



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 205 OF 2009

PATRICK NJUGUNA WAWERUPLAINTIFF

VERSUS

PATRICK NJUGUNA FRANCIS WAWERU1ST DEFENDANT

DISTRICT LAND REGISTRAR, NAIROBI.....2ND DEFENDANT

RULING

The 1st Defendant filed an application by way of notice of motion dated 29th November 2011 as amended on 30th January 2012, wherein he is seeking the following two orders from this Court:

1. That the Plaintiff /Respondent be restrained by himself, his authorized agents, servants and or employees from trespassing and or in any other ways dealing or interfering with the 1st Defendant's/Applicant's property known as LR. NO. DAGORETTI/RIRUTA/1260, pending the hearing and determination of this suit.
2. That an order of mandatory injunction be issued requiring the Plaintiff/Respondent to immediately demolish and remove a two bed-roomed temporary structure that he or his agent have erected on LR. No. DAGORETTI/RIRUTA/1260 (hereinafter referred to as the suit property), failing which the 1st Defendant /Applicant be authorized to demolish and remove the said temporary structure at the Plaintiff's expense.

The grounds for the application are that the 1st Defendant is the registered proprietor of the suit property, and that the Plaintiff and/or his agents trespassed onto the said property on 1st November 2011, and have constructed thereon a two- bedroomed temporary house. These grounds are elaborated upon in the 1st Defendant's Supporting Affidavit sworn on 29th November 2011, to which he has annexed a copy of his title to the suit property, a letter dated 1st November 2011 demanded that the Plaintiff ceases the trespass and the construction, and photographs of the temporary structure and *mabati* fence erected by the Plaintiff on the property, as well as maize crops he has planted thereon.

The Plaintiff opposed the application in a Replying affidavit he swore on 14th February 2012, wherein he stated that the suit property is one of the subject matters in the further Amended Plaintiff dated 5/10/2010 and filed in this Court on the same date. The Plaintiff states that his elderly mother has always resided on the suit property, and that she recently added a few structures in front of her residential house. The Plaintiff also stated that demolishing the structures would be an infringement on his mother's right given that she inherited the land from the Plaintiff's father, and that the 1st Defendant who is the Plaintiff's step brother fraudulently transferred the land to himself. Further, that the 1st Defendant has never been in possession nor has he utilized the suit property, and as such he stand to suffer no loss if the orders sought are not granted.

The 1st Defendant responded to the Plaintiff's averments in a supplementary affidavit sworn on 27th February 2012 and denied that Plaintiff's aged mother resides on the suit property or that she has any residential house thereon. The 1st Defendant stated that the Plaintiff's mother resides on Parcel No. Dagoretti/Riruta/1285 which is directly opposite the suit property, which residence was brought down in November 2011, and has annexed a copy of photograph of the empty space left after the residence was brought down. The 1st Defendant also stated that he had established that the Plaintiff has now rented out the temporary structures that he caused to be erected on the suit property to two people, one of whom is operating a food kiosk, and the other a hotel, and photographs of the same were attached as evidence.

I have read and carefully considered the pleadings, evidence and written submissions by the respective parties to this application. At this stage all I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and to determine if the 1st Defendant has shown any special circumstance to entitle him to the mandatory injunction sought.

The first question I must answer is whether the Defendant has established a *prima facie* case. I must answer this question in the affirmative because the Defendant has produced in evidence a copy of title to the suit premises, issued to him on 5th February 1993. The Plaintiff has not produced any evidence of such title, and the issue of fraudulent dealing with the suit property he alleges can only be determined after full trial and not at this stage. The next question that I must then answer is whether damages would be an adequate remedy to the 1st Defendant. I will however not make any finding in this regard as the Plaintiff has not pleaded that he is able to compensate the 1st Defendant in monetary terms. I therefore find that the 1st Defendant is entitled to the temporary injunction sought.

The final question that this court must answer is whether the 1st Defendant has shown any special circumstances to entitle him to the mandatory injunction sought of demolition of structures on the suit property. It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** that 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.

The 1st Defendant stated that the said premises are not being used for residential purposes as alleged by the Plaintiff but as business premises, and has provided photographic evidence of the same. The Plaintiff has also not disputed the 1st Defendant's averment that the Plaintiff's mother resides in Parcel No. Dagoretti/Riruta/1285, and does not reside on the suit property. In my opinion these are enough circumstances to warrant the order sought, which is any case a necessary order consequent to the temporary injunction already allowed.

For these reasons the 1st Defendant's application dated 29th November 2011 as amended on 30th January 2012 is allowed, and it is hereby ordered as follows:

1. That the Plaintiff be restrained by himself, his authorized agents, servants and or employees from trespassing and or in any other ways dealing or interfering with the property known as LR. NO. DAGORETTI/RIRUTA/1260 pending the hearing and determination of this suit.

2. That the Plaintiff to immediately demolish temporary structures that he or his agents have erected on LR. No. DAGORETTI/RIRUTA/1260 within 30 days of service by the 1st Defendant of the orders in this ruling, failing which the 1st Defendant to demolish and remove the said temporary structures at the Plaintiff's expense.

The costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____28th____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE