



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT NAIROBI

ELC CIVIL SUIT NO. 558 OF 2014

HALIMA DAFARA GOLE.....PLAINTIFF

VERSUS

DAVID KAMARI.....1ST DEFENDANT

PINNACLE PROPERTIES CONSULTANT LTD.....2ND DEFENDANT

NAIROBI CITY COUNCIL.....3RD DEFENDANT

RULING

The Application

The application before the Court for determination is a Notice of Motion filed by the Plaintiff dated 7th May 2014, seeking a temporary injunction against the 1st and 2nd Defendants to restrain them from alienating, selling, disposing, trespassing and/or in any manner dealing with property known as L.R Plot No. Eastleigh off Currier Street TOL No. VAL 597/SG/1/0/JWG) Nairobi (hereinafter referred to as "the suit property").

The grounds for the application are stated in a supporting affidavit and supplementary affidavit sworn by the Plaintiff on 7th May 2014 and 7th October 2014 respectively. These are that the Plaintiff is the lawfully registered owner or allottee of the suit property, which was allocated to her by the 2nd and 3rd Defendant herein. Further, that the 1st Defendant is the registered owner of the property known as L.R No. Eastleigh 36/VII/310 which is adjacent to the suit property, and which he has sold to the 3rd Defendant and included the suit property without any legal justification.

The Plaintiff further states that there is extreme urgency in protecting the suit property and the Plaintiff's right and interest therein from flagrant interference by the Defendants, as she had been issued with a notice to vacate that expired on the 30th April, 2014. She also gave an undertaking as to payment of damages should the orders she seeks turn out to have been unwarranted. The Plaintiff attached a bundle of documents evidencing her ownership of the suit property including a temporary occupation licence and a copy of the notice to vacate. The Plaintiff averred that the 3rd Defendant had issued her with letters confirming that the said temporary occupation licence does exist and the same has not been nullified.

The Defendants' Responses

The 1st Defendant opposed the Plaintiff's application in a replying affidavit sworn on 28th May 2014. The deponent stated that he is a director of Mahuru Ltd, which is the *bona fide* owner of the property known as LR No. 36/VII/310 Eastleigh, Nairobi having acquired it through succession from the estate of Amos Nganga Nguyai, and he annexed a copy of the indenture dated 28th July 1971 and a copy of the certificate of confirmation of grant. Further, that the Plaintiff has breached the specifications of temporary occupation license (TOL) issued to her, and that she was encroaching on the 1st Defendant's land.

The deponent explained that after writing a letter of complaint to the 3rd Defendant about the encroachment, the chief land surveyor of the 3rd Defendant at the time, one Mwai Kariuki, did establish that there were illegal structures developed by the Plaintiff on the plot LR No. 36/VII/310 Eastleigh Nairobi by a length of 4.5 meters inside and along the boundary, and he directed that the temporary occupation license issued to the Plaintiff be revoked as the specifications of the said license had not been met. The deponent annexed a copy of the said letters dated 10th February 2006 and 21st February 2006 respectively.

Further, that a surveyor by the name Patrick Musembi came to the ground and pointed out the beacons showing where the 1st Defendant's plot LR. No. 36/VII/310 Eastleigh, Nairobi were, and subsequently issued a beacon certificate. The deponent annexed a copy of the beacon certificate and report that indicates that the beacons E8 and E9 were not placed due to an encroachment on the front part of the plot.

The 3rd Defendant also opposed the Plaintiff's application in a replying affidavit sworn on 16th September 2014 by Stephen Gathuita Mwangi, its Chief Officer, Lands Department. The deponent stated that the Plaintiff's claim that she is the registered owner of the parcel of land purportedly known as LR Plot No. Eastleigh Off Currier Street T.O.L No. VAL 597/SG/1/0/JWG is misleading, as the said parcel of land does not exist in the 3rd Defendant's records or on the ground at all, and that this position had been communicated to the Plaintiff. He attached a copy of an internal memo dated 18th July 2014 from the 3rd Defendant's Chief Valuer to the Director – Legal Affairs confirming the foregoing, as well as copies of letters dated 27th February 2006 and 10th September 2014 from the 3rd Defendant to the Plaintiff.

The deponent further stated that the nature of a Temporary Occupation Licence is that it is issued on a temporary basis on land designated for other uses for example road reserves or public utility land, and that in the event of conflicts then the same is terminated. Thus, that the Plaintiff cannot claim ownership over the said parcel of land. Further, that the two allotment letters exhibited by the Plaintiff describe non-existent suit property and/or give a vague description of the allotted property. The deponent also averred that the Plaintiff in addition seeks to rely on a beacon certificate issued to her on 20th October, 2000 two or four years before the purported allotment of the suit property of her.

The Issues and Submissions

The parties were directed to file submissions on the Plaintiffs application. The Plaintiff did not file any submissions. The 1st and 2nd Defendants' Advocates filed submissions dated 6th October 2014 while the 3rd Defendant's Advocates filed submissions dated 7th October 2014.

I have carefully read and considered the pleadings and arguments made by the parties herein. The primary issue for determination is whether the Plaintiff has met 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 1st and 2nd Defendants in their submissions argued that the Plaintiff has not established a *prima facie* case as she had failed to establish a clear basis of ownership of the premises she claims, and that the letters of allotment she relies upon cannot confer her any proprietary interest or defeat the interests of

registered proprietors. They further argued that the temporary occupation licence issued to the Plaintiff was in respect of a road reserve which is not available for allotment, and the 3rd Defendant had confirmed that there was no existing temporary licence validly issued to the Plaintiff.

Lastly the 1st and 2nd Defendants averred that the injunctions sought would affect the registered proprietor of the suit property who is not joined as a party to this suit, and that this Court has no jurisdiction under section 18 (2) of the Land Registration Act to determine the extent of boundaries of land. The 1st and 2nd Defendants cited various judicial authorities in support of their arguments.

The 3rd Defendant on its part submitted that the Plaintiff had failed to demonstrate a *prima facie* case as she is not the registered proprietor of the suit premises, and her alleged property does not exist in the 3rd Defendant's records or on the ground. In any event, that the nature of her interest if it exists is temporary, and the documents she relies upon as evidence of her interest have several inconsistencies.

I have perused the letters of allotment dated 20th May 2004 and 20th September 2009 relied upon by the Plaintiff as the basis for her claim to the suit property. The first letter of allotment refers to a residential plot described as Eastleigh off Currier Street TOL No. VAL 597/SG/1/0/JWG, while the second allotment letter refers to allotment of a space next to LR No. 36/VII/310 Eastleigh Nairobi. The 3rd Defendant in various letters to the Plaintiff which were exhibited by both the Defendants and Plaintiff has indicated that the said residential plot known as Eastleigh off Currier Street TOL No. VAL 597/SG/1/0/JWG does not exist in their records, and even at one time in a letter dated 27th February 2006 cancelled the Plaintiff's temporary occupation licence.

The Plaintiff in turn relied on a memo dated 8th November 2006 from the 3rd Defendant's Chief Valuer which states that the cancellation was reviewed on condition that "there is no encroachment on any private land whatsoever". The 3rd Defendant in a memo dated 18th July 2014 from its Chief Valuer annexed as annexure "SG1" to their replying affidavit however reiterates that there is no parcel of land known as Eastleigh off Currier Street TOL No. VAL 597/SG/1/0/JWG, and that the Plaintiff's temporary occupation licence is with respect to a road reserve.

The 1st and 2nd Defendants on their part have alleged that the Plaintiff has encroached on their land, being LR No. 36/VII/310 Eastleigh Nairobi, and they have produced evidence of their title to the same as well as evidence of a report by a surveyor dated 18th May 2014 on the alleged encroachment. This encroachment is also confirmed by the 3rd Defendant in a memo dated 10th February 2006 from the Chief Land Surveyor annexed as annexure "KM9" to the 1st and 2nd Defendant's replying affidavit.

The current position therefore from the evidence adduced is that the plot claimed by the Plaintiff is indeterminable, and is also contested by the allotting authority being the 3rd Defendant. There is also evidence that the Plaintiff has encroached on LR No. 36/VII/310 Eastleigh Nairobi, and granting her the injunction sought may result in the interference with the rights of the registered proprietors of the said property. To this extent I find that the Plaintiff has not established a *prima facie* case.

I accordingly decline to grant the prayers in the Plaintiff's Notice of Motion dated 7th May 2014 for the foregoing reasons, and the Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___10th___ day of ___November___, 2014.

P. NYAMWEYA

JUDGE