

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 130 of 2012

SIMON KAPAIKU..... PLAINTIFF

VERSUS

GLADYS WANGUI.....DEFENDANT

RULING

The Plaintiff filed a Notice of Motion application dated 12th March 2012 under 3A of the Civil Procedure Act seeking orders that a mandatory injunction be issued for eviction of the Defendant and demolition of her structures and or buildings from land parcel No. KJD/OLCHORO-ONYORE/4601 (hereinafter referred to as the suit property), and that the officer commanding Ongata Rongai Police Station enforces the said order.

The grounds for the application are that the Plaintiff is the owner of the suit property, and that the Defendant has entered and/or remained on the land parcel of land without colour of right and despite owing two other pieces of land. The application is supported by a supporting affidavit, further affidavit and supplementary affidavit sworn by the Plaintiff on 12th March 2012, 1st November 2012 and 21st November 2012 respectively. The Plaintiff has attached a copy of his title to the suit property, certificates of official searches showing that the Defendant is registered as proprietor of two parcels of land in her capacity as co-administrator and an affidavit sworn by Elizabeth Kapaiko, the Plaintiff's mother and Defendant's mother-in-law.

The Plaintiff's application was opposed by the Defendant who filed a replying affidavit sworn on 19th September 2012 wherein she stated that the suit property initially belonged to her deceased father in law, who died in 1998 and the land was subsequently transferred to her mother-in-law namely Elizabeth Watiri Kapaiko.

Further, that she continued living on the suit property with her husband and children after the death of her father-in-law without any interference, and that she continued to reside thereon with her children after the death of her husband in 2006, wherefrom she earn my living by growing local crops and farming. The Defendant averred that her mother-in-law also resides in the suit property, and that the Plaintiff irregularly transferred the title deed of the said property to his name with the sole objective of evicting the Defendant from the said parcel of land.

The application was heard on 11th March 2013, and the parties relied on written submissions they had filed. The Plaintiff's Counsel in his submissions dated 21st November 2013 argued that the Plaintiff has title to the suit property and relied on the decision in **Harrison Musau vs Simon Sabonyo & 2 Others, 2004 eKLR** which upheld the constitutional right to sanctity of private property.

The Defendant's Counsel in submissions dated 18th February 2013 relied on the doctrine of proprietary estoppel as expounded in **Central London Property Trust vs High Trees House, 1947 1 KB 130** to argue that Plaintiff knew of the Defendant's equitable interest in the suit property, and allowed her to invest money and time in the said property to her detriment.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The issue before the court is whether the Plaintiff has met the requirements for the grant of a mandatory injunction, as he is seeking prayers for the Defendant's eviction from on the suit property

and demolition of structures thereon.

The Court of Appeal held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** that for a mandatory injunction to issue, there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has produced evidence of ownership of the suit property by annexing a copy of a title to the suit property issued to him on 16th April 2008. To this extent I find that he has established a *prima facie* case.

The Defendant however disputes the issuance of title to the Plaintiff, and claims that it was driven by malice with the sole purpose of evicting her from the suit property. She also alleges that her matrimonial home is situated on the suit property which was initially registered in the name of her mother-in-law. I have perused the affidavit by Elizabeth Kapaiko, the Plaintiff's mother and Defendant's mother-in-law sworn on 1st November 2012 which the Plaintiff attached as evidence. I note that the deponent in paragraph 3 states that she is the mother of the husband of the Defendant, yet in paragraph 6 she refers to the Defendant's husband as her late brother. There also seem to be a number of paragraphs missing between paragraph 7 and the last paragraph which is paragraph 11. In addition, the copy of title produced as evidence by the Plaintiff does not have any entries to show that the property was previously registered in the name of Elizabeth Kapaiko.

It is thus my opinion that this is not a clear case for a mandatory injunction to issue for two reasons. Firstly, the circumstances of the transfer of the suit property from Elizabeth Kapaiko and the registration in the Plaintiff's name needs to be clarified. Secondly, the allegations made by the Defendant of malice in this respect need to be proved and/or disproved. These clarifications can only be made after examination of evidence and further arguments at full trial.

The Plaintiff's Notice of Motion dated 12th March 2012 is therefore disallowed for the foregoing reasons, and the costs of the said Motion shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____16th____ day of ____April____, 2013.

P. NYAMWEYA
JUDGE