



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 127 OF 2012

MARY NJERI KIARIE PLAINTIFF

=VERSUS=

NATIONAL SOCIAL SECURITY FUND DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 13th March 2012 in which the plaintiff/applicant seeks the following reliefs:-

1. Spent

2. Spent

3. That pending the hearing and determination of this suit an injunction order do issue restraining the defendant/respondent either by itself, its agents and/or servants or any other persons under the authority from demolishing and/or threatening to demolish, materially damaging and/or reducing the plaintiff/ applicant's property known as L.R No.12948/126 – Mountain View.

4. That a permanent injunction do issue restraining the defendant/ respondent from demolishing the plaintiff/applicant's structures or issuing threats of demolishing, materially damaging and/or reducing the plaintiff/applicant's property known as LR No.12948/126 – Mountain View.

5. That the costs of this application be provided for.

6. Any other of further relief that this court deems fit and just to grant.

2. The applicant is the registered owner of LR No.12948/126 at Mountain View in Nairobi on which house number 32 stands. The defendant/respondent is the registered owner of LR No.12948/123 on which house number 31 stands. The respondent had asked the applicant to demolish part of her structures which had encroached on to its property but the applicant declined to do so and instead came to court and filed a suit against the respondent for a permanent injunction restraining the respondent from demolishing any part of her property.

3. The applicant was granted interim injunction pending hearing and determination of the application inter-partes. The parties were directed to file written submissions. When the parties appeared for highlighting of submissions on 21st June 2012, it was agreed that there be a site visit by the court. The site visit was delayed for one reason or the other until 13th December 2017 when the Deputy Registrar of this Court visited the site and prepared a report. The applicant who had been notified of the site visit never appeared at the site.

4. The applicant contends that she has not encroached on to the property owned by the respondent and that any demolition of part of her property which is said to be encroaching onto the respondent's property will affect the structural stability of her house.

5. The respondent opposed the applicant's application through a replying affidavit sworn on 23rd April 2012. The respondent contends that the filing of this suit as well as the application is an abuse of the process of the court. The applicant had filed another suit against the respondent in the chief magistrate's court. The suit at the lower court was filed by a Mr David Kiarie Ngatia on behalf of the applicant. The respondent commissioned the services of a surveyor who confirmed that the applicant had encroached on to its property by 37% leaving only 67% for it.

6. In a supplementary affidavit sworn on 21st May 2012, the applicant contends that the survey carried out by the respondent was carried out in her absence and that it is the new survey which portrays her as having encroached on to the respondent's property. The applicant alleges

that the survey carried out by the respondent was not carried out in accordance with the established rules. On the issue of the case in the lower court, the applicant contends that she forgot to inform her present lawyers about it and that in any case, the lower court had no jurisdiction to entertain the same. She has made all efforts to peruse the court file in the lower court in vain as the file cannot be traced.

7. In a further affidavit, the respondent denies the contents of the applicant's supplementary affidavit and states that it was carrying out a survey of its plot. There was no re-surveying carried out as alleged by the applicant and the survey was carried out based on maps obtained from the survey office at Ruaraka.

8. I have carefully considered the applicant's application as well as the objection to it by the respondent. I have also considered the submissions filed by the parties herein. This being an application for injunction, I have to determine whether the applicant has met the threshold for grant of an injunction. First and foremost, as was clearly set out in the case of **Giella Vs Cassman Brown & Co.Ltd (1973) EA 358**, an applicant has to demonstrate that he has a prima facie case with probability of success.

9. In the instant case, this is a case of encroachment. The respondent through its replying affidavit has shown that there is encroachment on to its property by the applicant. The parties had agreed to do a site visit to confirm the position on the ground. The site visit was conducted by the Deputy Registrar of this court. The surveyor from the respondent's side was present. He pointed out the area encroached. In total the applicant has encroached into the respondent's land by 37%. The applicant who had been notified of the site visit never availed herself. It is therefore clear that she has failed to demonstrate that she has a prima facie case with probability of success. I proceed to dismiss the applicant's application with costs to the respondent. The injunction orders which had been given are hereby discharged.

It is so ordered.

Dated, and Signed at Nairobi on this 31st day of July 2018.

E.O.OBAGA

JUDGE

Delivered in the absence of parties who were aware of the date and time of delivery of Ruling.

Court Assistant: Hilda

B. M. EBOSO

JUDGE