suit property the applicant alleges to be hers belong to the interested party having purchased the same from **Umoja III Housing Resettlement Scheme** way back in October 2005 adding that his sister who is the interested party is in physical possession of the suit property .He contended that the applicants documents of ownership were not authentic and that the applicant had not shown how she purchased the suit property by annexing a sale agreement. He therefore prays that since the applicant had not shown any prima facie case in seeking the said relief the application should be dismissed.

The interested party filed her replying affidavit on 26th March 2014 stating that she is the legal owner of plot no.770 and 771 respectively which are referred by the applicant as Plot No 1506 and 1507 having been allocated the same pursuant to a balloting exercise that was conducted in October 2005 by **Umoja Housing Settlement Scheme**. She was issued ownership documents of the plots in October 2005.She added that the applicant had not constructed on the suit property as alleged but on her plots which are adjacent to the suit property and stated that she was the one residing on the suit property. She also contended that the applicant has not attached any ownership document to prove that she purchased the suit property from **Kiambu Dandora Farmers Co.Ltd**. She stated that there was a pending suit in the High Court case No 393 of 2008 where the applicant is a party in a dispute of ownership of **LR No 11379/3** was pending determination. She averred that would be a travesty of justice to grant the applicant the prayers sought herein before establishing whether **Kiambu Dandora Farmers** had capacity to sell the property in the first place and to ignore the ownership of documents of the suit property which were issued in 2005 before the applicant acquired her in 2011.That in view of the foregoing the plaintiff had failed to show any prima facie case to warrant an injunction and urges this court to dismiss the application with costs.

Parties prosecuted this matter through written submissions. The plaintiff filed her submissions on 15th November 2013 and 2nd March 2014.In her submission she stated that she is the owner of plots no. 1506 and 1507 and that the defendants have been trespassing on the said suits. She claimed to hold certificates to these plots. On the other has she alleges that the 3rd Defendant had not proved ownership of the two plots as she had not exhibited any documents to support her claim. She added that the balance of convenience tilted in her favour and relied on the case of **Giella –vs Cassman Brown Limited**. She submitted that she purchased the plots from **Umoja III Housing Scheme** in 2004 which was earlier than the interested party who purchased the property in 2005 and has been on the suit property since then.

The interested party filed her written submissions on 25th March 2014 which she submitted that she purchased the suit property from **Umoja III Housing resettlement** in October 2005 being **Plot No 770 and 771**, paid for registration and water. She also paid development fees, foundation charges, survey fees and security fees and that the 2^d defendant was in the suit property as a caretaker. She therefore states that the claim against the 2nd defendant should be struck out because he was on the suit property on the permission of the interested party. She contended that the applicant could not be granted the orders prayed as she alleges that **Kiambu Dandora Farmers Co.Ltd** is the registered owner of the suit plots yet no ownership documents have been availed to assist the court. Further the applicant did not disclose to this court that there was a pending suit at the High Court being **HCCC No 393 of 2008** that is on a dispute of ownership of **LR No 11379/3** therefor it is futile to make orders in vain .She concluded by stating that none of the authorities had been enjoined in this suit and therefore one cannot tell whether Plot No **1506 and 1507** are the same plots as **Plot No 770 and 771**.

I have considered the pleadings; the law and the authorities cited and relied. The issue for determination is whether the plaintiff has made out a case to be granted the reliefs sought. In deciding whether to grant the temporary injunction sought after by the Plaintiff, 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 -VS- 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 shown certificates of ownership to Plot No 1507 and 1506 having been allotted the same by Kiambu Dandora Farmers Company Limited. She has shown payment of plots **715, 716, 771 and 770**. He annexed photographs showing that there is construction going on but one is not sure which exact portion of this suit is the construction taking place. The interested party on her part showed receipts of purchase of **Plot 770 and 771** but not the plots that are in contention as stated by the plaintiff which are Plots No **1506 and 1507**. From the receipts she has annexed to her affidavit it is clear that a different entity of **Umoja III Housing Settlement Scheme** was the entity that sold the two plots to her. It is therefore clear that there are two entities that were selling the plots to the two parties herein and the plots seem to be different from each other. However what is clear is that the physical location of this plots with different plot Numbers is one. What the plaintiff wants protected by this court is Plot 1506 and 1507 that were allotted to her by **Kaimbu Dandora Farmers Company Limited**. She is not in possession of the suit property and looking at the material available at this interlocutory stage I am unable to find that the Plaintiff has an indefeasible title. The Parties will have to testify and their respective documents examined for the court to decide one way or the other. The result is that the Plaintiff has not established a prima facie case with probability of success to be entitled to an interlocutory injunction.

As I have come to the conclusion that the plaintiff has not established that she has a prima facie case with a probability of success and I am equally of the view that damages would be an adequate remedy, I need not consider where the balance of convenience would fall as I have no doubt in regard to first two conditions that a court needs to consider in an application for injunction. In short the Plaintiff has failed to satisfy the conditions for the grant of an interlocutory injunction as established in the **Giella -Vs- Cassman Brown case (Supra)** and thus I disallow the plaintiff’s application in the circumstances.

As this is not a claim based on adverse possession, this fact is not sufficient to prove ownership. On that basis therefore, I find that the Plaintiff/Applicant has not established a prima facie case with probability of success at the main trial.

Having now carefully considered the Notice of Motion dated 10th July, 2013 and the Written Submissions, I find that the same is not merited. Consequently, the Court dismisses the said application entirely with costs in the cause.

Dated, Signed and delivered this 25th day July 2014

L.N. GACHERU

JUDGE

In the Presence of:-

M/s Githaya holding brief Mr Njiru for the Plaintiffs/Applicants

Nyoike holding brief Owang for Interested party/Respondent and

2nd Defendant/Respondent

None attendance : 1st Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE