



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 791 OF 2014

NDUKU MBINDYO.....1ST PLAINTIFF/APPLICANT

DAVID LINGWA MBINDYO.....2ND PLAINTIFF/APPLICANT

-VERSUS-

MUNG'ALI MUASYA.....1ST DEFENDANT/RESPONDENT

KIOKO MUTISYA.....2ND DEFENDANT/RESPONDENT

ANTHONY MASILIA.....3RD DEFENDANT/RESPONDENT

RULING

1. Before me is an amended Notice of Motion dated 6th October, 2014 and which motion seeks an order of eviction of the Respondents from all that property known as title No. Mavoko Town/Block 3/2319. The said Notice of motion also seeks orders to compel the Respondents to hand over vacant possession of the suit property to the Plaintiffs and a further order to restrain the Respondents from scooping sand, cultivating crops, grazing livestock burning charcoal on the suit property and or alienating the suit property. It is to be noted that the amended plaint filed by the Plaintiff on 5th October, 2014 seeks basically the same orders. The Plaint also seeks a declaratory order to the effect that the Plaintiffs are the proprietors of the suit property.
2. The motion is pegged on the grounds stated on the face thereof as well as on the supporting affidavit of the 2nd Applicant. The motion though served by way of substituted service did not receive any reaction from the Defendants. The Applicants on the other hand filed written submissions on the motion on 4th November, 2014. The Applicant's counsel relied on the supporting affidavit and the written submissions in urging the motion before the court on 5th November, 2014.
3. Briefly, the Applicants contend that they are the joint proprietors of the suit property. They have annexed to the supporting affidavit of the 2nd Applicant a copy of the title deed as well as a slightly outdated search undertaken on 7th June, 2012. The title deed reveals the Applicants as proprietors and so does the certificate of official search. The latter document however also reveals a restriction registered against the title prohibiting further dealings until the parties appear in person before the Land Registrar. It is however not clear who lodged the restriction or prompted

the Land Registrar to register the same. The suit property measures approximately 41 acres and the Applicants state that the Respondents who have no proprietary interest at all have intruded and occupied the same. The intrusion it would appear took place in 2007. The Applicants say that attempts to have the Respondents vacate the suit property have been futile. This includes an agreement between the Applicants and the Respondents together with other persons. The said agreement was finalized in December, 2011 and was to be consummated in December, 2012. The Respondents are said to have acted through their representatives in the agreement. The Applicants further state that the Respondents continued occupation of the suit property continues cause irreparable harm to the Applicants.

4. In the Applicants written submissions filed on 4th November, 2014, the Applicants majorly reiterated the contents of the Supporting affidavit. The Applicant's Counsel further submitted that the Applicants had met the standards set out in the case of **Giella –v- Cassman Brown & Co. Ltd [1973] EA 358** of the grant of an interlocutory injunction. To the Applicants, they had established a prima facie case with a probability of success and further they had shown that they would suffer irreparably if an injunction was not granted.
5. No doubt the principles laid out in the **Giella –v- Cassman Brown & Co. Ltd** case (supra) still hold as good guidance when a court is faced with an application for interlocutory prohibitory injunction. No doubt too that an injunction is an equitable remedy. It is also a discretionary relief. In exercising the jurisdiction therefore and answering the question whether or not to grant an interlocutory injunction the court, in my view, must not only ensure that the principles enunciated in the case of **Giella –v- Cassman Brown** are met but must also take into account all the relevant principles of equity as well as the factors of the case (application) before it. In short, it is not discretion to be exercised in a summary manner even in the absence of the Respondents.
6. I have read through the pleadings especially the amended plaint as well as the amended notice of motion and the supporting affidavit. I have also carefully perused the submissions by the Applicants. The orders sought by the Applicant, it is important to point out are mandatory in nature. The Applicants in seeking eviction orders and delivery up of vacant possession are seeking a positive injunction. By virtue of the provisions of Section 63(c) of the Civil Procedure Act this court has powers to grant mandatory injunctions at an interlocutory stage. The standards and principles for the grant of an interlocutory positive (mandatory) injunction are however slightly different from those of an interlocutory negative (prohibitory) injunction. As was held in the case of **Kenya Breweries Ltd –vs- Washington Okeyo [2002] 1EA 109**, there must be special circumstances over and above the establishment of a prima facie case for a mandatory injunction to issue and even then only in clear cases where the court thinks that the matter ought to be decided at once.
7. The orders now sought in the amended notice of motion are effectively the same as the prayers sought in the amended plaint save for the declaratory prayer. In effect, the question in this motion is whether the Applicants have met the threshold for the grant of the mandatory injunction of eviction and delivery up of vacant possession that they seek.
8. There is no doubt that the Applicants have established a prima facie case. The Applicants, from the uncontroverted affidavit evidence are the registered proprietors of the suit property. They have availed evidence of title and thus of proprietary interest as held by themselves through the copy of the title deed. The Land Registry records through the copy of the certificate of official search also reveal that they are the true owners. They are consequently entitled to possession: See **Moya Drift Farm Ltd –v- Theuri [1973]E.A. 114**.
9. The Applicants have also submitted that the Respondents through self or servants have intruded into the suit property. The Respondents, by the Applicants own admission, have however been on the premises since the year 2007. That is certainly a while back. The Applicants state that negotiations to have the Respondents vacate the premises have been futile. It is not clear why the same have been futile or even if indeed there were such negotiations. The negotiations were crystallized into a formal exit agreement. A copy of that Agreement and Memorandum of

understanding have been annexed to the supporting affidavit. None of the Respondents however was a party to the said memorandum of understanding. I would not in the circumstances and at this stage bind them to the memorandum of understanding to vacate the suit property.

10. I also take note of the fact that the Respondents have been in the suit premises since the year 2007. The circumstances of their entering the property are unclear.

11. The Applicants are however the registered proprietors and under Sections 24 and 25 of the Land Registration Act they are not only entitled to possession but also the protection of the court. I see absolutely no reason why the Respondents can continue to deny the Applicants access to and possession of the suit property.

12. I am convinced that this case falls within the threshold of a mandatory injunction. I am satisfied that I would grant automatically the orders sought against the Respondents without hesitation if a trial was held today. I would grant a mandatory injunction.

13. The amended Application dated 6th October, 2014 is allowed specifically against the three Respondents in the terms of prayers number 3 and 3(a). The Respondents are to hand over vacant possession within 30 days of service of the court order herein. In default the Applicants shall be at liberty to apply for eviction orders. The Applicants will also have costs of the application.

Dated, signed and delivered at Nairobi this 28th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

.....for the Applicants

.....for the Respondents