



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 474 OF 2013

GRACE MUTHONI MWAURA.....PLAINTIFF/APPLICANT

VERSUS

MAURICE KIHORO WANDUTO 1ST DEFENDANT/RESPONDENT

CLLR. JOSPHAT K. WAICHAHI..... 2ND DEFENDANT/RESPONDENT

CITY COUNCIL OF NAIROBI..... 3RD DEFENDANT/RESPONDENT

RULING

Before me for determination is the Notice of Motion dated 18th April 2013 in which the Plaintiff/Applicant seeks for orders of a temporary injunction restraining the Defendant/Respondents from building or excavating or selling the land parcel known as L.R. No. 209/7260/191 originally Plot Number ES 11 Eastleigh Sewerage Depot (hereinafter referred to as the “Suit Plot”) pending the hearing and determination of this Application and suit together with costs.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Grace Muthoni Mwaura sworn on 18th April 2013 wherein she stated that she bought the Suit Plot from one Njoki Njambi who was the holder of a letter of allotment dated 13th December 1995 in respect of the Suit Plot issued by the 3rd Defendant/Respondent. She exhibited a copy of a Sale Agreement between her and the said Njoki Njambi dated 14th November 2002. She further asserted that the 3rd Defendant confirmed that sale by endorsing the transfer of the Suit Plot to her on the said letter of allotment. She confirmed that she has since been paying ground rent to the 3rd Defendant in respect of the Suit Plot. She also stated that when she wished to develop the Suit Plot, she approached the 3rd Defendant to approve her architectural drawings which the 3rd Defendant approved. She then stated that when she visited the Suit Plot early this year together with her architect, she was shocked to find that the 1st Defendant had already started illegal construction thereon to the extent that the building had reached the 3rd floor. She accused the 2nd Defendant of watching over this illegal construction. She stated that she reported this to the DCIO at Buruburu Police Station who advised her to obtain a court order.

The Application is contested. The 1st Defendant filed his Replying Affidavit sworn on 29th April 2013 wherein he averred that while the Plaintiff/Applicant claims the Suit Plot, he purchased Plot Number 30

Eastleigh Section III (former sewerage plot) from one Anthony Waweru Wachira on 9th November 2010. He attached a copy of the sale agreement. He further stated that the said Plot Number 30 was originally allocated by the 3rd Defendant to a company called Kenton Limited about September 2001 which company later sold it to the said Anthony Waweru Wachira. He annexed a copy of the Letter of Allotment. He further asserted that after purchasing that plot, he paid the transfer fee to the 3rd Defendant. He further stated that in February 2011, he obtained a Beacon Certificate over the plot from the 3rd Defendant after making the required payments for survey. He further stated that in March 2011, the 3rd Defendant approved his building plans after he made the required payments. He confirmed that he was in the process of building a commercial residential building after obtaining a change of user of his said plot. He disclosed that he commenced construction in June 2012 and has now constructed 3 floors. He further stated that he has no interest in the Suit Plot and has not trespassed the same. He further disclosed that the Plaintiff/Applicant and others filed CMCC No. 1796 of 2009 wherein she was the 8th Plaintiff and she attempted to join him as a defendant in August 2012 alleging that he was interfering with her land but that he was not enjoined. He also disclosed that the 3rd Defendant was also a party in that suit. He further averred that he has invested a substantial amount of money in his said plot and it is unfair for the Plaintiff/Applicant to seek to stop him from developing his land. He argued that in any event, any loss suffered by the Plaintiff/Applicant is quantifiable and recoverable from whoever sold to her a non-existent plot.

The Application is further contested by the 3rd Defendant which filed the Replying Affidavit of Rose K. Muema sworn on 18th June 2013 wherein she stated that she is the Acting Director in the Department of City Planning in the 3rd Defendant. She further averred that in the late 1990s, some developers moved in and tried to grab land known as L.R. No. 209/7260, which parcel was formerly City Council of Nairobi Eastleigh Sewerage Depot. She stated that that attempt was thwarted by the Council and stated further that the grabbers had pieces of land bearing the series ES. She further stated that on 5th June 2009, the Council approved alienation of part of the land and approved allocation of 58 plots duly surveyed. She further disclosed that the 1st Defendant is the owner of one of those plots and has received the full approval of the Council to construct. She further confirmed that the said plot was originally allocated to Kenton Limited which transferred it to Anthony Waweru Wachira who later transferred it to the 1st Defendant. She further stated that the property in question is Plot No. 30 Section III Eastleigh Nairobi which is L.R. No. 209/7260/191. She further stated that on 19th July 2012, a directive was issued stipulating that plots bearing the L.R. No. 209/7260 bearing the ES series were not recognized and any transactions involving the same is a nullity. She further stated that after consultation between the Director of Legal Affairs, Director of City Planning, Chief Valuer and the Director of Investigation and Information Analysis, it was concluded that plots with the ES series do not exist and that a letter to that effect was forwarded to the Plaintiff/Applicant's counsel. She further stated that the letter of allotment is an offer which is subject to acceptance of the condition therein and that payment made 10 years after the allocation is a nullity. She further stated that the endorsed transfer of the Suit Plot to the Plaintiff/Applicant is not signed or dated by any officer of the 3rd Defendant.

The Plaintiff/Applicant filed a Further Affidavit on 8th August 2013 wherein she stated that the 3rd Defendant has conceded the existence of the Suit Plot as part of L.R. No. 209/7260.

The Plaintiff, 1st and 3rd Defendant filed their written submissions which have been read and taken into consideration in this ruling.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might

otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Looking at the facts of this case, the Plaintiff has based her claims of ownership over the Suit Plot on a letter of allotment issued by the 3rd Defendant which is in the name of one Njoki Njambi. She has relied on a Sale Agreement entered into between herself and the said Njoki Njambi. Her claim has been attacked by the Defendant/Respondents on two fronts. Firstly, there is the question whether the Suit Plot and the Plot No. 30 which the 1st Defendant claims are different parcels or one and the same plot. That issue has not been determined and remains an issue to be determined at the trial court after all the relevant evidence has been adduced. The second attack of the Plaintiff/Applicant’s case has been by the 3rd Respondent which has indicated that the Suit Plot is not in existence as there was impropriety in the allocation of the same. Being the custodian of all the information regarding ownership of land within its area of jurisdiction and being empowered to allocate land, this declaration seriously brings the authenticity of the Plaintiff/Applicant’s claims to doubt. In light of that, this court finds that the Plaintiff/Applicant has not shown that she has a prima facie case with high chances of success at the main trial.

With that finding, I see no need to further interrogate whether the other two conditions in the **Giella** case have been met.

Accordingly, I hereby dismiss this Application. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE