



No. 265

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 323 OF 2013

RICHARD MECHA KABAGENDIPLAINTIFF

VERSUS

JOHN MONGARE NYARONDIADEFENDANT

RULING

1. What I have before me is the plaintiff/applicant's application dated 23rd July 2013 brought by way of Notice of Motion under Order 40 rule 1 and 2 of the Civil Procedure Rules 2010 seeking the following orders:-
 - a. **THAT the application be certified urgent and be heard on priority basis.**
 - b. **THAT a temporary injunction do issue restraining the defendant, his agents and/servants from in any way whatsoever trespassing on the plaintiff's land parcel West Mugirango/Siamani/3757 till the hearing and determination of the application interpartes.**
 - c. **THAT a temporary injunction do issue restraining the defendant, his agents and/or servants from in any way whatsoever trespassing on the plaintiff's land parcel West Mugirango/Siamani/3757 till the hearing and determination of this suit.**
 - d. **The cost of the application.**

The application is supported by the affidavit of the plaintiff/applicant herein Richard Mecha Kabagendi sworn on 23rd July, 2013 in which he has averred that he is the absolute registered owner of all that parcel of land known as **LR. No. West Mugirango/Siamani/ 3757** ("hereinafter referred to as "**the suit land**"). He has stated that in the year 2003, the defendant encroached upon the suit land and proceeded to plant thereon Napier grass, maize and bananas and in the process denying him the user thereof.

2. The plaintiff has stated further that the defendant has since the year 2013 threatened him with physical harm over the suit land which threat made him to lodge a complaint against the defendant with the Kenya Police leading the arrest and arraignment of the defendant in court to face criminal charges at Nyamira Law Courts in Cr. Case No. 500 of 2013 where he was charged with creating disturbance. The plaintiff has contended that the continued occupation of the suit land by the defendant is bound to cause him untold suffering and that unless the defendant is restrained by the orders of this honourable court, he shall continue with the said acts of trespass.
3. When the matter came before me on 29th September 2013 the defendant/respondent was granted

leave to file a replying affidavit and/or grounds of opposition to the above application. I have perused the file and I have not seen any replying affidavit/grounds of opposition filed by the defendants. When the application came up for hearing on 17th December 2013, the plaintiff who was present in person relied entirely on his affidavit in support of the application and prayed that his application be allowed.

4. On the other hand, Mr. Nyamwange, advocate who appeared for defendant/respondent opposed the plaintiff's/applicant's application. He submitted that if the plaintiff had a genuine claim against the defendant, the plaintiff should have moved the court earlier. He submitted further that the plaintiff is not certain about his rights over the suit land and noted that the plaintiff has failed to exhibit a copy of any agreement for sale that the plaintiff entered into with the defendant's father if any. Counsel submitted further that there was no certificate of official search submitted by the plaintiff to show that the plaintiff is the current registered proprietor of the suit land. Counsel submitted that in the circumstances, the plaintiff had not satisfied the condition for granting a temporary injunction set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1975] E.A 358**. On whether or not the plaintiff would suffer irreparable loss or injury unless the orders sought are granted, the defendant's advocate submitted that the defendant has been on the suit property since 2003 and as such his continuous stay on the suit property pending the hearing and determination of this suit would not cause the plaintiff any harm. Counsel submitted that the most appropriate order to make in the circumstances is that which would maintain the status quo since the defendant has been on suit land for several years. In conclusion, counsel submitted that the plaintiff's application lacks merit and should be dismissed altogether. The plaintiff in reply to the above submissions reiterated the contents of his affidavit in support of the application and stated that he had not come to court earlier because he was committed with school fees and that they had an agreement with the defendant's father which the defendant was well aware of. The plaintiff urged the court to allow his prayer for injunction.
5. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the oral submissions made by the plaintiff and the defendant's advocate in support of and in opposition to the application. This being an application for a temporary injunction, it has to be considered in light of the principles that were set out in the case of **Giella – vs- Cassman Brown Ltd.(supra)** which are:
 - a. **That the applicant must satisfy the court that he has a prima facie case with a probability of success.**
 - b. **That the applicant 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.**

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 a 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”.

Turning to the present case, the question which this court needs to answer is whether the plaintiff/applicant has satisfied the conditions for awarding a temporary injunction enumerated in the Giella case (Supra). To begin with, has the plaintiff established a prima facie case with a probability of success against the defendant? Looking at the facts of this case and the entire evidence placed before this court by way of affidavit, I am satisfied that the plaintiff has demonstrated that he is indeed the legal registered proprietor of the suit land. This has been proved by a copy of the certificate of title attached to plaintiff's affidavit. This fact has not been disputed by the defendant who has contended merely that he has been in occupation of the suit land since 2003. The defendant does not contend that he has any superior title to the suit land as against that held by the plaintiff. His argument if I have understood him well is that he has been in

occupation of the suit property from the year 2003 and the plaintiff has never taken any action to evict him from the suit land until now.

6. I am satisfied that the plaintiff has demonstrated that he has a prima facie case against the defendant. The plaintiff's title to the suit property has not been challenged in any material respect. Even if it were true that the defendant has been occupying the suit land since 2003 without any interruption from the plaintiff, the plaintiff still has a right to the suit land since the defendant's occupation of the suit land has not lasted long-enough for the defendant to claim ownership of the suit land by way of adverse possession. Under section 24(a) of the Land Registration Act 2012, the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land together with all the rights and privileges belonging and appurtenant thereto. Under section 25 (1) of the Land Registration Act 2012, the rights of a proprietor of land acquired for valuable consideration is indefeasible except as provided under the said Act.
7. The defendant/respondent has not placed any evidence before this court of any irregularity in the acquisition of the plaintiff's title that can defeat the plaintiff's rights over the same. It follows therefore that the plaintiff has a prima facie case with a probability of success against the defendant. I am also satisfied that the plaintiff stands to suffer irreparable harm unless the orders sought are granted. The plaintiff is the proprietor of the suit property and the defendant's continued occupation thereof, would deny the plaintiff the use and enjoyment thereof which would result in irreparable injury to the plaintiff.
8. In conclusion, I hereby allow the Notice of Motion application dated 23rd July 2013 in terms of prayer (C) thereof. The order shall however be stayed for a period of ninety (90) days from the date hereof to enable the defendant to harvest or remove any crops that he may have planted on the suit land. The plaintiff shall have the costs of this application.

Delivered, dated and signed at Kisii this 29th day of May 2014

S. OKONG'O

JUDGE

In the presence of :

Plaintiff present in person

N/A for the defendant

Mr. Mobisa Court Clerk

S.OKONG'O

JUDGE