



NO.116

REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 321 OF 2013

NELSON OMOLO ACHOLA.....PLAINTIFF

VERSUS

GEORGE OMONDI AJWALA.....DEFENDANT

RULING

1. On 13th August, 2013, I certified the plaintiff's Notice of motion Application dated 10th August, 2013 as urgent and ordered the same to be served upon the defendant for hearing inter partes on 27th August, 2013. On 27th August, 2013 only the plaintiff's advocate appeared in court. There was no appearance by the defendant who was duly served with the application on 14th August, 2013 according to the affidavit of service by one, David Okumu Ojill that was filed in court on 27th August, 2013. After satisfying myself from the said affidavit of service that the defendant was duly served, I allowed the plaintiff's advocate to argue the application in the absence of the defendant.
2. The plaintiff's application dated 10th August, 2013 seeks a temporary prohibitory and mandatory injunction against the defendant. The prohibitory injunction is sought to restrain the defendant from entering into, trespassing onto, making bricks, cultivating, building structures, interfering with and/or in any other manner whatsoever dealing with all that parcel of land known as LR No. Kanyamkago/Kawere II/3162 (hereinafter referred to as "**the suit property**") or any portion thereof pending the hearing and determination of this suit. The Plaintiff is also seeking a temporary mandatory injunction to compel the defendant to yield up, vacate and/or grant vacant possession of the suit property to the Plaintiff pending the hearing and determination of this suit. The application is based on several grounds which are set out on the face thereof which grounds are also reiterated in the affidavit of the plaintiff sworn on 10th August, 2013 in support of the application. In summary, the plaintiff's suit and the application herein is brought on the ground that the plaintiff is the registered proprietor of the suit property and that the defendant has trespassed thereon. The plaintiff has annexed to his affidavit in support of the application; a certificate of official search dated 2nd July, 2013 with respect to the title of the suit property which shows that the same was registered in the name of the Plaintiff on 15th September, 2011 and, a copy of a title deed for the suit property dated 20th September, 2011 in the name of the Plaintiff. These documents leave no doubt that the plaintiff is the registered proprietor of the suit property.
3. The plaintiff claims that sometimes in June, 2013, the defendant entered the suit property and started making bricks thereon. The defendant at the same time commenced cultivation and

erection of temporary structures on a substantial portion of the suit property. The Plaintiff annexed a photocopy of a photograph to show the defendant's said offensive activities. The Plaintiff claims that he reported the defendants' said activities to the area chief and also caused a demand letter to be written to the defendant to stop the said acts of trespass but the defendant failed and/or refused to stop the same. The Plaintiff claims that the acts of the defendant aforesaid are intended to deprive the Plaintiff of his rights and/or interests in the suit property as the Plaintiff has now been dispossessed of a substantial portion of the suit property by the defendant. The Plaintiff claims further that he stands to suffer irreparable harm if the defendant's said acts of trespass are not stopped as the same is interfering with the character and soil texture on the suit property which cannot be compensated in monetary terms. The plaintiff contends that he has made out a case against the defendant that warrants the granting of the temporary prohibitory and mandatory injunction orders sought herein. The Plaintiff contends that as the registered proprietor of the suit property, he is entitled to absolute and/or exclusive rights over the suit property. The defendant did not appear at the hearing of this application and filed neither a replying affidavit nor grounds of opposition to the same. The plaintiff's application is therefore not opposed.

