



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.452 OF 2014

REBECCA MOTABORI ONGERA PLAINTIFF

VERSUS

ALLOYS MOSETI 1ST DEFENDANT

COUNTY LAND REGISTRAR KISII COUNTY 2ND DEFENDANT

RULING

1. This dispute is over the exact ground location of LR No. Kisii Municipality/Block I/58 owned by the plaintiff (hereinafter referred to only as “Plot No.58” and LR No. Kisii Municipality/Block I/61 owned by the 1st defendant (hereinafter referred to as “Plot No.61”). The plaintiff brought this suit against the defendant seeking a declaration that she is the owner of Plot No.58, a permanent injunction restraining the 1st defendant from entering or interfering with Plot No. 58 and an order compelling the 1st defendant to demolish the structures that he has put up on the said parcel of land. Together with the plaint, the plaintiff filed a Notice of Motion application dated 20th November, 2014 seeking the following orders:-
 - i. **That pending the hearing of this application interpartes an order of a temporary injunction be issued restraining the defendant either by himself or through his agents, servants and/or employees from entering, trespassing, wasting the suit land(Plot No.58) or plants and construction materials thereon and from transferring and/or in any way dealing with the said property.**
 - ii. **Costs of this application.**
2. The application was supported by the affidavit and further affidavit of the plaintiff sworn on 20th November 2014 and 6th January, 2015 respectively. The same was also supported by the affidavit of one, Teresa Nyantune Mesa sworn on 6th January, 2015. In her two affidavits, the plaintiff stated that she is the registered owner of Plot No. 58 and that the defendant entered the said parcel of land forcefully with the assistance of a local vigilante outfit and started making preparations for developing the same. The plaintiff annexed to her two affidavits several documents in support of her claim including, a lease and certificate of lease in respect of the suit property issued in her favour and a certificate of official search on the title of the suit property showing that the same was registered in her name on 27th February, 2012. The plaintiff also annexed several survey maps showing the ground location of the suit property and the fact that Plot No. 58 lies between Plot No. 57 and Plot No. 61 owned by the 1st defendant. In her affidavit in support of the plaintiff’s application, Teresa Nyantune Mesa stated that she is the proprietor of all that parcel of land Known as LR No. Kisii Municipality/Block I/57 (hereinafter referred to as “Plot No.57”) which is

- adjacent to Plot No. 58 and that the plaintiff who is the owner of Plot No. 58 is her neighbour and has occupied the said parcel of land for over 20 years.
3. The plaintiff's application was opposed by the 1st defendant through a replying affidavit sworn on 5th December 2014. In his affidavit, the 1st defendant admitted that the plaintiff is the registered owner of Plot No. 58. The 1st defendant denied however that he had entered onto the said parcel of land with the assistance of a vigilante group with a view to commencing construction thereon. The 1st defendant stated that his activities are limited to LR No. Kisii Municipality/Block I/61(Plot No.61) which he purchased from one, Simon Nyakundi Otaro on 20th November, 2014 in vacant possession. The 1st defendant contended that Plot No. 58 which is owned by the plaintiff has been developed and occupied by Teresa Nyantune Mesa aforesaid who is the owner of Plot No. 57.
 4. The 1st defendant stated further that the previous owner of Plot No. 61 has a pending case with the plaintiff concerning Plot No. 61 namely, Kisii HC. ELC No. 361 of 2013 in which the court has issued an order of a temporary injunction restraining the plaintiff herein from trespassing onto, depositing building materials and/or carrying out any activities on the said parcel of land. The 1st defendant contended that the plaintiff failed to disclose all the material facts to the court with the intention of stealing a march against the 1st defendant. The 1st defendant annexed to his affidavit several documents in support of his claim over Plot No. 61 including a copy of his certificate of lease for the said parcel of land. The plaintiff also annexed copies of pleadings in Kisii HC. ELC. No. 361 of 2013 and a copy of a temporary order of injunction that was issued in that case. The 1st defendant also annexed to his affidavit a report that was prepared on 5th November, 2013 by the County Surveyor, Kisii County concerning a dispute that had arisen between the previous owner of Plot No. 61 and the plaintiff over the boundaries and location of Plot No. 58 and Plot No. 61. The 1st defendant contended that the plaintiff's application does not satisfy the basic principles for granting a temporary injunction that were laid down in the case of **Giella –vs- Cassman Brown [1973] E. A 358**.
 5. When the application came up for hearing before me on 5th March 2015, the parties agreed to argue the same by way of written submissions which were duly filed by both parties. I have considered the plaintiff's application together with the affidavits filed in support hereof. I have also considered the 1st defendant's replying affidavit in opposition to the application. Finally, I have considered the parties' respective written submissions. In the case of **Giella –vs- Cassman Brown Ltd(supra)** that was cited by the 1st defendant, the principles for granting a temporary injunction were set out as follows:-
 - a. **The applicant must satisfy the court that he has a prima facie case with a probability of success.**
 - b. **The applicant must show that he will otherwise suffer irreparable injury which is uncompensable in damages and;**
 - c. **If in doubt the court will determine the application on a balance of convenience.**
 6. In the case of **Mrao –vs- First American Bank of Kenya and 2 Others [2003] KLR 125**, a prima facie case was described as:

“A prima facie case in 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.”

7. The plaintiff's application would be determined on the foregoing principles. The first question to determine is whether the plaintiff has established a prima facie case with a probability of success against the defendants. Looking at the facts of this case and the affidavit evidence placed before this court by both parties, I am not absolutely satisfied that the plaintiff has established a prima facie case against the defendants. What is clear from the material before me is that the plaintiff and the 1st defendant own separate and distinct parcels of land, with the plaintiff owning Plot No.

- 58 and the 1st defendant Plot No. 61. There is no dispute over the titles for these two parcels of land. What is in dispute in this case and Kisii HC. ELC No. 361 of 2013 is the location of the two parcels of land on the ground. In Kisii HC. ELC No. 361 of 2013, the previous owner of Plot No. 61 had contended that the plaintiff herein had entered onto Plot No. 61 without his permission on 19th August, 2013 and assembled building materials thereon with the intention of commencing development thereon.
8. In the present case, the Plaintiff has contended that the 1st defendant forcefully entered onto Plot No. 58 on 18th November, 2014 cleared the ground by cutting down bananas plants and avocado trees which had been planted thereon by the plaintiff and started putting up structures thereon in the process of which he wasted or used the building materials that the plaintiff had assembled on the property as aforesaid. There is no doubt from what I have set out above that the plaintiff and the 1st defendant are referring to the same parcel of land on the ground although they have different titles. The Plaintiff's contention is that the parcel of land which the 1st defendant claims to be Plot No.61 on the ground is actually Plot No.58. The 1st defendant on the other hand has contended that the parcel of land which the Plaintiff claims to be Plot No. 58 on the ground is Plot No. 61 and that Plot No. 58 exists on the ground but is occupied by the owner of Plot No.57 who has left his parcel of land vacant. The plaintiff and the 1st defendant have each refuted each other's contentions aforesaid.
 9. On the material placed before me, I am unable to determine the ground location of Plot No. 58 and Plot No.61. I am of the view that where issues of fact are seriously contested like in the present case, it is not proper to determine the same on affidavit evidence. The determination of the same should await full hearing. Due to the foregoing, I am unable to say at this stage that the parcel of land which the 1st defendant is said to be occupying is Plot No. 58 as claimed by the plaintiff and not Plot No.61 as claimed by the 1st defendant. In the circumstances, I am doubtful whether the plaintiff has a prima facie case against the defendants.
 10. As to whether the plaintiff would suffer irreparable harm if the injunction sought is not granted, I am equally doubtful that that would be the case. It appears from paragraph 6 of the plaint and paragraph 10 of the 1st defendant's replying affidavit that neither the plaintiff nor the 1st defendant had developed the disputed parcel of land. The plaintiff had assembled building materials on the disputed property with a view to commencing development on the same. She was however stopped by the court from proceeding with the said development through the injunction that was issued on 30th August, 2013 in Kisii HC. ELC No.361 of 2013. The plaintiff has stated in the plaint that the 1st defendant had either destroyed or used the building materials that she had assembled on the said property in putting up the structures that she has complained about in this suit. As things stand now, the plaintiff is not in occupation of the disputed property and is unable to enter the same due to the injunction that I have mentioned above. The building materials that she had assembled on the property are also no more, the same were either destroyed or used by the 1st defendant as aforesaid. In the circumstances, I am doubtful that the plaintiff would suffer irreparable harm if the orders sought herein are not granted. That being my view of the matter, the plaintiff's application falls for consideration on a balance of convenience.
 11. Due to the nature of the dispute before the court, the scale seems to balance evenly. It does not tilt on either side. I am of the view that the interest of justice would be better served if the status quo is maintained pending the hearing and determination of this suit. Such order in my view would not prejudice any of the parties. In the Court of Appeal case of **Ougo & Another vs. Otieno [1987] KLR 364**, it was held that, "The **general principle is that where there are serious conflicts of facts the trial court should maintain the status quo until the dispute has been decided at the trial.**"
 12. In conclusion, I would dismiss the plaintiff's Notice of Motion application dated 20th November, 2014 and order that pending the hearing and determination of this suit the status quo prevailing as of the date hereof as concerns the title, use and occupation of the disputed parcel of land which the plaintiff has referred to as LR No. Kisii Municipality/Block I/58 and the 1st defendant as LR No. Kisii Municipality/Block I/61 shall be maintained by the parties. The costs of the application shall be in the cause.

Delivered, Dated and Signed at Kisii this 27th day of August, 2015.

S.OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

Miss Okwoyo h/b for Bosire Gichana for the defendants

Mr. Omwoyo court clerk

S.OKONG'O

JUDGE