



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT & LAND COURT CASE NO. 104 OF 2013**

DANIEL ATIBU JASIMBA..... PLAINTIFF

**VERSUS**

AINEA SANDANYI MAGANA.....DEFENDANT

**RULING**

1. The plaintiff is the registered proprietor of all that parcel of land known as LR. Nos. Suna East/ Kakrao/ 2099 (hereinafter referred to only as “**the suit property**”). The plaintiff brought this suit against the defendant on 23<sup>rd</sup> May, 2012 seeking among others an order for the eviction of the defendant from the suit, a permanent injunction restraining the defendant from entering into or occupying the suit property and mesne profits. The suit was filed initially at the Senior Principal Magistrate’s Court at Migori which declined to entertain the same for want

**E&LCC.NO.104 OF 2013**

**NO.95**

of jurisdiction. The Plaintiff applied to this court through HCMCA. No. 259 of 2012 for the transfer of this case from the Senior Resident Magistrate’s Court at Migori to this court. The Plaintiff’s the application was granted. After the suit was transferred to this court, the plaintiff filed an application by way of Notice of Motion dated 19<sup>th</sup> March, 2013 under certificate of urgency seeking interlocutory injunction to restrain the defendant from encroaching into, trespassing onto, interfering with and/or in any other way dealing with the suit property pending the hearing and determination of this suit. The plaintiff’s application was certified as urgent on 20<sup>th</sup> March, 2013 and the plaintiff directed to list the application for hearing at the registry on a priority basis. On the same day, the Plaintiff proceeded to the registry and listed the application for hearing on 21<sup>st</sup> May, 2013. When the application came up for hearing on 21<sup>st</sup> May, 2013, the Plaintiff and the defendant who both appear in person attended court for the hearing of the

**E&LCC.NO.104 OF 2013**

**NO.95**

application. The defendant who had not filed an affidavit in reply to the application asked for leave to be given time to file a replying affidavit. The court adjourned the hearing of the application to 20<sup>th</sup> June, 2013 and granted leave to the defendant to file his replying affidavit to the application within 21 days from that date.

2. On 20<sup>th</sup> June, 2013 only the plaintiff appeared in court. The defendant did not appear and had not filed a replying affidavit pursuant to the leave that was granted to him by the court on 21<sup>st</sup> May, 2013. Since the date was given in court in the presence of the Plaintiff and the defendant, I allowed the plaintiff to argue the application in the absence of the defendant. The plaintiff's application was supported by the affidavit sworn by the Plaintiff on 19<sup>th</sup> March, 2013. The plaintiff's case against the defendant as pleaded in the plaint and the affidavit in support of the application ("**supporting affidavit**") is that; the Plaintiff is the registered proprietor of the

### **E&LCC.NO.104 OF 2013**

#### **NO.95**

suit property which measures approximately 0.22 hectares and that the defendant has without the Plaintiff's consent or authority entered the suit property and occupied the same. The Plaintiff claims that as a result of the defendant's trespass aforesaid, the Plaintiff has been highly inconvenienced and has been deprived of the right to quiet possession and enjoyment of the suit property. The plaintiff annexed to the supporting affidavit copies of; the agreement for sale of the suit property, a copy of the title deed for the suit property, a copy of the certificate of official search for the suit property and a letter of demand addressed to the defendant. Copies of the said title deed and certificate of official search show that the suit property is registered in the name of the Plaintiff.

3. In his submission in support of the application, the Plaintiff submitted that he is the registered proprietor of the suit property having purchased the same from one, Evans Linyali Dimade and Jane Kadogo Jasimba. He submitted that the

### **E&LCC.NO.104 OF 2013**

#### **NO.95**

defendant is occupying the suit property with members of his family and has refused to vacate despite demand. He submitted that the defendant has no right to continue occupying the suit property.

4. The principles for granting interlocutory injunction are well settled and the plaintiff is not excused from satisfying the same simply because the application is not defended. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for interlocutory injunction must prove that he has a prima facie case with a probability of success against the defendant and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. The plaintiff has placed evidence before the court which shows that the Plaintiff is the registered proprietor of the suit property. The plaintiff's contention is that the defendant entered the suit property without the Plaintiff's permission and

### **E&LCC.NO.104 OF 2013**

#### **NO.95**

has occupied the same thereby denying the Plaintiff the right to use and enjoy the same. In the absence of any challenge to the validity of the plaintiff's title and the plaintiff's claim that the defendant has trespassed on the suit property, I am persuaded that the plaintiff has established a prima facie case with a probability of success against the defendant since the plaintiff is the registered proprietor of the suit property and is entitled to possession of the same. I am also satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted as that would result in the plaintiff being kept away from his property. I have noted however from the Plaintiff's submission that what the Plaintiff is seeking is actually an interlocutory mandatory injunction. The defendant is in occupation and is residing in the suit property with his family. The Plaintiff from his

submission made before the court wants the defendant to be ordered to vacate the suit property. This requires mandatory and not prohibitory injunction sought by

**E&LCC.NO.104 OF 2013**

**NO.95**

the Plaintiff. A prohibitory injunction would not be able to command the defendant to vacate the suit property. The principles for granting interlocutory mandatory injunction are also different from those that apply to interlocutory prohibitory injunction. Due to the foregoing, although the Plaintiff has established a prima facie case for trespass against the defendant and has shown that he will suffer irreparable harm if the injunction sought is not granted, the type of injunction sought is not appropriate in the circumstances. The orders sought if they are intended to evict the defendant would be in vain. The court is also reluctant to issue orders to restrain the defendant from entering his residence although such residence belongs to the Plaintiff. Since the Plaintiff's suit is for eviction of the defendant from the said residence, such an injunction will amount granting a major relief in the suit without the benefit of a hearing. If the Plaintiff wanted such orders to issue, he ought to have applied for a mandatory injunction and fulfilled the

**E&LCC.NO.104 OF 2013**

**NO.95**

conditions for granting such injunction. Due to the foregoing, I decline to grant the Plaintiff's application dated 19<sup>th</sup> March, 2013. The same is accordingly dismissed. The costs of the application shall be in the cause. The Plaintiff should take steps to set down this case for pre-trial case conference and thereafter list the case for full hearing.

**Dated, signed and delivered at KISII this 12<sup>th</sup> day of July, 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

Plaintiff Present in person.

No appearance for the defendant

Mobisa Court Clerk.

**S. OKONG'O,**

**JUDGE.**

**E&LCC.NO.104 OF 2013**