



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MOMBASA

Civil Suit 141 of 2011

ROSEMARY NJOKI MWANGI.....PLAINTIFF

VERSUS

NATHIFY HASSAN.....DEFENDANT

RULING

- (1) The Plaintiff, who is the registered proprietor of Subdivision No. 2646 (Original No. 1657/6) Section III MN has filed a Plaint dated 25th May 2011 seeking the **“eviction of the Plaintiff (sic) [Defendant] from the suit property, mesne profits and costs”** and at the interlocutory stage has sought a mandatory injunction to compel the Defendant to vacate the suit property pending the hearing and determination of the suit on the ground that the Defendant is a trespasser to the land.
- (2) The Defendant has denied the plaintiff’s claim to the suit property as registered and contends that the Plaintiff is the owner only of a smaller portion of the land being ½ -acre that she purchased from one Dhahabu Chai Mrewa (deceased) with whose consent the Defendant occupied the portion of the land on which he is settled since 1979. The Defendant further claims that the portion on which he is settled is set apart from the ½ -acre which the Plaintiff purchased but the Plaintiff proceeded to include the Defendant’s portion with her own making it much bigger than the ½ -acre she was given, and had fraudulently caused the same to be registered in her own name, and the Defendant had tried to have surveyors determine the dispute, a move which the Plaintiff resisted. The Defendant also challenged the Plaintiff’s suit on the grounds that (a) there is previous suit between the parties HCCC 494 of 1987 in which the Defendant sued the Plaintiff in respect of the original plot out of which the suit property was created and (b) the question of trespass to land is a matter under the special jurisdiction of the Tribunal under section 3 of the Land Disputes Tribunal Act, 1990 and the court lacks jurisdiction. For his own part, the Defendant counter-claims for a declaration that the Plaintiff is only entitled to ½ -acre of the suit property and for an order for the cancellation of her title pending resurvey of the property and registration of only ½ -acre in favour of the Plaintiff.
- (3) Pending the hearing of the dispute between the parties, the Plaintiff has sought by Notice of Motion dated 25th May 2011 for mandatory injunction to compel the Defendant to vacate the suit property on the grounds that:
 - (a) The Plaintiff is the registered owner of the suit property and the Defendant is a trespasser who has not shown his interest in the land.
 - (b) The Defendant had signed an agreement to vacate the land.

- (c) The Defendant is a hindrance to the Plaintiff's plan to develop the suit property.
- (d) In the event that the Plaintiff is unsuccessful, the Defendant may be allowed to move back into the property.
- (4) The Defendant opposes the application on the following grounds:
 - (1) The prayer for mandatory injunction is also the substantial prayer in the Plaint hence granting it will be tantamount to condemning the Defendant unheard, and dismissing the counter-claim to the suit.
 - (2) There are no special circumstances calling for such drastic measures.
 - (3) This is not a clear cut case in favour of the Plaintiff, since the Sale Agreement indicates that she only purchased ½ -acre of the subject plot and the Defendant pleads fraud.
 - (4) The Defendant is not a trespasser because he was already living on the said portion before the Plaintiff bought the suit property.
 - (5) If the Defendant is a trespasser then the court lacks jurisdiction by virtue of section 3 of the Land Disputes Tribunal Act and
 - (6) The suit is sub-judice.
- (5) The parties' counsel cited various case law authorities in support of the respective contention of the parties. I have considered the application and I find that the only issue for determination is whether an interlocutory injunction in the nature of a mandatory injunction should issue to evict the Defendant. In a recent decision, I accepted two principles of temporary injunctions being that:
 - (a) Interlocutory injunctions have the purpose of maintaining the status quo pending the full trial of the dispute and
 - (b) Interlocutory mandatory injunction will only be granted in exceptional and clear cases, such as case of trespass.

See **Margit Sommer Charo v. Isaac Njuguna Njoroge, Msa HCCC No 230 of 2010 of 6th September 2012.**

- (6) In the present suit, I find that there are several triable issues which make it an unsuitable case for the grant of interlocutory mandatory injunction. These triable issues include:
 - (a) Whether the Plaintiff is entitled only to ½ -acre of the suit property and whether the suit property exceeds such acreage.
 - (b) Whether the matters raised in this suit are sub-judice.
 - (c) Whether the Defendant is entitled to continue to occupy the suit property as licensee since 1979 of the original owner of property out of which the suit property was created.
 - (d) Whether, and amount of, mesne profits are payable by the Defendant to the Plaintiff.

The Plaintiff's suit and the Defendant's counter-claim should be heard on the merits before a determination is made as to whether the Defendant is a trespasser against whom an order of permanent mandatory injunction should be made. I am not prepared to hold at this stage that the Defendant is a trespasser in view of his alleged license to occupy the land since 1979 and the dispute as to the acreage of the suit property.

(7) The objection that the court lacked jurisdiction by virtue of section 3 of the Land Disputes Tribunal Act, 1990 is now only of academic value following the repeal of that Act by Environment and Land Court Act of 2011, and I do not propose to rule on it at this stage. I should only offer that the unlimited jurisdiction of the High Court may in a proper case be called in aid in all cases where a statute grants some special jurisdiction to an inferior tribunal or court.

(8) Accordingly, I make following orders on the Plaintiff's application dated 25th May 2011:

- (a) The application for interlocutory mandatory injunction is dismissed.
- (b) Both parties to maintain the status quo on the suit property as at the date of this ruling pending hearing of the suit on priority basis.
- (c) The costs of this application will be costs in the cause.

EDWARD M. MURIITHI
JUDGE

Dated and delivered on this 14th day of September 2012.

F. TUIYOTT
JUDGE

In the presence of:

Mr. Wachira for the Plaintiff

Mr. Ondonji for the Defendant

Miss Moriasi - Court Clerk