



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 120 OF 2014

IBRAHIM MUNGARA KAMAU.....PLAINTIFF

VERSUS

FRANCIS NDEGWA MWANGI.....DEFENDANT

RULING

The application for determination is the Notice of Motion dated 10th February 2014 brought under **Order 40 Rules 1,2 &3 of the Civil Procedure Rules and Sections 1A,1B and 3A of the Civil Procedure Act**, seeking for orders that pending the hearing and determination of this suit an order of injunction do issue to stop and restrain the defendant whether acting by himself or through his agents, servants and/or workers and/or anybody claiming any right or interest to the land through the defendant from trespassing onto, constructing and/or continuing with the construction of any house, building or anything upon the land or generally from getting into and trespassing upon the plaintiff's plot **L.R No Kamiti/Anmer Block 4/139**.

This application is premised on the supporting affidavit of **Ibrahim Mungara Kamau**, who stated that he is the registered owner of **LR No Kamiti/Anmer Clock 4/139**, situated at Kamiti Amner Area, Kiambu County. He averred that he received information sometime in April 2013 that the defendant had trespassed on his land parcel whereby he instructed his advocate requiring the Defendant to vacate the suit property immediately. Despite the demand to vacate the defendant went ahead and fenced off the suit property and employed armed guards to guard the suit property and that he commenced construction on the suit property. He also added that the defendant was doing excavations which will cause irreparable and irredeemable damage and waste to the property and that it was only just and equitable to evict the defendant from the suit property. He therefore seeks this court to grant the temporary injunction pending the hearing and determination of this suit.

This application has been opposed. The defendant **Francis Ndegwa Mwangi**, filed his replying affidavit on 15th February 2014 and stated that an injunction being an equitable remedy is not available to the indolent, that later come to complain when events have taken place. That the plaintiff is guilty of non-disclosure of material facts. He added that the history of this suit land cannot be complete without an explanation of how the applicant joined a society called **Kiu Kenda Society** which bought a **270 acre** farm from Waverly Estates and subdivided it amongst its members and that by the plaintiff's dishonesty has occasioned him loss and the injunction that had earlier been issued has stopped him from completing his house. He believes that the plaintiff obtained his title deed after the leadership of Kiu Kenda Society finished allocating plots to members and decided to cheat them and that the plaintiff was privy to the project. He avers that he bought half an acre that had been allotted to Margaret Muthoni Maina in 2009 which land had been allotted to Margaret on 30th June 2007 by Kiu Kenda Society and Waverly Estates Ltd and constructed a house on it in 2010.

In a rejoinder the applicant filed his further affidavit on 13th March 2014, and stated that he is the registered owner of the suit property and was issued with a certificate of lease on 22nd April 2009 and even after the dispute arose he did a search on the suit property which showed that he was still the registered owner of the suit property. That the defendant had not produced any evidence to show that indeed he was the registered owner of the suit property. He also added that **Kamiti/Amner Block 4/138 and Kamiti /Anmer Block 2/139** are distinct and different parcels of land.

Parties filed their written submissions .The plaintiff in his submissions relied on the case of **Giella –vs- Cassman Brown Limited [1973]E A 358**. He submitted that he exhibited transfer documents from the previous owners of the suit property,a lease showing previous owners who sold the land to the plaintiff, certificate of lease, a search certificate confirming that the plaintiff was the registered owner of the suit property and a map showing the area Kamiti/Amner Block 4.On the other hand the defendant has submitted a lease for Kamiti/Amner Block 4/138 which is not in dispute. He therefore submits that he has established a prima facie case with a high chance of success.

The defendant filed his submissions on 10th April 2014, and submitted that he is the registered proprietor of a parcel of land known as **LR No. Kamiti/Amner/Block 4/138** and a portion of **LR No. Kamiti/Amner/Block 4/139**, which was wrongly registered in the name of the plaintiff. That both portions constitute half acre parcel of land which he bought from one Margaret Muthoni Maina in 2009.He submitted that he fenced it and has completed the construction of his house on the suit property. He cited the case of **Kimani –Vs-Attorney General [1969] EA29**, where it was held that in law a person who has no legal right to enforce has no right to file suit. He further submitted that he constructed his house as per the terms of the original seller therefore the plaintiff lacked any valid claim on the suit property hence not entitled to the injunction orders sought. He further submitted that the defendant has not met the requirements for the grant of temporary injunction for the reasons that an injunction being an equitable remedy is not available to the indolent as the applicant came to court after the defendant had completed the construction of his house. He stated that he started construction of the house in 2009 yet the plaintiff did not raise any objections and only brought this suit in court when he was almost done with the construction of the house. He relied on a passage in **Snell’ Equity by John Mc Ghee Q.C 31st Edition at page 99** where emphasize was laid on the effect of indolence on grant of injunctions follows;

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence where these want the court is passive and does nothing”

He added that equity does not act in vain since the plaintiff is seeking this court to restrain the defendant from trespassing and constructing on the suit property .The defendant submitted that he completed construction of the house and is in actual possession of the suit property.

I have now and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiff and Defendant. The issues arising herein are whether the Plaintiff has met the requirements stated in **Giella Vs Cassman Brown & Co Ltd, (1973) EA 358** for a grant of temporary injunction. These requirements for the grant of such an injunction are;

“That the applicant must establish a prima facie case, and that he would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience”.

The first question I must therefore answer is whether the Plaintiff has established a prima facie case. At the heart of the suit is a dispute over ownership of the suit land. The disputants have laid claim to **KAMITI/ANMER BLOCK4/139**. The plaintiff has made a claim that he is the registered owner of **LR. No. KAMITI/ANMER BLOCK4/139** after purchasing it from Waverly Estate Limited on 23rd October 2008 and subsequently obtained a certificate of lease on 22nd April 2009.He further stated that when the dispute arose he instructed a surveyor who established that the defendant’s fence and construction was on his land. On the other hand the defendant has made a claim that he was the registered owner of **LR. No.**

KAMITI/ANMER BLOCK4/138 and a portion of **LR. No. KAMITI/ANMER BLOCK4/139** which he claims the later portion was wrongfully registered in the name of the plaintiff. What is in contention is a portion of the suit property. The defendant however has not produced any documents to show that he owns the portion in **LR. No. KAMITI/ANMER BLOCK4/139** that he has made a claim. I find that the plaintiff has made a prima facie case with a probability of success. As the suit property is now registered in the name of the plaintiff, this court is guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** where it was held that ***a party who has been issued with a good title takes precedence over other equitable rights to the title.*** Nevertheless, the determination of the legal owner is the true sphere of the trial court on tested evidence after the parties have been cross examined on their statements and documents.

There is ample evidence from the defendant that he is in possession of the suit property. He has averred that he has finished the construction of his house and that he now resides with his family. Possession is an important component of claim to title. The balance of convenience would then tilt a little more in favour of the defendant. If the plaintiff was to prevail, I am of the view that the values of the suit property can be ascertained. To my mind then, damages would be recoverable.

However the defendant has raised a pertinent issue that the plaintiff is undeserving of the injunction it seeks since he has waited for him to complete constructing his house then comes to court seeking for injunctive orders. An injunction is an equitable remedy and where the plaintiff has behaved in an unconscionable manner, the injunction will be denied. See the case of **Kenya Projects and investments Ltd Vs Kenya Post Office Savings Bank Nairobi High Court Civil Case 2811 of 1995** where the Court held that:-

“ The remedy of injunction being equitable in origin, the Court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to meet the approval of a Court of equity, delay, acquiescence and unclean hands would disqualify an applicant from equitable relief”.

An injunction will not be granted to a Plaintiff who with full knowledge that the defendant is infringing on his rights, stands there watching those rights being violated over and encourages the defendant to claim them so that the defendant on the strength of the implementation the plaintiff will not otherwise object or on the strength of his encouragement or inaction, expends substantial sums of money on the infringing act or otherwise materially alter his position so that should an injunction be granted against him now he would suffer considerable loss or detriment. In this case the Plaintiff had the full knowledge of the defendant's actions on the suit property and waited until 2013 [four years] after the purchase of the suit property for him to sue the defendant when he has finished the construction of his house on a portion of the suit property. I refer to the case of **Esso (K) Ltd Vs Makwata Okiya Civil Appeal No. 69 of 1991** where the Court held that; -

“Injunction is not to be granted if the event meant to be restrained has taken place. The purpose of injunction is to maintain Status Quo”

It is this court's finding that the plaintiff is guilty of acquiescence; meaning that he has been consciously silent while his rights were being violated by the defendant. Equity aids the vigilant and not the indolent; delay defaults equity and Equity always refuses to aid stale delay. The Plaintiff sought for orders that this court bars the defendant from trespassing, constructing and/or continuing with the construction of any house upon the land .The court has noted from the pleadings and the defendants annexures that the defendant has completed construction of the house. As I stated earlier, as injunction cannot issue to restrain an event that has already taken place. This was not rebutted by the plaintiff.

It is for these reasons that this court finds that the plaintiff's application has no merit and is consequently dismissed with costs being in the cause.

It is so ordered.

Dated and Delivered and Signed this **30th October, 2014.**

L GACHERU

JUDGE

In the Presence of:-

Mr Kenyariri holding brief Mr Makori for the Plaintiff/Applicant

Mr. Ndungu for the Defendant/Respondent

Okoth : Court Clerk

L GACHERU

JUDGE