



No. 203

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 260 OF 2012

JAMES THEURI WAMBUGU PLAINTIFF

VERSUS

MELLEN MBERA DEFENDANT

RULING

1. The Plaintiff filed this suit against the defendant on 3rd July, 2012 through a Plaint dated 2nd July, 2012. The Plaintiff sought an order for the eviction of the defendant from all that parcel of land known as **LR. No. Transmara/Ololchani/863**(hereinafter referred to as “**the suit property**”), a permanent injunction restraining the defendant from entering, trespassing onto, interfering with and/or in any manner dealing with the suit property and general damages. The Plaintiff’s claim against the defendant was brought on the grounds that the Plaintiff is the registered proprietor of the suit property and that sometimes in the month of March, 2010, the defendant without any permission or authority from the Plaintiff trespassed on the suit property and put up structures thereon thereby denying the Plaintiff the use and enjoyment of the property. On 14th January, 2013, the Plaintiff filed an application by way of Notice of Motion of the same date seeking interlocutory prohibitory and mandatory injunction against the defendant pending the hearing and determination of this suit. This is the application before me. The prohibitory injunction was sought to restrain the defendant from trespassing on the suit property, cultivating, erecting a pit latrine or any other structure thereon and/or in any other manner interfering with the Plaintiff’s activities on the suit property. On the other hand, the mandatory injunction was sought to compel the defendant to demolish and/or remove the structures that she has erected on the suit property. The application was supported by the Plaintiff’s affidavit sworn on 14th January, 2013 in which the Plaintiff contended that sometimes in the month of March, 2010, the defendant entered into the suit property without the Plaintiff’s authority and started erecting illegal structures thereon. The Plaintiff reported the matter to the police who arrested and charged the defendant with the offence of forcible detainer contrary to section 91 of the Penal Code in **Kilgoris SRMCRC No. 263 of 2010**(“**Kilgoris case**”). The defendant was tried, convicted and sentenced to pay a fine of Ksh. 10,000.00 and in default to serve 3 months imprisonment. The Plaintiff contended that the defendant did not prefer any appeal against the said conviction and sentence. The Plaintiff claimed that despite the said conviction and sentence, the defendant has continued with attempts to forcefully enter the suit property with a view to carrying out illegal activities thereon. The Plaintiff claimed that on 9th January, 2013, the defendant attempted to enter into the suit property for the purposes of putting up a pit latrine which attempt was thwarted by the Plaintiff who was on site at the material time. The Plaintiff claimed further that the defendant has threatened to enter the suit property and tilt the same for the purposes of planting crops. The

Plaintiff has contended that the defendants actions aforesaid are illegal and an infringement of his constitutional rights. The Plaintiff has contended further that unless the orders sought are granted the defendant is likely to put up more structures on the suit property and also cultivate the same thereby completely alienate the suit property from the Plaintiff. The Plaintiff annexed to his affidavit in support of the application, a copy of the title deed for the suit property dated 19th October, 2010 in the Plaintiff's name, a copy of certificate of official search dated 4th October, 2010 which shows that the Plaintiff was registered as the proprietor of the suit property on 30th September, 2010, a copy of the charge sheet, the proceedings and judgment made in the Kilgoris case.

2. The Plaintiff's application was opposed by the defendant through a replying affidavit sworn on 30th January, 2013. In response to the application, the defendant claimed that she has been staying on the suit property which was owned by her father for over 20 years. The defendant claimed that her family had constructed houses on the suit land and that they have been cultivating the same for a long period of time. The defendant claimed that upon the death of her father, the Plaintiff colluded with the local land officials and caused the suit property to be registered in the name of the Plaintiff with a view to dispossess the defendant's family of their father's estate. The defendant contended that she has appealed against her conviction and sentence by the Kilgoris court and that the orders sought if granted would be highly prejudicial to her. The defendant annexed to her replying affidavit, copies of photographs showing her residence and her farming activities on the suit property which she claims to have been carrying out over the years. The defendant also annexed a copy of the petition of appeal that she lodged in the High Court against the decision made in the Kilgoris case (SRMCRC No. 263 of 2010) in which she was convicted and sentenced to pay a fine of Kshs. 10,000.00.
3. On 15th April, 2013, the court directed that the Plaintiff's application be heard by way of written submissions. The Plaintiff filed his written submissions on 4th July, 2013 while the defendant filed her submissions on 19th July, 2013. In his submission, the Plaintiff submitted that there is no doubt from the material placed before the court that the Plaintiff is the absolute proprietor of the suit property and that the defendant herein has not placed any evidence and/or material before the court to justify her interference and/or encroachment on the suit property. The Plaintiff submitted that during the criminal proceedings at Kilgoris the defendant had claimed that she had purchased the suit property which according to her, was Plot number 58 and that the defendant had produced some documents as evidence of her payment for the rates and rent for her then presumed property. The Plaintiff submitted that it is ironic that in these proceedings, the defendant seems to have changed her story. The defendant now claims that the suit property had hitherto belonged to her deceased father and the plaintiff herein colluded with the lands officials and had it registered in his name. The defendant has now contended that she has the right to occupy the suit property which rightfully belongs to the estate of her father.
4. The Plaintiff submitted that the defendant has exhibited a high degree of impunity in that even after her conviction and sentencing, she has remained on the suit property and has continued to alter the character of the same. The Plaintiff explained that this suit was initially lodged without an application for injunction with the intention to have the same heard on merit. The Plaintiff submitted that the injunction application was brought when the defendant started to exhibit a high degree of violence and aggression which was exemplified by her entry into the suit property again on the 9th day of January 2013 together with her servants with a view to construct a pit latrine. The Plaintiff pointed out that the defendant does not live on the suit property and that she only has a temporary mud walled house which is occupied by her agent. The Plaintiff submitted that the defendant has another parcel of land in the vicinity where she lives with her family.
5. The Plaintiff contended that after the determination of the criminal case, the defendant retreated for sometime until 9th January 2013 when she resumed her acts of encroachment on the suit property. The Plaintiff submitted that the defendant has no right whatsoever to interfere with and/or encroach on the suit property. On the effects of the judgment in the Kilgoris case, the Plaintiff submitted that one of the issues that the Kilgoris court determined before convicting and sentencing the defendant in the said criminal case was the ownership of the suit property and the said court made a finding that the suit property belongs to the Plaintiff herein. The Plaintiff submitted that the said finding has not been reviewed or overturned by way of an appeal. The

- Plaintiff concluded that the Plaintiff has established a case for the issuance of the orders sought. The Plaintiff relied on a number of authorities in support of his submissions.
6. In her submissions in reply, the defendant submitted that from the facts of this case, it is not disputed that the defendant is in occupation of the suit property and that she has been in occupation of the same for some time. The defendant denied that she is a recent trespasser on the suit property as claimed by the Plaintiff. The defendant submitted that she has preferred an appeal against the decision of the Kilgoris court which appeal is pending hearing and determination in the High Court. The defendant contended that the Kilgoris court did not order her eviction from the suit property and as such she has the right to remain in occupation of the suit property pending the outcome of her appeal to the High Court. The defendant submitted that this is not an appropriate case in which a mandatory injunction should be issued as such an order would result in the eviction of the defendant from the suit property before her case is heard and determined. The defendant submitted that the most appropriate order to make in the circumstances is that which would maintain the status quo.
 7. I have considered the Plaintiff's application and the replying affidavit filed in opposition thereto by the defendant. I have also considered the parties' advocates' respective submissions. This is the view I take of the matter. The Plaintiff has in his application herein sought both prohibitory and mandatory injunction at this interlocutory stage. The principles applicable to applications of this nature are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that, unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. For a temporary mandatory injunction, an applicant must establish more than a prima facie case. The granting of a temporary mandatory injunction effectively determines a case without the benefit of a trial. An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. Such applicant must also fulfill the usual conditions for granting the normal interlocutory injunction such as showing that he will suffer irreparable harm unless the orders sought are granted. In the case of **Shepherd Homes Ltd. –vs.- Sandham [1971] 1 ch.304**, that was cited in the case of, **Samwel Ongori Ongori vs. Yuvinalis Nyankeboka Ongori & 4 others, Kisii HCC No. 67 of 2010 (unreported)** that was cited by the plaintiff in her submissions, **Meggary J.** had this to say on interlocutory mandatory injunctions;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

8. In the case of **Redland Bricks Ltd vs. Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction“ **is a jurisdiction to be exercised sparingly and with caution but in a proper case, unhesitatingly**”. On the basis of the foregoing principles, the question that I need to answer is whether the Plaintiff has satisfied this court that he has unusually strong and clear case against the defendant that warrants the issuance of the prohibitory and mandatory interlocutory injunctions sought. I am satisfied on the material before me that the Plaintiff is the registered proprietor of the suit property. This has been demonstrated by a certificate of official search and a copy of the titled deed for the suit property which the Plaintiff exhibited in his affidavit in support of the application herein. The suit property was registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) (hereinafter referred to as “**the Act**”). Section 27 (a) of the Act provides that, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land with all rights and privileges belonging or appurtenant thereto. On the other hand, section 28 of the Act, provides that the rights of a proprietor acquired on first registration or subsequently for valuable consideration shall not be liable to be defeated save as provided in the Act and shall be held by the proprietor together with all privileges and

- appurtenances belonging thereto free from all other interests and claims subject only to the limitations set out under that section.
9. The Plaintiff has demonstrated that he is the registered proprietor of the suit property. The defendant has not placed any material before me which points to the Plaintiff's alleged collusion in the illegal acquisition of the suit property. In the absence of such material, I am convinced at this stage that the Plaintiff is prima facie the lawful proprietor of the suit property. The defendant has not in any way justified her occupation of the suit property which I have held to be owned by the Plaintiff. In the absence of such justification, the only conclusion that this court can arrive at is that the defendant is occupying the suit property unlawfully. I am satisfied therefore that the Plaintiff has established a prima facie case against the defendant with a probability of success. I am also satisfied that unless the orders sought are granted, the Plaintiff will suffer irreparable harm. The Plaintiff has shown that he is the owner of the suit property. As such owner, he has a right to peacefully occupy and use the same. Any act that interferes with that occupation would cause irreparable loss to the Plaintiff.
10. What I have set out hereinabove would have been sufficient to dispose of the Plaintiff's application. However, even though the Plaintiff has laid a basis for granting the orders sought, the remedy of injunction is discretionary. The discretion must be exercised judiciously considering the circumstances of each case. I do not think that in the circumstances of this case, it would be appropriate to grant a mandatory injunction at this stage. The Plaintiff's main prayer in this suit is for eviction of the defendant from the suit property. If the mandatory injunction sought by the Plaintiff herein is granted, it will result in the eviction of the defendant from the suit property and the Plaintiff would have achieved the main relief sought in this suit without a hearing. The court can grant an order that have such effect but as enunciated in the cases that I have cited above, the applicant for such order must have a very strong and clear case. I have noted from the record that the defendant is said to have entered the suit property in the month of March, 2010 even before the Plaintiff acquired a title to the same. The Plaintiff instead of instituting a civil suit to restrain the defendant from putting up structures on the suit property decided to take the criminal route. The defendant has now put up a structure on the suit property which she claims to occupy as of right. The Plaintiff has admitted the existence of this structure but claims that it is occupied not by the defendant but by the defendant's agent. The truth as to who is in occupation of the said structure cannot be determined at this stage. In view of the length of the period the defendant has been in occupation of the suit property which is said to be from the year 2010, I am of the view that it would only be fair if she is given an opportunity to explain her claim to the suit property. It would not be just to order her eviction without a hearing. The Plaintiff has contended that the defendant was heard during the criminal case proceedings. My answer to that is that the purpose of the said criminal proceedings was not to determine the ownership of the suit property but the guilt of the defendant. The defendant having lodged an appeal against the determination in the said criminal case which is still pending hearing, the same is not binding on her in these proceedings by virtue of the provisions of section 47A of the Evidence Act, Cap. 80 Laws of Kenya. Due to the foregoing, I am of the opinion that this is not an appropriate case to grant a mandatory injunction and I would accordingly exercise my discretion against granting the relief. The upshot of the foregoing is that the Plaintiff's application dated 14th January, 2013 succeeds in part. The application is allowed in terms of prayer 3 thereof pending the hearing and determination of this suit provided that the entry by the defendant into her homestead or house if any situated on the suit property shall not be deemed an act of trespass. The Plaintiff shall have the costs of the application.

Delivered, dated and signed at KISII this 24th day of January 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Kerongo h/b for Otieno for the Plaintiff

Mr. Momanyi h/b for Nyambati for the Defendant

Mr. Mobisa Court clerk

S. OKONG'O

JUDGE