



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 371 OF 2013

WILLIAM THENDI MAINA.....PLAINTIFF

VERSUS

SAMUEL MUIRURI KAMONDO.....RESPONDENT

RULING

The Plaintiff's Application

The application before the court for determination is a Notice of Motion dated 24th July 2012 as amended on 10th August 2012 filed by the Plaintiff. The Plaintiff is seeking orders of a temporary injunction to restrain the Defendant from entering, trespassing, constructing structures, interfering with his ownership rights or in any other manner dealing with Plot No. 729 RES. KWARE/O.RONGAI within Ngong in Kajiado District (hereinafter referred to as “the suit property”), pending the hearing and determination of this suit.

The grounds for the application are that the Plaintiff lawfully owns the suit property. Further, that the Defendant has constructed structures and started living thereon without his consent and any colour of right, and has defied several notices given to him by the Plaintiff and the County Council of Olkejuado to remove the said illegal structures and move out of the suit property.

The Plaintiff in his supporting affidavit sworn on 10th August 2012 states that the suit property was transferred to him by its original allottee, one Ibrahim Ole Sondai on 20th August 2002. Further, that on or about 12th February, 2009 the surveyor for County Council of Olkejuado, one Mr. Kasuku validated the plot and confirmed that it was owned by the Plaintiff. The Plaintiff further stated that during the validation exercise the Defendant was verbally directed by the said Council to remove structures from the suit plot and move to Plot No. 311 “B” which the Council had allocated to him.

However, that the Defendant has remained on the suit property and defied both the Plaintiff’s verbal notices and those of the council to vacate. The Plaintiff also averred that he as a result is unable to develop the suit property despite consistently paying annual rates to the County Council of Olkejuado as required.

The Plaintiff annexed copies of the transfer of the suit property from the original owner; a Rates Clearance Certificate bearing his name; the transfer signed by the Council Surveyor during the validation exercise on 12th February, 2009; a survey map extract showing the location of the suit property; the letter of allotment for plot No. 311 “B” in the name of the Defendant; notices issued to the Defendant by the Council of Olkejuado dated 25th October, 2011; receipts for annual rates payments for the suit property paid by him to the County Council of Olkejuado from 2002, and receipts for replacement of beacons

thereon.

The Defendant's Response

The Defendant opposed the Plaintiff's application in a replying affidavit sworn on 25th July 2013. The Defendant stated that he was issued with an allotment letter by Olkejuado County Council in 2000 which he annexed, and that he is the owner of plot No. 311B on which he had been living even before the issuance of the letter of allotment. Further, that in 2005 the suit property was subdivided and two plots numbers 311A and 311B created, and he continued living on plot 311B.

The Defendant denied that notice to vacate have been served upon him, and stated that survey sketch plan from Olkejuado County Council indicates that it is plot No. 728 that borders his plot No. 311, and not plot No. 729 as alleged by the Plaintiff. Further, that the receipt from the County Council of Olkejuado for replacement of beacons annexed by the Plaintiff clearly indicates that the exercise was to be carried at Kamukunji Ward, and not at Hospital Ward where plot 311B is located.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 23rd May 2014 while the Defendant filed submissions dated 20th July 2014. The Court also directed the parties to undertake a joint survey of the suit property and that the survey report to be filed in court. Two survey reports were subsequently filed in Court on 15th October 2013 and 22nd April 2014 respectively.

I have read and carefully considered the pleadings and submissions made by the parties herein, as well as the survey reports on the suit property. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction. 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. These 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 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] eKLR** 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 in the Plaintiff filed herein dated 24th July 2012 is seeking a permanent injunction against the Defendant restraining him from dealing with the suit property, and an eviction removing him from the suit property. The Plaintiff has produced a letter of allotment for plot 729 while the Defendant has produced an allotment letter for plot 311“B”, which they both claim is the suit property. The Plaintiff in his submissions states that he has shown a *prima facie* case as he has produced evidence of a validated letter of allotment, and of payment of annual rates to the Olkejuado County Council. The Defendant in his submissions claims that plot 729 is separate from plot 311“B”, and that the plans produced in evidence show that plot 729 is adjacent to plot 311“B”.

I have perused the survey reports prepared by the secretary and surveyor of Kajiado County Government respectively. Both survey reports confirm the existence of plot 729 and that the said suit property is located on plot 729 whose allotment has been validated by the said county government. It is also stated that the allotment for plot 311“B” was not validated, and that it is not possible to tell where plot 311“B” is

situated. The reports recommends that the holder of plot 311“B” should move to his rightful location and leave the suit property to the holder of the allotment letter for plot 729.

Arising from the foregoing reports, I find that the Plaintiff has established a *prima facie* case, as his letter of allotment and location of the suit property has been confirmed by the issuing authority which is the Kajiado County Government. This finding notwithstanding, I also note that the Defendant has put up temporary structures on the suit property which he is occupying. The orders sought by the Plaintiff will essentially result in an eviction of the Defendant, which will be final in nature. However, I am of the opinion that this is a clear case where such final orders can issue in the form of a mandatory injunction, as there is adequate evidence to show the Plaintiff’s entitlement to the suit property. The Defendant should in this regard pursue the Kajiado County Government to confirm the location of his plot 311“B”.

I accordingly allow the Plaintiff’s Notice of Motion dated 24th July 2012 on the following terms:

1. That the Defendant, his employees, agents, servants, and/or tenants shall, within sixty (60) days of service by the Plaintiff of the orders granted herein, remove all his structures and possessions located on the property known as Plot No. 729 RES. KWARE/O.RONGAI
2. That after the expiry of the said sixty (60) days, the Defendant shall be restrained from entering, trespassing, constructing structures on or in any other manner dealing with Plot No. 729 RES. KWARE/O.RONGAI within Ngong in Kajiado District, pending the hearing and determination of this suit or until further orders.
3. The Plaintiff shall serve the Defendant with the orders herein within fourteen (14) days of the date of this ruling.
4. The costs of the Notice of Motion dated 24th July 2012 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of ____October____, 2014.

P. NYAMWEYA

JUDGE