



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 131 OF 2018

SIMION C. LILAN.....PLAINTIFF

VERSUS

JACKSON LANGAT.....1ST DEFENDANT

WILLIAM KIPRUTO.....2ND DEFENDANT

RULING

This ruling is in respect of an application dated 13th December 2018 by the plaintiff/applicant seeking for the following orders:

a. Spent.

b. A temporary injunction be and is hereby issued restraining the defendants/respondents, their servants and/or agents from constructing structures and/or digging terraces and diverting the course of water towards the plaintiff and/or along the boundary for and/or in any other manner adversely dealing in the plaintiff/applicant's provisional plot No. 4 or their respective parcels No. 2 & 5 comprised in the parcel of land known as I.,R No.733/16 pending the hearing and determination of this application and eventually the suit.

c. The OCS Naiberi Police station be and is hereby ordered to provide the necessary security to the said officers while establishing the position and ensure compliance of the orders herein and that peace prevails.

d. Cost be provided for.

The court issued temporary orders of injunction and when the matter came up for inter partes hearing Counsel agreed that the Deputy Registrar of the court to visit the suit parcel of land to ascertain the situation on the ground and file a report in court.

Counsel also filed submissions in respect of the application. Counsel for the plaintiff applicant submitted that the plaintiff has established a prima facie case that he is the lawful owner of Plot No. 4 in L.R No. 744/16 by annexing the mother tile of which his plot was hived off. That the plaintiff is entitled to quiet possession of his property without interferences from the neighbours who are the defendants herein.

Further that the defendants are trespassing and/or digging trenches that are likely to lead the flooded water flow into his suit property which actions are adverse to the peaceful enjoyment of the plaintiff's property. Counsel submitted that the applicant has annexed photos to illustrate the trenches dug by the defendants.

Counsel submitted on the principles of grant of injunction as laid down in the case of Giella v Cassman Brown & Co. I td. (1973) E. A 358 which states that for an applicant to be granted an injunction he or she must establish a prima facie case with a probability of success, demonstrate irreparable injury if a temporary injunction is not granted, and if the court is in doubt then it should decide on a balance of convenience is in his favour.

Counsel submitted that the court in determining whether a prima facie case exists or has been established stated that the court's role is limited to gauging the strength of the plaintiff's case and not to decide the main suit. Counsel further submitted that from the annexed photos it is clear that the plaintiff has a prima facie case against the defendants.

Counsel submitted that from the activities of the defendants it is evident that the applicant will suffer irreparable harm if the order is not granted. Counsel therefore urged the court to allow the application as prayed.

1ST & 2ND DEFENDANTS' SUBMISSIONS

Counsel for the respondents gave a brief background to the case and opposed the application. Counsel listed the conditions to be met in order for an order for injunction to be issued to an applicant. It was Counsel's submission that the applicant has not established a prima facie case as the defendant have not trespassed on the suit land as they dug trenches on the boundary without interfering with the applicant's land.

Further that the applicant has not established any irreparable harm that will be occasioned to him if the orders are not granted. Counsel defined the meaning of irreparable harm as defined by Robert Sharpe, in Injunctions and Specific performance "loose-leaf", (Aura, on: Canada Law Book, 1982), P 2-27 which states that:

irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.....'

Counsel therefore submitted that the applicant has not demonstrated how he will suffer irreparable harm hence the application should be dismissed with costs to the defendants as granting the orders will violate the defendants' right to property as enshrined in the constitution.

To illustrate the limb of balance of convenience Counsel cited the case of Paul Gitonga Waniau versus- Gathuri Tea Factory Company Limited And 2 Others (2016) eKLR where Mativo J stated thus;

"As for the balance of convenience I reiterate what I stated above, that the court makes a determination as to which party will suffer the greater harm with the outcome of the motion".

Counsel therefore urged the court to find that the balance of convenience tilts in favour of the defendants and dismiss the application with costs.

Analysis and Determination.

The principles for grant of temporary injunctions are now well settled as per the Giella Casman Brown case and various precedents. Before the ruling in this case, the court had ordered that the Deputy Registrar of the Court do visit the suit land ascertain the situation on the ground and file a report within a stipulated period which was complied with. I have looked at the report and find that it confirms that there were trenches dug at the fence and the same was admitted by the defendants. The trenches have been dug by both defendants on their parcels of land which are adjacent to the plaintiff's land.

The question is whether the dug trenches would pose a risk of flooding to the plaintiff's land causing irreparable harm. The answer would be in the affirmative as a party should not use the right to property to harm others. Since Counsel raised the issue of right to property I will briefly deal with it by stating that that **Article 40** of the Constitution is not absolute. It has limitations for instance **Article 40(2) (a)** which allows Parliament to legislate for permissible deprivation of property, with the rider that it should not be arbitrary. It should also be appreciated that ownership of property brings with it rights and duties which must also be adhered to.

Having said that I find that the applicant has established a prima facie case with a probability of success which is corroborated by the exhibited photos annexed to the application and confirmed by the report by the Deputy Registrar. The trenches pose a risk to the plaintiff and it was confirmed by the defendants including the submissions that the same were dug.

Consequently, I allow the application as prayed.

DATED and DELIVERED at ELDORET this 1st DAY OF October, 2019.

M. A. ODENY

JUDGE

RULING READ in open court in the presence of Mr.Amihanda for 1st and 2nd Defendants/Respondent and in the presence of Mr.Bett holding brief for Mr.Omusundi for Plaintiff/Applicant.

Mr. Mwelem - Court Assistant