



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 215 OF 2014

BERNARD KEIROH KAMAU..... PLAINTIFF

VERSUS

JAMES MUGO WAWERU..... DEFENDANT

RULING

By a plaint dated 25th February 2014 the plaintiff claims to be the legal, equitable and registered owner of land parcel Nairobi/Block 141/590 Kasarani Nairobi County. The plaintiff alleges the Defendant has trespassed onto his plot and has built illegal temporary structures thereon and has placed a mabati fence all round. In the suit the plaintiff is seeking a permanent injunction against the Defendant and vacant possession.

By a Notice of Motion application filed simultaneously with the plaint the plaintiff seeks a temporary order of injunction against the Defendant to restrain the Defendant from further trespassing into, developing, disposing off, selling, leasing, erecting unlawful structures or in any manner interfering with the plaintiff's right of ownership occupation, use and enjoyment of the suit property. The plaintiff basis the application on the grounds that as the registered owner his title is indefeasible that the defendant has without any colour of right or justification encroached on the plaintiff's property and has started making unauthorised developments on the suit property. In the replying affidavit sworn by the plaintiff, the plaintiff avers that the Defendant recently entered and built temporary structures and fenced off the plot with 'mabati' with the objective of developing and that the defendant lays baseless claims of ownership to the property and denies the plaintiff unrestricted access to the property. The plaintiff further avers that he acquired the suit property on or about 1992 for valuable consideration and was registered as owner and issued title on 29th August 2003 which was later reissued on 29th July 2013 and therefore entitled to exclusive possession and occupation.

The plaintiff further avers that the defendant was issued with notice by the plaintiff's Advocates to stop the trespass vide a letter dated 14th February 2014 which the Defendant ignored and that attempts at mediation have not yielded any positive results culminating in the present suit by the plaintiff seeking orders of injunction.

The Defendant opposes the application for injunction and has filed a replying affidavit sworn on 12th March 2014 in opposition thereto. The Defendant/Respondent avers that he is the absolute proprietor of the suit property land parcel NO. **Nairobi/block 141/590** and that he has occupied, possessed and developed the same for over 32 years. The Defendant avers that he was allocated the property as a shareholder by **Karura Farmers Company Ltd in 1982**. The Defendant further states the original

parcel number of the suit property was plot NO. 114 as shown in the share certificate issued to the Defendant by **Karura Farmers Company Ltd** annexed and marked “**JMW2**”.

The Defendant claims that the said **Karura Farmers Company Ltd** fraudulently and illegally re-allocated the suit property to the plaintiff which prompted the Defendant together with other shareholders of **Karura Farmers Company Ltd** to file a suit against **Karura Farmers Company Ltd** vide **HCCC NO. 3017 of 1990** where the court on 4th February 1992 issued an order in the following terms:-

“That the Defendant/Respondent be and is hereby restrained from depriving the applicant/plaintiffs of membership of the company and interference with their ownership of the plots allocated to them”.

The Defendant states that this order was extended, and the status quo to be maintained as per the further order of the court given on 30th June, 1992. The copies of the orders of 4th February 1992 and 30th June 1992 are annexed and marked “**JMW 3**” and “**JMW4**” respectively. The Defendant alleges the certificate of lease issued to the plaintiff on 29/8/2003 and later re-issued on 29/7/2013 was fraudulently obtained and contends that he is the legal owner of the suit property in respect of which he has been paying rates to the city council and has occupied and has been living thereon for over 32 years since 1982.

The plaintiff by a further affidavit filed on 26/3/2014 reiterates that he is the registered owner of the suit property and his title is indefeasible and is thus entitled to exclusive possession and occupation of the said property. The plaintiff alleges that the orders issued in **HCCC 3017/1990** referred to by the Defendant have no bearing with the suit property. Further the plaintiff contends that the claim by the Defendant that the plaintiff obtained the title to the suit property illegally and fraudulently is unsubstantiated and at any rate the Defendant has not since 2003 challenged the title.

The parties filed written submissions where they each reiterate the facts as set out in their respective affidavits. I have considered the pleadings and the affidavits in support and opposition of the application for injunction together with the parties filed submissions and the only issue to determine is whether on the facts and circumstances of this case the plaintiff has made out a case for the grant of an interlocutory injunction.

A perusal of the plaintiffs' pleadings and the bundle of documents shows that the plaintiff purchased the suit property from one **Charles Ndungu Karanja** as per the memorandum of Agreement dated 4/1/1992 and the plot the subject of the sale was plot **NO. 114 in Karura Farmers Company Ltd**. A transfer form by Karura Farmers Co. Ltd was made on 17th February 1995 showing **Charles Ndungu Karanja** Register member NO. 729 had sold his plot **NO. 114 Phase 'A'** to **Bernard Keiroh Kamau**. The plaintiff was issued with share certificate **NO. AB 2118** showing that he had been registered as member **NO. 729** and that he had been issued legally and officially with plot **NO. 114** measuring 23 X 14 metres. As relates to the Defendant the annexures attached to his replying affidavit include payment receipts to **Karura Farmers Company Ltd** made in 1982. **Karura Farmers Co. Ltd** issued a share certificate **NO. 301** to the defendant, **James Mugo waweru** showing that he was registered as member **NO. 729** and that he had been issued legally and officially plot **NO. 114** measuring 23 X 14 metres. This share certificate is dated 31st December, 1982.

From the above it is clear that the plot that was sold and transferred to the plaintiff is the same the Defendant was allocated by **Karura Farmers Co. Ltd in 1982**. When and how did it change from the Defendant to the person who sold the same to the plaintiff? That is something that may require explanation through evidence at the trial. The Defendant states that he has occupied his plot since being allocated in 1982. The plaintiff admits the defendant is in possession and has constructed temporary structures thereon. If the Defendant has been in occupation and possession can he be enjoined from trespassing? I think not since he is already in site. The net effect of granting the injunction application as sought by the plaintiff would be to obtain eviction of the Defendant at the interlocutory stage. The plaintiff has properly sought an order for vacant possession through the plaintiff and my view is that the appropriate course would be for the parties to have the issue of ownership determined at the hearing

whereupon the party decreed as owner shall be entitled to vacant possession.

As matters stand presently both the plaintiff and the Defendant claim ownership of the suit property which issue cannot be determined conclusively at this interlocutory stage without hearing evidence from the parties and their witnesses.

On the facts and circumstances of this case I am not able to hold that the plaintiff has demonstrated a prima facie case with a probability of success to entitle him to a grant of an interlocutory injunction. The conditions for grant of injunction as outlined in the case of **Giella – vs- Cassman Brown & Co. Ltd (1973) EA 358** in my view have not been satisfied and I decline to grant the injunction sought. However having regard to the circumstances of this case it is my view that an order requiring the parties to observe and maintain the obtaining status quo pending the hearing and determination of the case would serve the interest of justice and I so order. In observing the status quo no party shall sell, dispose off or transfer the suit property and no party shall carry out developments of a permanent nature on the suit property pending the hearing and determination of the suit. To accelerate the hearing of the case the parties are directed to comply with Order 11 of the Civil Procedure Rules within the next 45 days from the date of this ruling and thereafter to fix the suit for a pretrial conference to obtain directions as relates to the hearing of the main suit.

Each party shall meet their own costs for the application.

Order accordingly.

Ruling dated, signed and delivered this...**2nd**.....day of...**October**.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

Mr. Wangai..... For the Plaintiff

Mr. Gachie..... For the Defendant