



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 195 OF 2007

GIDEON LETOYA OLE HAPU.....PLAINTIFF

VERSUS

PATRICIA WAMBUI.....DEFENDANT

RULING

This is an application by the plaintiff brought under the provisions of **Order XXXIX Rules 1, 2 and 9** of the **Civil Procedure Rules** seeking an order of temporary injunction to restrain the defendants, by themselves or their servants or agents from constructing, carrying out any development, encroaching, interfering or in any other way dealing with the plaintiff's parcel of land known as **Kijabe/Kijabe Block 1/4303** (*hereinafter referred to as the suit land*) at Mai Mahiu Trading Centre pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The plaintiff contends that, as the registered owner of the suit land, he was entitled to be protected by the law from trespassers and other persons who would interfere with his exclusive enjoyment of the suit land. He stated that the defendants had, without any colour of right, encroached into the suit land and commenced construction thereon without the plaintiff's consent or authority. He therefore stated that the defendants should be restrained from their illegal and unwarranted acts of trespass. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The 2<sup>nd</sup> defendant swore a replying affidavit in opposition to the application. In the said affidavit, the 2<sup>nd</sup> defendant deponed that he had purchased a business premise known as Mt. Longonot Hotel situated on land reference **No.Kijabe/Kijabe Block 1/4301 and 4302** from the plaintiff. He deponed that the said hotel was purchased as a going concern and included "*all the improvements erected or being thereon.*" He deponed that all along he was made to understand that the premises of the said hotel were situated on parcels No.Kijabe/Kijabe Block 1/4301 and 4302. When the present suit was filed, the 2<sup>nd</sup> defendant discovered that part of the improvements and the septic tank of the hotel were in fact situated at parcel No.Kijabe/Kijabe Block 1/4303. The 2<sup>nd</sup> defendant deponed that the plaintiff had fraudulently concealed the existence of the suit parcel of land when he entered into the agreement with him (*the 2<sup>nd</sup> defendant*) for the sale of the business premises known as Mt. Longonot hotel. He further deponed that part of the improvements of the hotel were in parcel No.Kijabe/Kijabe Block 1/4303. The 2<sup>nd</sup> defendant was of the view that the plaintiff had concealed the existence of the suit land so as to frustrate him in his bid to develop the said hotel's business. He urged the court to dismiss the plaintiff's application with costs.

At the hearing of the application, I heard the rival submissions made by Mr. Karanja on behalf of the plaintiff and by Mr. Kayai on behalf of the 2<sup>nd</sup> defendant. The said counsel basically reiterated the contents of the application and the replying affidavits filed in court. The issue for determination by this court is whether the plaintiff established a case to enable this court grant the order of interlocutory injunction sought. The principles to be considered by this court when determining whether or not to grant an order of injunction are well settled. The plaintiff must establish that he has a prima facie case with high likelihood of success. He must also establish that he would suffer irreparable harm that would unlikely be compensated by an award of damages. In the event that the court would be in doubt, it would determine the case on a balance of convenience. (See ***Giella vs Casman Brown [1973] E.A 358***).

In the present application, certain facts are not in dispute. It was not disputed that the plaintiff sold to the 2<sup>nd</sup> defendant a business premises situated at Mai Mahiu known as Mt. Longonot Hotel. The said hotel is said to be situated on parcels No.Kijabe/Kijabe Block 1/4301 and 4302. The 2<sup>nd</sup> defendant deponed that he thought that the area occupied by said business premises extended to parcel No.Kijabe/Kijabe Block 1/4303. This was due to the fact that some of the facilities of the said hotel had extended to the said parcel of land. It was apparent that the 2<sup>nd</sup> defendant was under a mistaken belief that the premises of the said hotel extended to the suit land. I have perused the agreement which was annexed to the 2<sup>nd</sup> defendant's replying affidavit as "JM 1". The said agreement specifically identifies the parcels of land sold to the 2<sup>nd</sup> defendant to be land reference No.Kijabe/Kijabe Block 1/4301 and 4302. It does not mention parcel No.Kijabe/Kijabe Block 1/4303. Although the said parcel of land is adjoining the parcels of land which were sold to the 2<sup>nd</sup> defendant, it was clear from the said agreement that the same was not included in the agreement. The 2<sup>nd</sup> defendant's contention that the plaintiff fraudulently concealed the existence of the said parcel of land does not hold. This was because it was presumed that before a party enters into an agreement for purchase of land, he would have satisfied himself by conducting a search at the relevant land registry of the dimensions of the parcel of land to be bought.

The plaintiff established that he is the registered owner of the suit land. The 2<sup>nd</sup> defendant acknowledges the fact that the plaintiff is so registered. This court does not agree with the 2<sup>nd</sup> defendant's submission that he was duped into believing that the premises of the hotel extended to the suit parcel of land. This court is aware of the existence of a suit between the plaintiff and the 2<sup>nd</sup> defendant touching on the said agreement entered between the plaintiff and the 2<sup>nd</sup> defendant. The subject matter of this suit is a separate parcel of land which is not the subject of the said suit. *i.e.* Nakuru HCCC No.5 of 2007. In the premises therefore, I hold that the plaintiff has established a prima facie case that he is the owner of the suit land. He has further established that the 2<sup>nd</sup> defendant encroached into his said parcel of land without any legal ground. The plaintiff will suffer irreparable harm which will not be compensated by an award of damages if the 2<sup>nd</sup> defendant proceeds with construction on the said parcel of land.

The application for injunction is allowed. The defendants by themselves, their servants or agents are hereby restrained by means of an interlocutory injunction from interfering, encroaching, constructing or in any manner whatsoever dealing with parcel No.Kijabe/Kijabe Block 1/4303 at Mai Mahiu Trading Centre pending the hearing and determination of the suit. The plaintiff shall have the costs of the application.

**DATED at NAKURU this 5<sup>th</sup> day of December 2007**

**L. KIMARU**

**JUDGE**