



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.235 OF 2014

ANNE KAREGI BETT PLAINTIFF

VERSUS

MERIO OLAMROI 1ST DEFENDANT

HASSAN TAJEU *alias* MZUNGU..... 2ND DEFENDANT

SOPHILAL *alias* MZUNGU..... 3RD DEFENDANT

RULING

1. By a Motion dated 29.12.2014 the Plaintiff/Applicant seeks the following reliefs:

1. Spent

2. Spent

3. That a temporary injunction do issue compelling the demolition (*sic*) of any illegal structure unlawfully built by the Defendants, their servants or agents on the suit land, which order, be enforced by the Officer Commanding Kajiado Police Station pending the Inter parties hearing and determination of this application.

4. Spent

5. That this Honourable court do order the Defendants/ Respondents deposit such security in monetary terms to cover the Plaintiff's/Applicant's loss pending the inter parties hearing and determination of this application.

6. That cost of this application be borne by the Defendants.

2. The application is anchored on the provisions of Order 40 Rules 1, 3, and 4 and Order 51 Rule 1 Civil Procedure Rules, 2010, section 1A, 3A, 63(c) (e) of Civil Procedure Act Cap 21 and all enabling provisions of the law. The application is supported by the Affidavit of Anne Karegi Bett sworn on 29.12.2014 and the grounds on the face of the Motion. The Applicant has also filed supplementary Affidavit sworn by her on 28.1.2015.

3. The Respondents have filed their replies vide Affidavits by Merio Ole Lemumok Lempisai sworn on

2.2.015, another affidavit by Hassan Tajeu Mzungu sworn on 2.2.2015 and the last one by Emily Sophial Morasua also sworn on 2.2.2015.

4. The Plaintiff's/Applicant's case is that in 2006 she with Joseph Kibet Tanui bought Kajiado/Lorugusua/1299 herein after referred to as the suit land and they were registered as the owners. They started economically to utilize same and enjoying it continuously and uninterrupted quietly and peacefully without interference. However, in December 2014, the Defendants unlawfully trespassed into the suit land and upon being asked to vacate the suit land they threatened the Plaintiff with lynching. Thus prompting the Applicant to report to Kajiado Police Station.

5. The Defendants/Respondents put up temporary structures and started fencing, cutting trees wantonly and still in occupation in a portion of the suit land thus interfering with Plaintiff/Applicant peaceful and quiet enjoyment of the suit land. The Defendants admit they entered the suit land but in 2013 which according to the Plaintiff is blatant trespass as they knew the Applicant and her co-owner are registered owners since 2006. The suit land was a sub-division of Kajiado/Longosua/63 owned by (Group Ranch called Ilpartimaru) in which a member No.334 Ole Lempesai Oloriki got share being the suit land.

6. On 30.3.2001 he transferred to his son Sarinke Ole Lempesai Murre (Sarinke) as a gift and title was issued to him on 30.3.2001. The said Sarinke sold and transferred same to the Plaintiff and the co-owner in 2006. The 1st Defendant or any of the Defendants have never owned suit land nor do they have any documents to support their case.

7. The Applicant therefore submits that she has met the threshold in the authority of **GIELLA –VS- CASSMAN BROWN (1973) EA 358** on grant of temporary injunction and also the threshold in **SHARIFF ABDI HASSAN –VS- NADHIF JAMA ADAN Civil Appeal No.121/05 Nairobi**, on grant of temporary injunction. They have also relied on authority of **RAY PHARMACEUTICALS LTD & 6 OTHERS –VS- COUNTY GOVERNMENT OF KIAMBU ELC Case No.1191/2013**.

8. The Respondents oppose the application via an affidavit sworn by Hassan Tajeu on 22.1.2015 as authorized by 1st and 3rd Respondents. He avers that he has been utilizing suit land since 2013 by grazing animals, burning charcoal and having a structure therein. He claims that the 1st Defendant is the owner though fraudulently disposed. He avers that the group ranch colluded to issue the Plaintiff with title and thus the same is null and void.

9. After going through the application and the parties affidavits filed, and also the oral submissions, I find the following issues for determination:

1. Whether the Applicant has met the threshold of issuance of mandatory injunction?
2. Whether the same mandatory injunction can issue at this stage?
3. What is the order as to costs?

By the documents the Plaintiffs has demonstrated that the land which originally registered in the name of Ilpartimaru Group Ranch as Kajiado Lorugusua/63 was shared to members with one Ole Lempesai Oloriki member No.334 getting the suit land Kajiado/Lorugusua/1299. He transferred the same to his son Sarinke Ole Lempesai Murre (hereinafter referred to as Sarinke). The said Sarinke sold to the Plaintiff and to her co-owner way back in 2006 and got title deed issued to them on 15.9.06.

10. The Respondent admits entering and erecting structures in suit land though in 2013 not 2014 as stated by the Applicant. The Respondent moved to suit land while aware that the land was registered in Plaintiff's names though alleging the same title was fraudulently issued to the Applicants and her co-owner in the Group Ranch area. The list produced by the Respondents, shows the owner of 1299 is member No.334 Ole Lempesai Oloriki who is not a party in the suit.

11. The 1st and 2nd Defendants have not denied that they are facing criminal charges in Kajiado Magistrates court Cr.No.8/2015 for forcible detainer over suit land and forgery. In the case of **SHARIFF ABDI HASSAN –VS- NADHIT JAMA ADAN Civil Appeal No.121/05** the Court of Appeal held that:

“a mandatory injunction ought not to be granted on an interlocutory application in absence of special circumstances and the only in clear cases where the court thought that the matter ought to be decided at once for where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal the match on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightfully been granted, that being a different and higher standard than was required for a prohibitory injunction.”

12. The court relied on the case of **LOCHBAI INT. FINANCE LTD. –VS- AGRO-EXPORT & ANOTHER (1986) IALLR 901.**

Also in another case the court cited **KAMAU MUCHUCHA –VS- THE RIPPLES LTD. Civil Appeal No.186/86** which held that:

“A party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act and without in any way attempting to precede ... or influence decision thereon....”

Further the case of **SUPER POWER CASH & CARRY LTD. -VS- NAIROBI CITY COUNCIL & 2 OTHERS Civil Application No.111/02** also cited held that:

“The court has recognized and held in the past that it is a trespasser who should give way pending the determination of the dispute and its no answer that the alleged acts of trespass are compensable in damages.”

13. In our instant case the Respondents entered the land without seeking to challenge the Plaintiff’s title and then started to fight from the point of advantage. They aver that court should not issue the orders before trial. The cited authorities above obtain in the circumstances of this case. The Defendants unjustifiably entered the suit land and continue to do damage and/or wastage without any justification. They have no documents to hold on to proclaim title to land.

14. Section 26(1) LRA stipulates that the certificate of title is a prima facie evidence that the registered person is the proprietor of land. The entry whether in 2013 or 2014 is and was intended to steal a match. The court will not countenance where a party knowing the adverse party has title to land trespasses and then seeks to maintain status quo pending hearing of the suit. The trespasser has to give way and do the matter while out of the suit land.

15. The court therefore finds the application to have merit and make the following orders:

1. Prayer No.3 is granted.
2. The OCS Kajiado Police Station to ensure compliance.
3. The Applicant is at liberty to use court bailiffs to execute the order and under the oversight of security provided by the OCS Kajiado.
4. However, the same order above to be executed after 14 days to give Defendants time to remove the structures and their animals and vacate the suit land.

Orders accordingly.

Dated and Delivered at Machakos, this 27th day of February, 2015.

CHARLES KARIUKI

JUDGE