



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 313 OF 2013

MARTIN MUTHIKE NDAMBIRI.....PLAINTIFF

VERSUS

JOHN MWANGI MBURU.....1ST DEFENDANT

NAOMI CATHERINE.....2ND DEFENDANT

JOSEPH OIRO AYIECHA.....3RD DEFENDANT

CITY COUNCIL OF NAIROBI.....4TH DEFENDANT

RULING

The Plaintiff's Application

The application before the court is a Notice of Motion dated 27th February 2013 filed by the Plaintiff, seeking orders of a temporary injunction against the Defendants to restrain them from trespassing, transferring, constructing on, and/or interfering with the Plaintiff's peaceful possession of all that property identified as Plot No. 113 Kariobangi South Riverbank within Nairobi County (hereinafter referred to as "the suit property"), pending the hearing of this suit *inter partes*.

The grounds for the application are that the Plaintiff is the *bona fide* allottee with title of the suit property, and has since erected a perimeter fence surrounding the suit property. Further, that the Defendant's actions have no legal foundation and are premised on malice and are tantamount to trespass and unjust enrichment at the behest of the Plaintiff. The Plaintiff is also apprehensive that he is likely to be disposed on his property if this Court does not intervene.

The Plaintiff in his supporting affidavit sworn on 27th February 2013 explained that he purchased the suit property from the 1st Defendant on the 4th day of May 2012 for valuable consideration, which 1st Defendant had initially bought the same from one Lucy Njeri Gachinga. Further, that after payment of the full purchase price he made statutory payments to the 4th Defendant in relation to the plot transfer fees and ground Rent. The Plaintiff annexed copies of the said sale agreement between himself and the 1st Defendant, a letter of allotment to Lucy Njeri Gachinga dated 22nd August 2007 and of receipts for payments made to the 4th Defendant.

The Plaintiff claims that the 2nd Defendant has entered the suit property with the protection of the 3rd Defendant who is the area's local chief, and has forcefully dispossessed him of the said property. He also claims that the 2nd Defendant with the protection of the 3rd Defendant has started construction upon the said property, which action is likely to lead to the loss of his legally acquired land.

The Defendants' Response

The 1st Defendant did not file any response to the Plaintiff's application. The 2nd Defendant on her part filed Grounds of Opposition dated 17th September 2014, and a replying affidavit she swore on the same date. The 2nd Defendant opposed the Plaintiff's Notice of Motion on the grounds that it is in gross contempt of court process, the Plaintiff has no *locus standi* to institute these proceedings, and that his suit as drawn and filed is fatally defective in law and ought to be struck out.

The 2nd Defendant in addition stated that she is the legal allottee to the suit land having taken out such legal right by way of purchase from the original allottee, and she annexed a copy of her letter of allotment dated 9th November 1997. She also stated that she had started construction on the suit property, and that the Plaintiff had not shown a *prima facie* case.

The 4th Defendant filed Grounds of Opposition dated 11th April 2013 in which it averred that the Plaintiff has no *locus standi* to institute this suit against it, and that his suit is devoid of merit and *mala fides* for the reason that the Plaintiff has not annexed any legal documents conferring interest in the suit property to him. Further, that the said property is allocated to one Catherine Naomi having purchased the same from the original allottee.

The 4th Defendant further stated that the issues raised are between the Plaintiff and the 1st Defendant, as the 4th Defendant was not a party to the alleged sale transactions and transfers of the suit property, and that the Plaintiff has not produced any documents or receipts in anyway proving that he is the lawful allottee of the suit property. Further, that the payments made to the 4th Defendant are of no relevance, neither do they prove the Plaintiff's alleged ownership of the suit property.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 12th September 2014 while the 2nd Defendant's counsel filed submissions dated 1st October 2014. The 1st and 4th Defendants did not file any submissions. I have read and carefully considered the pleadings filed and submissions made by the parties herein. 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 his Plaintiff filed herein dated 27th February 2013 is seeking a permanent injunction against

the Defendants restraining them from transferring the suit property and/or interfering with his peaceful possession of the same, and a declaration that he is the owner thereof.

The Plaintiff's submission is that he was allocated the suit property by the allotment letter dated 22nd August 2007 and the transfer of the same to him by the 1st Defendant, which transfer he submitted is noted on the said allotment letter, and also pursuant to the payments he made to the 4th Defendant in line with the conditions in the said allotment letter. He relied on the decision in **James P. Maina Muriuki vs Moses Maina Ngugi & Another (2012) e KLR** that the law recognizes the rights created by an allotment letter as long as parties have met the conditions thereof.

The 2nd Defendant in her submissions argued that the application and the entire suit are bad in law for reasons that the 3rd Defendant was sued as the local chief without notice to the Attorney General as required under section 13A of the Government Proceedings Act. Further, that the 4th Defendant is unknown in law and cannot be sued as such. The 2nd Defendant also submitted that no particulars of fraud have been provided in the Plaint as required by the Civil Procedure Act.

The 2nd Defendant further submitted that she had shown that she was the *bona fide* allottee of the suit property, which had also been indicated by the 4th Defendant. Further, that the Plaintiff's loss if any can be compensated by an award of damages, and that the balance of convenience tilted in favour of the 2nd Defendant who is in occupation of the suit property and who has invested in development of the same. The 2nd Defendant produced evidence of her letter of allotment with respect to the suit property dated 9th November 1997.

I have perused the letter of allotment relied upon by the Plaintiff. I note that it was issued to one Lucy Njeri Gachinga on 22nd August 2007, after an earlier letter of allotment with respect to the same property had been issued to the 2nd Defendant on 9th November 1997. I have also noted the various transfers of the allotment letter issued to Lucy Njeri Gachinga indicated thereon. It however is not shown who noted the said transfers and/or whether they are endorsed by the 4th Defendant. The 4th Defendant which is the allotting authority, on the other hand in this regard stated that the suit property was allocated to the 2nd Defendant, and that it has no knowledge of the Plaintiff's interest in the suit property.

I therefore find arising from the foregoing reasons that the Plaintiff has not established a *prima facie* case, and the prayers sought in his Notice of Motion dated 27th February 2013 are accordingly denied. The Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___24th___ day of ___November___, 2014.

P. NYAMWEYA

JUDGE