



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT NAIROBI

ELC SUIT NO. 1116 OF 2013

TERESIA WANGARI MWANGI.....1ST PLAINTIFF

JANE RUGURU MWANGI.....2ND PLAINTIFF

-VERSUS-

KIRATON INVESTMENTS LIMITED.....1ST DEFENDANT

CLLR. JOSEPHAT KIRAGU WAICHAHI.....2ND DEFENDANT

NAIROBI CITY COUNTY.....3RD DEFENDANT

SHEIKH ABDULLAHI MOHAMED.....4TH DEFENDANT

RULING

The Plaintiffs' Application

The application before the court for determination is a Notice of Motion by the 1st Plaintiff dated 9th September 2013, brought under section 3A of the Civil Procedure Act as well as Order 51 Rules 1 and 3 and Order 40 Rule 1 of the Civil Procedure Rules. The application is seeking orders that pending the hearing and determination of this suit, the Defendants be restrained by way of an injunction from entering, registering in their name, building or causing to be put up structures, excavating, selling, charging, giving as security, trading in, wasting or in any other manner whatsoever interfering with the property known as Land Reference no. 209/7260/187 (formerly known as ES 38 Eastleigh Sewerage Depot). The said property shall hereinafter be referred to as the suit property.

The application is supported by an affidavit sworn by the 1st Plaintiff on 9th September 2013 where the grounds of the application are detailed. The 1st Plaintiff's case is that she is the *bona fide* co-purchaser/owner of the suit property, having bought the same from Eastleigh Water and Sewerage Welfare Association. The 1st Plaintiff has annexed as evidence a copy of a sale agreement dated 8th August 2005 between the officials of Eastleigh Water and Sewerage Welfare Association and the Plaintiffs, and has also annexed an allotment letter dated 13th December 1995 issued to the Plaintiffs by the City Council of Nairobi.

It is the 1st Plaintiffs' case that after the issuance of the letter of allotment, she paid a sum of Kshs 40,000/- which comprised the stand premium and other charges, and she exhibited a payment receipt for

the amount. The 1st Plaintiff further averred that she was issued with a beacon certificate dated 13th December 1995 whose copy she exhibited, and that before the deed plan for lease could be prepared, the original deed plan for the suit premises disappeared while in the custody of the 3rd Defendant.

The 1st Plaintiff availed a copy of a survey plan, and alleged that after the loss of the deed plan, unknown individuals started trespassing on the suit premises prompting the Plaintiffs to file a suit in Nairobi C.M.C.C No. 1796 of 2009, where they were seeking restraining orders against further trespass. It is the 1st Plaintiff's averment that the suit could not proceed following a ruling by the Chief Magistrate on 16th November 2012 directing the Plaintiffs to file separate suits. A copy of the said ruling delivered on 16th November 2012 was exhibited.

It is alleged by the 1st Plaintiff that the 2nd Defendant who was the then area Councillor, misled the Nairobi City Council's general purpose committee in its meeting of 18th May 2011 which subsequently influenced the decision of the full council meeting which gave authority to the town clerk to amend the list of the allottees. According to the 1st Plaintiff, the irregularity emanating from 2 conflicting lists was discovered by the Commissioner of Lands, who in a letter dated 13th August 2010 requested for a proper list of the *bona fide* allottees. The 1st Plaintiff exhibited a copy of the said letter, and of a letter dated 13th June 2012. In which the Chief Executive Officer of the Ethics and Anti-corruption Commission wrote to the town clerk of the 3rd Defendant informing him of the irregularities in allocation.

According to the 1st Plaintiff, the 3rd Defendant's Director of Legal Affairs subsequently issued a *bona fide* list of allottees which was attached to his letter dated 29th June 2012 whose copy was annexed. It is alleged by the 1st Plaintiff that her intentions to start developing the suit parcel have been thwarted by unknown people under the watch and invigilation of the 2nd Defendant and his servants/agents, who have chased her and her architect. Further, the 1st Plaintiff has alleged that the 2nd Defendant while trading as the 1st Defendant has sold the suit premises to the 4th Defendant, and she annexed a copy of the sale agreement dated 18th August 2009.

The 1st Plaintiff has also averred that the 4th Defendant has commenced the process of registering title to the suit premises, and a copy of a lease document dated 9th March 2012 has been exhibited. It is the 1st Plaintiff's case that by virtue of being a purchaser and having purchaser's interest, she is the rightful owner of plot no. 209/7260/187, and that the Defendants do not have any rights over the suit premises. According to the 1st Plaintiff, the Defendant's claim to a right of ownership/occupation of the suit premises cannot legally defeat or affect her ownership rights in any way, since her rights are inalienable and indefeasible in law. It is the 1st Plaintiff's assertion that the Defendants continued trespass on the suit premises has occasioned and continues to occasion her immense loss and damage as she is unable to develop the plots.

In a further affidavit sworn on 20th January 2014, the 1st Plaintiff has reiterated that the 2nd Defendant is a director of the 1st Defendant, and has further alleged that the said Defendant worked in cahoots with officers of the 3rd Defendant to influence the decision of the general purpose committee which led to the amendment of the list of allottees. The 1st Plaintiff has accused the 3rd Defendant of being in breach of the public trust conferred to it under the Constitution for having participated in alleged illegal allocation of public land.

The 1st Plaintiff alleged that the 2nd Defendant has in the past unlawfully attempted to register the suit premises in the 1st Defendant company where he is a director. The 1st Plaintiff while admitting that deed plans for the suit property were the subject of judicial review, stated that the court directed that the issues relating to the deed plan be dealt with in a pending suit where ownership was in issue. A copy of a ruling delivered on 1st October 2013 in the case of **R -vs- Commissioner of Lands & 27 others Ex-parte Jane Wairimu Mwangi & 9 Others (2013)eKLR** was annexed by the Plaintiffs as evidence.

The Defendants' Response

The application was opposed by the 2nd Defendant who in a replying affidavit sworn on 4th November 2013 stated that the 3rd Respondent was the original allottee from the Government of Kenya of Land Reference 209/7260 Eastleigh where the suit property lies. The 1st Defendant have averred that LR No. 209/7260 was originally owned by the 3rd Defendant's Water and Sewerage Depot prior to the said depot being transferred to Ruai Station and the Eastleigh Depot being decommissioned. It is alleged that the plot was subdivided into 58 plots and allotted to residents of Nairobi, whereof some plots were allotted to the 2nd Defendant.

It is the 2nd Defendant's case that he paid the requisite fees to the 3rd Defendant and was issued with beacon certificates indicating his boundaries. The 2nd Defendant has annexed as evidence a witness statement of K. J. Ayiecho dated 23rd May 2012 filed in Milimani CMCC No. 1796 of 2009. According to the 2nd Defendant, K. J. Ayiecho who was a Chief Valuer in the 3rd Defendant's department declared allottees assigned L. R. No. 209/7260/1-58 as genuine allottees as opposed to those bearing ESI -ES58 Numbers.

Further, the 2nd Defendant exhibited correspondences dated 11th July 2012, 13th July 2012, 19th July 2012 and 8th August 2012 in which it was stated that the plots bearing E.S series were nullified, and their transactions prohibited in addition to revocation of their formerly approved plans. According to the 2nd Defendant, the Plaintiffs were allegedly allocated the suit property through a fraudulent scheme which was the subject of investigation by the City Council of Nairobi Director of Investigation and Information Analysis, and found to have been a land grabbing attempt. The 2nd Defendant also annexed copies of correspondence on this issue dated 17th August 2012, 4th November 2012, 25th October 2011 and 23rd July 2012 as well as a copy of the City Council of Nairobi minutes of a meeting held on 12th June 2012.

It is the 2nd Defendant's contention that the letter of allotment issued to the Plaintiffs on 13th December 1995 had several anomalies, and was therefore not a genuine allotment. Further, that the payment receipt produced by the Plaintiffs dated 25th May 2005 was issued after a period of 10 years and therefore, that the condition for payment within 30 days was not complied with. While stating that he had been wrongfully sued, the 2nd Defendant averred that there was nothing to show that he had encroached on any of the plots belonging to the Plaintiffs, which do not actually exist.

It was the averment of the 2nd Defendant that if the Plaintiff was aggrieved by the decision of the council, she was at liberty to have the decision quashed through a judicial process which she never did, and further, that she has not sought to overturn the Council's decision in the instant suit. The 2nd Defendant has averred that the Plaintiffs' contention that the deed plan got lost was misleading and he annexed as evidence a copy of a letter dated 28th June 2013 indicating that the deed plans were given to their rightful owners. Lastly, the 2nd Defendant stated that the Plaintiff had not established a *prima facie* case to warrant the issuance of an injunction.

The 3rd Defendant also opposed the application through a replying affidavit sworn on 9th December 2013 by Violet A. Oyangi, who is its Deputy Director in the Department of Legal Affairs. The 3rd Defendant averred that in the late 1990s, some developers attempted to grab land known as LR No. 209/7260 which was its Eastleigh Sewerage Depot. It is the 3rd Defendant's contention that the land grabbing attempts were thwarted through its Council Town Planning Committee meetings held on 9th October 2008 and 15th October 2009 and further, that the persons who had attempted to grab the land had plots bearing the ES Series.

According to the 3rd Defendant, alienation and allocation of 58 duly surveyed plots was approved by its Town Planning Committee and further, that some of the plots have been built on with the approval of its

City Planning and Architecture Department after payment of the requisite fees. It is the 3rd Defendant's case that the 1st Defendant has a Council's approved lease and that according to its records, the suit property belongs to the 1st Defendant. It is the 3rd Defendant's contention that the suit plot had been subject to a previous suit being Milimani CMCC no. 1796 of 2008, and that the issue of deed plans was subject of High Court Misc. Application No. 163 of 2012 which was dismissed.

Further, the 3rd Defendant has contended that it issued a directive on 19th July 2012 indicating that the plots on LR 209/7260 bearing ES series were not recognized, and that any transactions involving them were a nullity. It is the 3rd Defendant's case that a consultation of the 3rd Defendant's Director of Legal Affairs, the then Director City Planning, the Chief Valuer and the Director Investigations and Information Analysis concluded that plots with ES series are non-existent. Further, the 3rd Defendant maintained that the illegal allocation of plots bearing ES, series was cancelled through its Town Planning Committee meeting held on 9th October 2008 and 15th October 2009.

According to the 3rd Defendant, pursuant to a memo dated 28th January 2002, the Part Development Plan (PDP) and survey plans that were prepared for LR no. 209/7260 off Eastleigh First Avenue have been duly approved and do not bear the ES series. It is also contended that since legally registered allottees have their own deed plans, the County authorized the Commissioner of Lands to deal and issue the pre-requisite documents. It is the 3rd Defendant's averment and that the 1st Plaintiff did not substantiate the allegations of corruption, fraud, and willful provision of wrongful information as alleged.

While stating that an allotment letter is an offer which is subject to acceptance of conditions which have a limitation and are subject to repossession and allocation of the property to suitable persons, the 3rd Defendant averred that payment made by the Plaintiffs 10 years after the allocation was a nullity and further, that acceptance of the same was erroneous. According to the 3rd Defendant, the alleged endorsed transfer on the allotment letter dated 13th December 1995 is neither dated nor signed by its officer. Further, the 3rd Defendant has averred that the name of the transferee appears where the transferor's name should have been and that the figure on standard premium and standard rent differ in the allotment letter. Lastly, the 3rd Defendant contended that the properties having ES series have no legal basis and had no Council minutes backing their allocation and therefore, that any transaction is void *ab initio*.

The Issues and Determination

The application was canvassed by way of written submissions, and the 1st Plaintiff filed submissions dated 30th January 2014 where she reiterated the facts of the case and argued that Article 40 of the Constitution protects the right to own property. The 1st and 2nd Defendants filed submissions dated 25th February 2014, while the 3rd Defendant did not file any submissions and entirely relied on its replying affidavit filed on 10th December 2013.

