



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO 504 OF 2009

AMENDEO MUNG'ERI GIKONYE.....PLAINTIFF/APPLICANT

VERSUS

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

RULING

Before me is a Notice of Motion dated 12th August 2011 in which the Applicant, Miriam Njeri Njoroge, seeks for the following orders:

1. Spent.
2. Spent.
3. That pending the hearing and determination of this application, execution of the orders of this court granted on 13th May 2010 be and is hereby stayed.
4. That pending the hearing of this application inter-parte, the Plaintiff and/or his agents, servants and employees be and are hereby restrained by way of injunction from developing and/or occupying that plot of land known as Plot Number 50 Komarock Community Social Centre (hereinafter referred to as the "Suit Plot").
5. That pending the hearing and determination of this suit the Plaintiff and/or his agents, servants and employees be and are hereby restrained by way of injunction from developing and/or occupying the Suit Plot.
6. That the orders this court issued dated 13th May 2011 be are hereby reviewed and the same are hereby vacated.
7. That the Applicant be and is hereby enjoined in this suit as the 2nd Defendant.
8. That leave to file a statement of defence be and is hereby granted to the Applicant herein.
9. That costs of this application are granted to the Applicant.

The Application is based on the grounds appearing on the face of it together with the Supporting Affidavit of Miriam Njeri Njoroge sworn on 12th August 2011 wherein she stated that she was allocated the Suit Plot by the Defendant in the year 1993. She produced her letter of allotment dated 22nd November 1993. She then stated that she has always paid the requisite rates in respect thereof and has also been issued with a Beacon Certificate which she produced. She then disclosed that she has never developed the Suit Plot since allocation. She then stated that on or about 3rd August 2011, she was informed by one Martin Gachunga Njoroge that the Plaintiff was digging a foundation to commence construction on the Suit Plot.

She stated that upon receiving that news, she proceeded to the Suit Plot and confirmed that report. She said that she then proceeded to the Defendant's office and was informed that the Plaintiff had obtained orders in this suit giving him quiet possession of the Suit Plot. She stated that it is then that she instructed her advocates to peruse the court file and file this application. She asserted that it is not true that the Plaintiff took possession of the Suit Plot in 1997 as the Plaintiff alleged. She then asserted that the Plaintiff deliberately failed to enjoin her in this suit as a co-defendant because he did not want the truth to come out.

The Application is not opposed by the Defendant. Despite being duly served, the Plaintiff did not file any response to this Application. The Applicant filed her written submissions which have been read and taken into consideration in this ruling.

For starters, I shall first address prayer numbers 3 and 6 wherein the Applicant seeks for this court to stay the orders of this court issued on 13th May 2010 and also to review and vacate those orders. The applicable law is to be found in Section 80 of the Civil Procedure Act which provides as follows:

“Any person who considers himself aggrieved-

- a. ***By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
- b. ***By a decree or order from which no appeal is allowed by this Act,***

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

It is also to be found in Order 45 rule 1(1) of the Civil Procedure Rules, 2010 which provides as follows:

“Any person considering himself aggrieved by ... an order ... but from which no appeal has been preferred and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the ... order, may apply for a review ... to the court which ... made the order without unreasonable delay.”

The order complained of by the Applicant is the one issued by Justice Mbogholi on 13th May 2010 which is to the following effect:

“That the Defendant, either by itself its agents and or servants be and is hereby restrained by a temporary injunction from trespassing on, demolishing any building and structures on, or in any other way from interfering with the Plaintiff's quiet possession and occupation of parcel number Plot No. 50 Komarock Community Shopping Centre pending the hearing and final determination of the main suit. That costs of the Application be in the cause”

I have studied Justice Mbogholi's said order. It is evident that while he was writing this ruling, he was fully aware of the existence of the Applicant and of her rival claim to the Suit Plot. He extensively referred to the letter of allotment issued by the Defendant to the Applicant which the Defendant produced to the court. It is therefore clear to me that there is no discovery of new and important matter or evidence which the Applicant is able to produce which would warrant my reviewing Justice Mbogholi's order. Accordingly, I decline to grant to those prayers.

I now turn to prayer numbers 4 and 5 which in essence are requests for injunction orders to be issued restraining the Plaintiff from developing and or occupying the Suit Plot. Clearly, there are already in force Justice Mbogholi's orders granting the Plaintiff a temporary injunction restraining the Defendant from interfering with his quiet possession of the Suit Plot. With these orders in force, and after I have declined to vacate the same as outlined above, I am therefore not able to grant the Applicant similar orders as prayed in prayer numbers 4 and 5.

The remaining orders are prayer numbers 6, 7 and 8 which pray for the Applicant to be enjoined in this suit as the 2nd Defendant, that she be granted leave to file a defence and that she be granted the costs of this Application. It is quite clear to me that the Applicant, who has a rival claim over the Suit Plot, should indeed be enjoined in this suit. I hereby allow that request and do grant her leave to file and serve her defence. On the issue of costs, I order that the same be in the cause.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013.

MARY M. GITUMBI

JUDGE