



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 164 OF 2012

CLEMENT OURE OPON PLAINTIFF

VERSUS

MICHAEL MUNEKANE NDORI

MUSA NGUSARE NDORI DEFENDANTS

RULING

1. What is before me is the plaintiff's application that was brought by way of Notice of Motion dated 26th November, 2012 under Order 40 rules 1, 2, 4 and 10 of the Civil Procedure Rules, 2010, sections 24, 25 and 26 of the Land Registration Act and Article 40 of the Constitution. In the application, the plaintiff sought two principal prayers, namely; an order of a temporary injunction to restrain the defendants either by themselves or through their agents, servants and/or anyone claiming under the defendants from entering into, trespassing onto, cultivating, building structures, burning bricks, felling trees, interfering with and/or in any other manner whatsoever, dealing with the suit property that is, **LR No. Suna East/Kakrao/1312** and/or any portion thereof pending the hearing and determination of this suit and, an order of a temporary mandatory injunction directed at the defendants either by themselves or by their agents, servants and/or anyone claiming under the defendants to yield up, vacate, be evicted from and/or grant vacant possession of the suit property, that is **LR No. Suna East/Kakrao/1312** and/or any portion thereof, pending the hearing and determination of this suit.
2. The application was supported by the affidavit sworn by the plaintiff on 26th November, 2012. The plaintiff deposed that, at all material times he was and still is the registered proprietor and/or owner of all that parcel of land known as **LR No. Suna East/Kakrao/1312** (hereinafter referred to as "**the suit land**"). The suit land was lawfully registered in his name on the 10th day of February 2012 and he has remained in occupation and possession of the suit land without any interference from the defendants. However, in March 2012 the defendants trespassed onto the suit land and started to cultivate and build temporary structures on a substantial portion of the suit land. He deposed further that following these activities by the defendants, he was forced to lodge a complaint with the chief of Kakrao location so that he may intervene and stop the defendants said acts of trespass. The said chief intervened but the defendants refused to heed his advice to stop the said activities and continued with the trespass complained of herein. The defendants thereafter resorted to using threats with a view to perpetuating the said acts of trespass. In addition to the said intervention by the area chief, the plaintiff's advocates on record also sent a demand notice to the defendants to stop the said activities which notice was also ignored by the defendants who continued with the said offensive activities unabated.
3. The plaintiff was left with no alternative but to file this suit. When the defendants were served with the Summons, the defendants stopped the offensive activities and withheld the trespass onto

the suit land. The plaintiff has claimed that the lull was short lived because on 15th November 2012, the defendants came back to the suit land and established a mound of bricks which they started to burn. The plaintiff has claimed that the defendants said acts of trespass have harmed the productivity of the suit land which is now exposed to waste. Furthermore, the plaintiff claims that the said acts are calculated to deny and/or deprive him of his rights and interests over the suit land. The plaintiff has claimed further that the actions of the defendants aforesaid are bound to affect and alter the character/texture of the suit land and it is necessary that this court do grant orders of mandatory and prohibitory temporary injunction so as to preserve and/or conserve the suit land.

4. The plaintiff's application was opposed by the defendants. The defendants filed a replying affidavit sworn by the 2nd defendant on 30th November 2012 in opposition to the application. In response to the application, the defendants claimed that the plaintiff is guilty of non-disclosure and concealment of material facts. The plaintiff was accused of failing to disclose the full facts giving rise to the dispute. The facts which the plaintiff was said to have failed to disclose were that:-

- i. The plaintiff is the son and the administrator of the estate of one, Marcilus Omolo Opon deceased who was the registered owner of all that piece of land then known as LR No.Suna East/Kakrao/879 (hereinafter referred to as "**Plot No. 879**").
- ii. That the plaintiff's said father (Marcilus Omolo Opon) caused the said Plot No. 879 to be subdivided into 2 portions, namely LR. Nos. Suna East WaswetaI /1311 and Suna East/ Wasweta I/1312("the suit land").
- iii. The suit land which is occupied by the defendants and members of their families had been sold to the defendants by plaintiff's father who nevertheless caused the same to be transferred and registered in the name of one, Dr. Peter Okins Ojwang Rakwach sometimes in the year 1987.
- iv. That the said Dr. Peter Okins Ojwang Rakwach never took possession and/or at any time claim ownership and/or even made any attempts to evict the defendants and any of their family members from the suit land.
- v. That in the year 2010, the said Dr. Peter Okins Ojwang Rakwach transferred the suit land to one, Deusdedit Otieno Ojala.
- vi. That the said Deusdedit Otieno Ojala had a dispute with the defendants over the making of bricks which had been going on and is still going on today on the suit land and even had a criminal case preferred against the 2nd defendant at Migori Law Courts namely, Cr. Case No. 690 of 2010 which terminated in the 2nd defendant's favour.
- vii. That the defendants and their families have lived on the suit land for over 38 years with the full knowledge of the plaintiff and even when the plaintiff allegedly bought the suit land in year 2012, he was well aware of their overriding interests and rights over the suit land for which they have filed a counter claim against the plaintiff for adverse possession over the said title.

5. When the application came up for hearing before me on 18th March 2013 the advocates for the parties agreed to argue the same by way of written submissions. The plaintiff also applied for leave to file a further affidavit which leave was granted. The Plaintiff seems however not to have put in any further affidavit as there is none on record. The defendants filed their written submissions on 9th July, 2013 while the plaintiff filed his written submissions on 2nd August, 2013. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants affidavit filed in opposition to the application. Finally, I have considered the written submissions filed by the respective advocates for the parties and the case law cited. The principles to be applied when considering an application like the one before me are now settled. In the case of, **Giella –vs- Cassman Brown & Co. Ltd .(1973) E.A.358**, it was held that;

- a. **An applicant for interlocutory injunction must show a prima facie case with a probability of success.**
- b. **An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**

c. **When the court is in doubt it will decide the application on a balance of convenience.**

It must also be borne in mind that an injunction is an equitable remedy and as such the applicant must come to court with clean hands. What this means is that, even if the necessary conditions are satisfied, still an injunction may not issue if it is proved to the satisfaction of the court that the applicant is undeserving of such equitable relief.

6. In addition to a temporary prohibitory injunction, the plaintiff has also sought a temporary mandatory injunction. The conditions to be met for a temporary mandatory injunction to issue are on a higher threshold than in the case of a prohibitive injunction. The Court of Appeal in the case of, **Kenya Breweries Ltd –vs- Washington Okeyo (2002) 1 E A 109** had an occasion to discuss and consider the principles that govern the granting of mandatory injunctions. The court held that the test for granting of a mandatory injunction was correctly stated in vol. 24 Halsbury Laws of England, 4th edition paragraph 948 that provides as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks, it ought to be decided at once or if the act done is simple and summary one which can be easily remedied or if the defendant attempts to steal a match on the plaintiff a mandatory injunction will be granted on an interlocutory application.”

7. In the English case of **Locabail International Finance Ltd –vs- Agro-Export & Anr [1986] 1 ALL ER 901**, it was held that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a 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 been rightly granted that being a different and higher standard than was required for a prohibitory injunction.”

Similar sentiments were expressed in the case of **Shariff Abdi Hassan –vs- Nadhif Jama Adan[2006]eKLR** where the court further observed that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However where it is prima facie established as per the standard spelt out in law as stated above the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to the property.”

8. On the basis of the foregoing principles, what I need to determine in this case is whether the plaintiff has met the conditions for granting a temporary prohibitory and mandatory injunctions. I am not satisfied on the material before me that the plaintiff has established a prima facie case against the defendants with a probability of success leave alone a clear case that would justify the granting of an interlocutory mandatory injunction. The defendants have placed uncontroverted evidence before the court which shows that the defendants have been in occupation of the suit property for several years and that the plaintiff purchased the suit property while they were in possession. There is also overwhelming and uncontroverted evidence that the activities complained of by the plaintiff started before the plaintiff purchased the suit property contrary to the plaintiff's claim that the defendants activities sought to be restrained herein started in the months of February/March, 2012. This fact was proved by the proceedings of Migori SPM's Court Criminal Case No. 680 of 2010 where the previous registered owner of the suit property had

caused the 2nd defendant to be charged with the offence of trespass an offence of which he was acquitted under section 210 of the Criminal Procedure Code for lack of evidence. It is worthy to note that the crime of trespass with which the defendant was charged was that of entering into the suit property and making bricks thereon which seems also to be the plaintiff's main complaint in this case. The defendants who claim to have been in occupation of the suit property for over 38 years a fact which has not been controverted by the plaintiff have filed a counter-claim against the plaintiff seeking a declaration that they have acquired title to the suit property by adverse possession. Whether or not such declaration can issue in these proceedings is an issue which this court cannot determine at this stage. The much I can say is that the defendants have demonstrated that they have a genuine interest in the suit property and that they are not mere trespassers as claimed by the plaintiff. Even if the defendants have not acquired prescriptive rights of the suit property as they claim, they had a right over the same by virtue of their occupation. This is a right which was recognized as an overriding interest on the title of the suit property as at the time that it was transferred to the plaintiff on 10th February, 2012. It follows therefore that the plaintiff acquired the suit property subject to the defendants' right of occupation. See the provisions of section 30 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). I am also in agreement with the submission by the defendants that the plaintiff was guilty of material non-disclosure. The plaintiff presented the defendants as complete strangers with whom he only came into contact in the months of February/March, 2012 when they invaded the suit property and commenced the activities complained of herein. The plaintiff did not even disclose to the court the fact that the suit property was a sub-division of Plot No. 879 which was initially owned by the plaintiff's deceased father whose estate he is the administrator. The plaintiff also concealed the fact that the defendants entered, occupied and started cultivating and making bricks on the suit property before he purchased the same. The plaintiff no doubt was guilty of lack of candor which renders him undeserving of the equitable remedy of injunction.

9. The upshot of the foregoing is that the plaintiff has failed to satisfy the conditions for granting the orders sought. In the circumstances, I find no merit in the plaintiff's application dated 26th November 2012. The same is accordingly dismissed with costs to the defendants.

Delivered, dated and signed at Kisii this 4th day of April 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwangi for the Plaintiff

Mr. Soire for the Defendants

Mobisa Court Clerk

S. OKONG'O

JUDGE