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 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] 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 Plaintiffs in this respect submitted that they followed all the rightful channels in acquiring the suit property and further, that since there was no encumbrance on the property when the Plaintiffs purchased or took possession of the same, she was an innocent purchaser for value without notice, and that the Defendants cannot purport to deprive her of her title to the property. The Plaintiffs further argued that their allocation was valid since they fulfilled all obligations of the allocation and were awaiting issuance of title.

The 1st and 2nd Defendants in their submissions reiterated that the Plaintiffs' plot had been declared non-existent by the 3rd Defendant, who was the custodian of the said plots, and who had the authority to allocate them. Counsel for the 1st and 2nd Defendants submitted that no *prima facie* case had been made out by the Plaintiffs to warrant the grant of an injunction as set out in the case of **Giella -vs- Cassman Brown (supra)**. Reliance was also placed on the decision in the case of **Grace Muthoni Mwaura -vs- Cllr. Josphat Kiaragu Waichahi & others, ELC No. 474 of 2013** in this respect.

I note that the Plaintiffs in their Plaint dated 9th September 2013 and filed in court on 18th September 2013 are seeking to be declared owners of the suit property, and for orders of an injunction restraining the Defendants from interfering with the said property. Although the 1st Plaintiff has exhibited a letter of allotment dated 13th December 1995 with respect to plot ES 38 Eastleigh Sewerage Plot, she did not provide any evidence to show that the entity she purchased the suit property from, namely Eastleigh Water and Sewerage Welfare Association had been allocated the suit property. In addition, the plans the Plaintiffs have provided in evidence to show the existence of the said plot ES 38 Eastleigh Sewerage Plot is neither stamped nor shown to be approved by the City Planning Department, from which it is alleged to have emanated.

In addition, the allocation of the said property to the Plaintiffs is highly contested by the 3rd Defendant which was the allocating authority, and which alleges that the said plot ES 38 Eastleigh Sewerage Plot is non-existent, and brought evidence of correspondence and minutes on the cancellation of the Plaintiffs' letter of allotment. The Plaintiffs in this regard also acknowledge that the 3rd Defendant has since issued a registered lease to the 4th Defendant with respect to the suit property.

The Plaintiff's Counsel in this regard submitted that the process through which the 4th Defendant acquired title to the suit property was questionable and illegal and rendered their title null and void, and that the 3rd Defendant was in breach of the trust conferred to it under the Constitution, since its corrupt officers participated in the illegal allocation of the suit property. Likewise the 3rd Defendant has alleged that the allocation of the suit property to the Plaintiffs was corrupt and fraudulent. However, this court cannot make any findings on these allegations at this stage, without the benefit of further evidence that is subjected to examination.

Lastly, I note that from the rulings and judgments annexed by the Plaintiffs, that the Plaintiff's suit in the **Jane Wairimu Mwangi & Others vs Councillor Josephat Kiragu & Others- Chief Magistrate's Court Suit No 1796 of 2009** appears to be still subsisting, and that what the ruling delivered in that suit on 18th November 2012 decided upon, was that the Plaintiffs should proceed with their respective suits in the Chief Magistrate's Court separately. This also appeared to be the position noted by the judgment was given on 1st October 2013 in **R vs The Commissioner of Lands & 27 Others ex parte Jane Wairimu Mwangi & 9 Others, Nairobi High Court in Judicial Review Misc. App. No. 163 of 2012.**

Furthermore, the 1st Plaintiff in her replying affidavit and witness statement dated 9th September 2013 and filed herein on 18th September 2013 states that the suit in **Chief Magistrate's Court Suit No 1796 of 2009** had “stalled”. There is thus the possibility that the suit herein by the Plaintiff might be in abuse of the process of court.

I therefore find that the Plaintiffs have not shown a *prima facie* case for the foregoing reasons, and accordingly decline to grant the prayers sought in their Notice of Motion dated 9th September 2013. The Plaintiffs shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 1st day of October 2014.

P. NYAMWEYA

JUDGE