REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. NO. 36 OF 2018 (O.S.)

ALEXANDER KARIOKO BEDAN.....PLAINTIFF/APPLICANT

VERSUS

DIOCESE OF EMBU TRUSTEES REGISTERED.....DEFENDANT/RESPONDENT

RULING

1. I am called upon to determine the application dated 2/2/2020 filed as a motion on notice on 26/10/2020. The application is expressed to be brought under **Section 68 of the Land Registration Act, Sections 1A and 3A of Civil Procedure Act (Cap 21), Order 50 Rule 10 of the Civil Procedure Rules and all other enabling provisions of Law.** The applicant – **Alexander Karioko Bedan** – is the plaintiff in the suit while the respondent – **Diocese of Embu Trustees Registered** – is the defendant. In the suit, the applicant is claiming a portion of land parcel **No. Gaturi/Nembure/3120.** He is doing so as a disseisor. The respondent is the registered owner of the land.

2. At this stage, what the applicant is seeking is a temporary restraining order injuncting the respondent from constructing or erecting structures on the portion of land occupied by him pending hearing and determination of the suit. The applicant would also wish the court to make provision for cost of the application. As initially brought, the application had four prayers but some, like prayer 1, were allowed by consent while others, like prayer 2, were for consideration at an earlier stage.

3. In a more specific way, the prayers for consideration are set out here *ipsissima verba:*

> **Prayer 3: That the respondent herein be restrained by way of temporary injunction from constructing, erecting structure on the portion occupied by the plaintiff on land parcel No. Gaturi/Nembure/3120 pending hearing and determination of the main suit herein.**
>
> **Prayer 4: That the costs of the application be provided for.**

4. The application is anchored on the grounds, *interalia,* that the applicant has been living on the disputed portion of land since 1975; that the respondent has commenced constructing of structures on it; that the applicant might be evicted, rendered homeless and/or his property destroyed; and that the interests of justice favour granting of the orders. These grounds were more elaborately stated and/or amplified in the supporting affidavit that came with the application. In that affidavit, the applicant depose, *interalia,* that he has lived on the disputed portion since 1960; that the respondent's employees have started becoming violent and are developing the land; and that the respondent also seems intent on selling the land.

5. The respondent made a response vide a replying affidavit filed on 25/11/2020 and dated 24/11/2020. It was deposed, *interalia,* that the applicant owns his own land parcel **No. Gaturi/Nembure/6582** which has a common boundary with land parcel **No. Gaturi/Nembure/3120** owned by the respondent. The structure mentioned by the applicant is allegedly a church being constructed on the respondent's own land and not on the applicant's land. The respondent stated that it has not encroached on the applicant's land and it has no intention of evicting him or destroying his property as alleged or at all. Further, it stated that it cannot be injuncted from developing its own land.

6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 18/1/2021. Those of the respondent had been filed earlier on 18/12/2020. According to the applicant, erection of structures by the respondent on the disputed portion is designed to deny him access to the land and also interfere with his quiet possession. It is also seen as an attempt to evict him. The applicant's submissions mention a supplementary affidavit. I haven't seen any such affidavit in the court file and the proceedings do not show that leave to file it was ever sought.

7. On its part, the respondent submitted that the applicant has not satisfied the threshold for granting temporary injunctive relief as set out in the *locus classicus* case of **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358.** The threshold entails establishing a prima facie case with a probability of success; demonstrating a likelihood of suffering irreparable harm which damages cannot compensate, and, where doubts arise regarding satisfaction of the first two considerations, choosing the balance of convenience as the last option.

8. The respondent submitted that the applicant has his own parcel of land. The respondent itself has its own. The two parcels of land have a common boundary which was confirmed by the area surveyor in the year 2012. The respondent, it was submitted, is using its own land, not the applicant's, and it would therefore be wrong to injunct it from using its own land. Further, the respondent submitted that claims that it intends to evict the applicant or destroy his property are all unfounded.

9. The applicant was also accused of not making full disclosure of material facts. He was faulted for not disclosing that he owns parcel No. 6582 which has a common boundary with parcel No. 3120 owned by the respondent. He was further accused of not disclosing that the respondent has had a semi-permanent church on the land for over 25 years. According to the respondent, the applicant **"has created a false impression that the defendant/respondent has been an absentee land owner who had suddenly appeared and threatened him with eviction."**

10. Ultimately, the court was urged to dismiss the applicant's application with costs.

11. I have considered the application, the response made, rival submissions, and the suit as filed and responded to generally. While the applicant alleges to have satisfied that requirements set in Giela's case (Supra), the respondent is categorical that such requirements are not met and the applicant therefore is not deserving of injunctive relief.

12. In my view, the applicant approached the issue in a rather casual manner. **Gielas case (Supra)** is only given momentary or fleeting mention. I expected to be shown clearly that a *prima facie* case is established. It behoved the applicant to appreciate that he does not have title to the portion he is claiming. It is the respondent who has title. Getting an injunction concerning land registered in the name of another is never a very easy task. In **Jamin Kiombe Lidodo Vs Emily Jerono Kiombe & Another; HCC No. 81/05,** Gacheche J (as she then was) was stating a generally accepted position when she held that where an applicant has not shown title to the suit land, it is unsafe to hold that a *prima facie* case is made.

13. The applicant also needed to demonstrate that he would suffer irreparable loss. The position in law is that you don't get temporary injunctive relief where damages would be an adequate remedy. An injunction is a remedy in equity and it's never resorted to where the common law remedy of damages is thought to be adequate. And the onus is always on the person seeking the remedy of injunction to demonstrate that the harm likely to be suffered if injunction is not granted is of the kind that common law damages may not adequately compensate.

14. And it is not enough to make a mere allegation before court that you will suffer irreparable loss. In **Nguruman Limited Vs Jan Bonoe Nielson & 2 Others; CA No. 77 of 2012,** the court expressed itself clearly on the issue:

> **"… the applicant must establish that "he might otherwise" suffer irreparable injury which can not be adequately compensated in damages in absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of injury.**
>
> **Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial, and demonstratable; injury that can not "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy."**

15. Further, this court also expected that as the applicant is not the title holder to the land, he would make an undertaking to pay damages to the respondent if it ultimately turns out that the order of injunction granted was not merited. In **Gati Vs Barclays Bank (K) Ltd [2001] KLR 525** the court held, *interalia*, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

16. As pointed out earlier, the applicant approached the application in a rather casual way. I have endeavored to point out what is remiss with that approach. I do not deem it necessary to consider the issue of balance of convenience but it seems to me that, were I to consider it, the result might favour the respondent given that the land is registered in its name.

17. Given what I have said so far, I think its clear that the application herein is one for dismissal and I hereby dismiss it with costs.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 2ND DAY of MARCH 2021.

In the presence of Njeru Ithiga for defendant/respondent, Ndolo for B. Ndorongo for plaintiff/applicant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

2.03.2021