



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 583 of 2012

ESTHER WANJIKU WAWERUPLAINTIFF/APPLICANT

-VERSUS-

DAVID ONGERI Alias “MAJOR”....DEFENDANT/RESPONDENT

RULING

The Plaintiff's application by way of Notice of Motion dated 6th September 2012 came before me for hearing on 23rd January, 2013. The Defendant though served with the hearing notice for the application did not attend. The Defendant had been served with the Notice of Motion application on 18th September 2012 which application was to be heard on 28th September 2012. The Defendant did not appear on the 28th September, 2012, nor did he file any response. The matter was not heard on 28th September, 2012 and was fixed for hearing subsequently on 25th October 2012 and 13th December 2012 when again the application was not heard for one reason or another. On all these occasions the Defendant had been served and he neither attended court nor filed any response to the application.

On the date the application came before me the Defendant had not filed any response to the application and hence the Plaintiff's application dated 6th September 2012 is unopposed.

The plaintiff's advocates have filed written submissions to buttress their arguments in support of the Plaintiffs application for injunction in terms of the Notice of Motion dated 6th September 2012.

The Plaintiffs' Notice of Motion application is expressed to be made under Order 40 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and seeks the following orders: -

1. That the matter be certified as urgent and heard *ex parte* in the first instance, and service in the 1st instance be dispensed with.
2. That the defendant/respondent by himself, agents, employees, servants or workmen or otherwise be restrained by an order of temporary injunction from entering, encroaching, dealing or any other way interfering with the plaintiff's occupation and possession of the Plot/Property known as Plot Nos. P.8533 and P.8534 (LR Nos. 179/41 Embakasi Ranching Company Ruai) pending the interpartes hearing of this application and thereafter until the final determination of this suit.
3. That the costs of the application be provided for.

The application is grounded on the following grounds:-

1. That the applicant is the lawful owner of the Plot Nos. P.8533 and of P.8534 (L.R. Nos. 179/41 Embakasi Ranching Company, Ruai)
2. That the Defendant has wrongfully and unlawfully tried to encroach and take possession of the above plots without the applicant's authority and/or consent.
3. That the Plaintiff/applicant intends to occupy and develop the plots so as to reap maximum benefits from the property.
4. That the Respondents actions are illegal and irregular.

The application is further supported by the affidavit sworn in support by the Plaintiff/Applicant together with the annexures attached to the said affidavit.

Briefly the Plaintiff/applicant deposes that she is the registered owner of the two plots having purchased the same in or about October 1997 from Embakasi Ranching Company Ltd. The plaintiff holds the certificates of ownership to the two plots and has been shown the plots on the ground and has been issued with the beacon certificates in regard to the 2 plots. The certificates of ownership in the name of the plaintiff and the beacon certificates are annexed to the plaintiff's affidavit sworn in support of the application.

The plaintiff further deposes that during the year 2012 she received information that an intruder had trespassed onto her 2 properties and commenced constructing structures thereat. The Plaintiff visited the site and confirmed that indeed there had been an intrusion by the Defendant whereupon She reported the matter to Ruai Police Station and subsequently to CID Headquarters but the Defendant declined to report at the Police station or CID Headquarters when requested to do so for purposes of establishing the true owner of the subject plots. The plaintiff further deposes that she is apprehensive that the defendant is bent on illegally and wrongfully grabbing her plots and unless restrained by an order of injunction by the court the defendant will persist with the acts of illegal occupation, trespass and unlawful development.

The defendant was served with the application on 25th September 2012 as per the return of service sworn by Mr. Isaac O. Oichoe and filed in court on 27th September 2012 and was subsequently served with hearing notices whenever the application was scheduled for hearing but has not appeared and/or filed any response to the application. The plaintiff's averments are therefore uncontroverted.

The court has reviewed the application, the affidavit in support, the annexures and the submissions filed by the Plaintiff's Advocate and is satisfied that the plaintiff has demonstrated that she is the owner of the 2 plots the subject of the suit. The plaintiff has documents to support her ownership of the 2 plots and as such owner she would be entitled to exclusive use and occupation.

On the basis of the facts and evidence tendered I am satisfied the Plaintiff has a prima facie case that has probability of succeeding and this satisfies the first limb in the **Giella vs. Cassman Brown Principles** for the grant of injunction.

On whether or not the applicant would suffer irreparable loss or injury which cannot be compensated by way of damages I would say that the defendant has not in any way shown he has a basis to enter the suit properties he having not responded to the application.

In the premises the plaintiff who has demonstrated ownership of the suit properties would in all probability suffer irreparable damage or loss if a third party who may have no right to the properties whatsoever is allowed to wantonly and with impugntly trespass and carry out unlawful developments on the suit properties.

On the third limb regarding the balance of convenience it is to be observed that this application is unopposed and in the absence of any compelling evidence to the contrary the court is entitled to rely on the uncontroverted evidence of the plaintiff as there is no other evidence on record. In such instance the

balance of convenience would inescapably tilt in favour of the plaintiff unless it is shown or it is apparent that the applicant is undeserving of an equitable remedy. In the present case the plaintiff has shown the effort and

The extent to which she went to resolve the matter by reporting to the Police, and CID and only came to court when the Defendant failed to cooperate.

For all the above reasons I find the plaintiff's application to have merit and I hereby grant an injunction in favour of the plaintiff in terms of prayer No. 2 of the Plaintiff's Notice of Motion dated 6th September 2012.

I award the costs of the application to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent