



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 262 of 2006

JOHN KIRIKA KIMANI.....1ST PLAINTIFF/APPLICANT

JOYCE WAMBUI MWANGI.....2ND PLAINTIFF/APPLICANT

VERSUS

HANNAH NJERI NG'ANGA.....DEFENDANT/RESPONDENT

RULING

Before me is a Chamber Summons dated 20th February 2006 filed by J. Harrison Kinyanjui & Company advocates on behalf of the applicant John Kirika Kimani and Joyce Wambui Mwangi. It is purported to have been brought under Section 63(c), 3 and (e) of the Civil Procedure Act, and Order XXXIX rules 1 (a), 23 and 8 of the Civil Procedure (Revised) Rules. It seeks under prayer (2) for temporary restraining injunction to be granted until the suit filed herein is heard and determined. It also seeks under prayer (4) for a mandatory injunction. The application arises from a suit filed by the applicants on 17//3/2006, and the application was also filed on the same date. The application has grounds on the face of the Chamber Summons. It is also supported by the supporting affidavit sworn by John Kirika Kimani, one of the applicants. The application is opposed and a replying affidavit, sworn by the respondent Hannah Njeri Ng'ang'a on 31/3/2006 was filed.

At the hearing of the application on 11/4/2006, Mr. Kinyanjui appeared for the applicants and Mr. Kinga appeared for the respondent. Both counsel for the parties made submissions before me.

From the submissions and documents on record, it is not in dispute that the applicants have title to Plot Number Degoretti/Kangemi/S.190 having acquired the plot from the previous owner Phyllis Wanjiru Mugo on 26/2/2003. It is not in dispute that the respondent occupies an adjacent plot number Degoretti/Kangemi/431. It is not in dispute that the respondent occupied plot number Dagoretti/Kangemi431 before the applicant acquired their plot number Degoretti/Kangemi/S.190.

In the year 2001, the previous owner of plot number Dogoretti/Kangemi/S.190 filed Nairobi HCCC No. 334 of 2001. The suit was filed against the respondent, who was occupying the same adjacent plot. After filing suit, the previous owner of plot number Dagoretti/Kangemi/S190 made an application dated 1st March 2001 for a restraining as well as mandatory injunction against the respondent herein. The complaint was that the respondent had erected structures on the road access to plot Dagoretti/Kangemi/5190

(plot.190) and put there some tenants, who engaged in criminal activities and drug abuse Waki J, as he then was, delivered a ruling in the application on 7/3/2003, after visiting the site. That ruling was part of the document filed in this application.

In that ruling, the learned Judge granted a mandatory and prohibition/injunction in the following terms –

‘The difficulty currently experienced by the Plaintiff in accessing the plot lawfully owned by her is to me a special circumstance sought to warrant the grant of a mandatory injunction. The injunction will serve to demolish and remove all those structures directly blocking the plaintiffs entrance gate to plot 190 and extending to the main road. The demolishing if any of the rest of the structures will await the main hearing. A prohibitory injunction shall follow to restrain the defendant from further interference with the egress and ingress of the plaintiff to plot 190.’

It is clear from the above ruling that the court granted a mandatory injunction for the demolition of structures that were on the entrance to plot No. 190 and extending to the main road. Also there was a prohibitory injunction issued by the court restraining the respondent herein from further interference with the egress and ingress of the owner of plot 190. The other structures were not to be demolished until the main suit was determined.

The applicant herein, who is the current owner of the plot 190, has come to court, in this application, seeking similar orders sought by the previous owner. As far as I can see it, the orders of the court issued on 7/3/2003.

The court did in the ruling of 7/3/2003 considered guiding principles for granting of a temporary prohibitory injunction, as well as the requirement to be considered in granting a mandatory injunction. The requirements for granting an interlocutory prohibitory injunction are as enunciated in the case of GEILLA –VS- CASSMAN BROWN & COMPANY LTD [1973] EA 358. The applicant must show that there is a prima facie case with a probability of success. Secondly, such an injunction will not normally be issued unless the applicant will suffer irreparable loss, that is that an award of damages will not be adequate compensation. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

For the grant of a mandatory injunction at an interlocutory stage, the applicant must show that there are special circumstances to warrant the order at an interlocutory stage – Nairobi Civil App. No. 72 of 1994 FINE SPINNERS LTD & 3 Others –vs- BEDI INVESTMENTS LTD (UR).

I have considered the application herein and the submissions of both counsel for the parties. I have not visited the scene, so I have to rely on documents filed and the submissions. Paragraph 5 the plaint says the respondent had erected iron sheet structures near the applicant’s plot, as she had earlier done before the demise of the previous owner of the property and along the applicants property, thereby depriving the plaintiffs of the quiet and peaceful enjoyment of their proprietary rights over the said parcel. The applicants have not particularized the area where the structures were erected. They have not indicated whether the area is that on which the court ruling of 7/3/2003 applied.

The respondent has avered in her replying affidavit sworn on 31/3/2006, that after demolition following the court’s orders, she had not erected any structures on the area in question.

So it appears that the respondent appreciates that she was to demolish structures and refrain from putting up structures in a certain defined area forming the access to plot 190. The previous owner of plot 190 appears to have died on 26/02/2003. The previous suit, if no substitution was done for the plaintiff in the case, would have lapsed on 25/02/2004.

Having considered the application before me and since the applicants have bought the same plot No. 190 from the previous owner, I am of the view that they have established a case for interlocutory injunctions on the same terms as granted by Hon. Justice Waki, as he then was. I do so because the only

change of substance herein appears to be a change in ownership of plot 190. I therefore grant orders of injunction as follows:-

A mandatory injunction will issue to serve to demolish and remove all those structures directly blocking the applicants entrance gate to plot 190 and extending to the main road. The demolition, if any, of the rest of the structures will await the main hearing. A prohibitory injunction shall follow to restrain the respondent from further interference with the egress and ingress of the plaintiffs plot 190.

For the record I want to state it that if the respondent has not erected any structures on the access road, after the ruling of 7th March 2003, there will be nothing to be demolished.

Costs will be in the cause.

Dated and delivered at Nairobi this 23rd day of May 2006.

George Dulu

Ag. Judge

In the presence of -