4. In his submission in support of the application, the plaintiff's advocate, Mr. Oguttu relied entirely on the Plaintiff's affidavit sworn in support of the application and submitted that on the material placed before the court and the authorities cited, the plaintiff has demonstrated that this is a fit and proper case in which the court should grant both the prohibitory and mandatory temporary injunction orders sought. Relying on the Court of Appeal case of, **George Orango Orago vs. George Liewa Jagalo and 3 others, Court of Appeal at Kisumu, Civil Appeal No. 62 of 2009(unreported)**, the Plaintiff's said advocate submitted that, to deny the Plaintiff an injunction in the circumstances would be tantamount to dispossessing the Plaintiff of the suit property. The Plaintiff's said advocate submitted further that the entry by the defendant into the suit property was unlawful and amounted to an infringement on the Plaintiff's proprietary rights. He submitted that the defendant should be restrained from continuing with the said acts as a court of equity does not assist law breakers. To buttress this submission, counsel relied on the Court of Appeal case of, **Aikman vs. Muchoki, (1984) KLR 353**. With regard to the Plaintiff's prayer for a temporary mandatory injunction, counsel submitted that the actions of the defendant complained of were intended to steal a match against the Plaintiff and as such should be remedied by an order of mandatory injunction. In support of this submission, counsel relied on the Court of Appeal case of, **Kenya Breweries Limited & Another vs. Washington Okeyo, Court of Appeal at Nairobi, Civil Appeal No. 332 of 2000 (unreported)** and, High Court Case of, **Samuel Ongori Ongori vs. Yuvinalis Nyankeboka Ongori, Kisii High Court Civil Case No. 67 of 2010(unreported)**. In conclusion, counsel submitted that the plaintiff's application which is not opposed should be granted.
5. The principles to be applied while considering an application for a temporary prohibitory and mandatory injunction are now fairly well settled. For a temporary prohibitory injunction, an applicant must establish a prima facie case with a probability of success and must also demonstrate that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. These were the principles that were pronounced in the case of, **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**. Different principles apply to applications for a temporary mandatory injunction. The granting of a temporary mandatory injunction effectively determines a case without the benefit of a trial. An applicant for a temporary mandatory injunction must therefore show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. The applicant must also fulfill the usual conditions necessary for granting interlocutory injunction set out herein above. In the case of **Shepherd Homes Ltd. –vs- Shadahu [1971] 1 ch.34, Meggery J.** had this to say on interlocutory mandatory injunction;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course

grant such injunction as the justice of the case requires; but

at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

6. The same sentiments were echoed in the case of, **Locabail International Finance Ltd. vs. Agroexport & others (1986) ALL E.R 901**, that was cited in the case of, **Kenya Breweries Ltd. & another vs. Washington Okeyo (supra)**. In the case of, **Redland Bricks Ltd –vs- Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction “**is a jurisdiction to be exercised sparingly and with caution but in the proper case, unhesitatingly**”. Applying the foregoing principles to this case, has the plaintiff satisfied the court that he has unusually strong and clear case against the defendant that warrants the issuance of the interlocutory prohibitory and mandatory injunction sought? The plaintiff has demonstrated on the material placed before the court that he is the registered proprietor of the suit property. Under **Section 24(a)** of the **Land Registration Act, 2012**, the registration of a person as a proprietor of land vests upon that person the absolute ownership of that land together with all the rights and privileges belonging and appurtenant thereto. Under **Section 25 (1)** of the **Land Registration Act, 2012**, the rights of a proprietor of land acquired for valuable consideration is indefeasible except as provided under the said Act. **Section 26 (1)** of the said Act provides that the certificate of title issued by the land registrar upon registration or to a purchaser of land shall be taken by all courts as a prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner thereof. From the foregoing, I am satisfied that the plaintiff has proved on a prima facie basis that he is the owner of the suit property. In the face of evidence that the plaintiff is the owner of the suit property, anyone occupying the suit property without the consent or authority of the plaintiff is doing so unlawfully and is a trespasser. In the absence of an explanation from the defendant as to the basis on which he has occupied the suit property, the only conclusion this court can reach is that the defendant’s occupation of the suit property has no basis and as such, the defendant is a trespasser on the suit property. I am satisfied that on the material placed before the court, the plaintiff has established a prima facie case against the defendant with a probability of success at the trial. This court is also satisfied that the plaintiff stands to suffer irreparable harm unless the orders sought are granted. The plaintiff as the proprietor of the suit property has a right to access, occupy and use the suit property. Failure to grant the orders sought would be tantamount to keeping the plaintiff off the suit property which would cause irreparable harm to the plaintiff. Due to the foregoing, I am convinced that the Plaintiff has made out a case for a temporary prohibitory injunction and that the Plaintiff’s application is for granting in that regard. As concerns the temporary mandatory injunction sought, I am not satisfied that the issuance of the same is necessary in the circumstances. I am of the view that the acts of the defendant complained of herein by the Plaintiff can be adequately remedied by way of a temporary prohibitory injunction and as such, to grant both prohibitory and mandatory injunction at this stage would not be appropriate. In exercise of this court’s discretion and applying the caution given in the cases cited above against issuing mandatory injunctions at interlocutory stage, I decline to grant the Plaintiff’s prayer for a temporary mandatory injunction.
7. The upshot of the foregoing is that the plaintiff’s application dated 10th August, 2013 succeeds in part. The same is allowed in terms of prayer 4 thereof. The plaintiff shall have the cost of the application.

Dated, signed and delivered at Kisii this 29th day of August, 2013.

S. OKONG’O,

JUDGE.

In the presence of:-

No appearance for the plaintiff

No appearance for the defendant

Bibu Court Clerk.

S. OKONG'O,

JUDGE.