



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. E084 OF 2020

DAVID KABUBII KURIA.....PLAINTIFF

VERSUS

REVIVAL & RESTORATION INTERNATIONAL CHURCH.....DEFENDANT

RULING

What is before me is a Notice of Motion application by the plaintiff seeking the following orders;

1. A temporary injunction restraining the defendant from entering, occupying, processing, trespassing, interfering, remaining or committing any acts of waste on all that piece of land known as L.R No. 36/111/1166, I.R No. 32088 (hereinafter referred to as “the suit property”) pending the hearing and determination of this suit.
2. An order directing the defendant to vacate, demolish and remove the illegal structures and properties erected on the suit property within 30 days and give vacant possession thereof to the plaintiff failing which the plaintiff shall be at liberty to demolish and remove the same without further recourse to the court.
3. The O.C.S Buruburu Police Station to provide security for enforcing the orders of the court.

The application that was supported by the affidavit of the plaintiff sworn on 25th August, 2020 was brought on the ground that the plaintiff and one, Lucy Muthoni Kuria purchased the suit property from Habib Bank Limited and Wakina Mama Wa Eastleigh Waendelea Mbele Company Ltd. (hereinafter referred to as “the sellers”) on or about 3rd June, 1998. The plaintiff averred that the suit property was registered in the name of Lucy Muthoni Kuria and the plaintiff on 3rd June, 1998. The plaintiff averred that in 2013, the defendant entered the suit property without the plaintiff’s permission and put up a structure thereon which it uses as a church. The plaintiff averred that the defendant entered the suit property pursuant to a purported lease agreement that the defendant entered into with a third party one, Simon Ngugi Mungai for a term of 5 years at annual rent of Kshs. 360,000/= . The plaintiff averred that the defendant’s trespass was continuing and had prevented him from selling the suit property.

The application was opposed by the defendant through a replying affidavit sworn by Benson Makau Mutisya on 23rd November, 2020. Benson Makau Mutisya stated that he was the secretary of the defendant. He stated that in 2013, the defendant entered into a lease with Wakina Mama Wa Eastleigh Waendelea Mbele Company Ltd. (hereinafter referred to as “the company”) in respect of the suit property for a term of 5 years. He stated that upon the expiry of the said lease, the same was renewed on 8th April, 2018 for a term of 10 years and one (1) month. He stated that when entering into the said lease, the company produced evidence showing that it was the owner of the suit property. He stated that the defendant had been paying rent to the company in accordance with the terms of the said agreement. He stated that since 2013, the defendant had enjoyed peaceful possession of the suit property on the strength of the said lease agreements. He stated that the defendant was lawfully in occupation of the suit property and denied that the defendant was a trespasser. He stated that the plaintiff was a stranger to the defendant.

The application was argued by the way of written submission. The plaintiff filed his submissions on 1st December, 2020 in which he submitted that he had established the principles for grant of the orders of injunction sought. The plaintiff submitted that the lease relied on by the defendant as a basis for its occupation of the suit property was defective and that the same was entered into by the defendant with fraudsters who had no interest in the suit property. The plaintiff submitted that it had unchallenged title to the suit property. The plaintiff submitted that it had demonstrated that it stood to suffer irreparable harm if the orders sought were not granted since he was prevented from selling the suit property by the acts of trespass complained of. The plaintiff submitted that even if the court was to consider the balance of convenience, the same would tilt in his favour since he had produced evidence of title to the suit property while the defendant had relied on unregistered lease with third parties.

The defendant filed its submissions on 30th June, 2021. The defendant submitted that it had developed and occupied the suit property since 2013 and that if the court was to grant the orders sought, the same will have the effect of evicting it from the suit property before the hearing of the suit. The plaintiff submitted that the orders sought were final in nature and as such could only be granted after the hearing of the suit but not at an interlocutory stage. The defendant submitted further that the plaintiff had not satisfied the conditions for grant of the orders of injunction sought.

I have considered the application together with the supporting affidavit. I have also considered the replying affidavit filed by the defendant in opposition to the application. I have also considered the written submissions by the advocates for the parties and the authorities cited in support hereof. The plaintiff has sought a temporary prohibitory and mandatory injunction. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court stated that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.”

In Shepherd Homes Ltd. v Shandahu [1971] 1 Ch.304, Megary J. stated as follows:

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

From the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant. I am satisfied from the evidence placed before the court that the plaintiff and one, Lucy Muthoni Kuria are the registered proprietors of the suit property. The plaintiff has exhibited an instrument of transfer pursuant to which the suit property was transferred to them by the company on 3rd June, 1998. The plaintiff has also exhibited a title showing that they are the registered proprietors of the suit property. The defendant on the other hand has exhibited a lease said to have been entered into between it and the company in 2018. As at 2018, the property was not registered in the name of the company. The company could not therefore enter into any valid lease with the defendant in respect of the suit property. I am not persuaded therefore that the defendant’s occupation of the suit property has any legal basis.

That said, the plaintiff was supposed to not only establish a prima facie case but also that unless the orders sought are granted, he will suffer irreparable harm. Since the plaintiff has also sought a temporary mandatory injunction, the plaintiff had also to demonstrate that it has a clear case against the defendant and that exceptional circumstances do exist that warrants the grant of a mandatory injunction at this stage. I am not satisfied that the plaintiff stands to suffer irreparable harm that cannot be compensated in damages unless the orders sought are granted. The plaintiff has contended that it has been prevented by the defendant from selling the suit property. The plaintiff did not place any evidence that it had a purchaser for the suit property and that he would have sold the property if the defendant was not in occupation. The plaintiff has also not persuaded me he will suffer harm if he does not sell the suit property before the hearing and determination of this suit.

I am also not satisfied that exceptional circumstances exist that would warrant the granting of a temporary mandatory injunction sought. I have noted that the plaintiff acquired the suit property in 1998. I have also noted that the defendant has been in occupation of the suit property continuously since 2013. For a period of 7 years, the plaintiff has never demanded possession of the suit property from the defendant. The defendant has developed the suit property and has been using the same as a church over the years. There is no evidence that the plaintiff was not aware of the defendant’s occupation of the property until 2020. The mandatory orders sought by the plaintiff if granted will result in the eviction of the defendant from the suit property before the hearing of the main suit. In view of the time that it has taken the plaintiff to come to court, there is no justification for an order for the eviction of the defendant from the suit property before the hearing of

the suit.

I wish to add that the injunctive relief sought by the plaintiff is discretionary. Injunction in its various forms is an equitable remedy. It means therefore that even where a case had been established for the grant of the order, the court can refuse to do so if it would be inequitable. I am of the view that the plaintiff is guilty of laches. The plaintiff has been indolent in the enforcement of his rights to the suit property. Equity aids the vigilant. The court cannot exercise its discretion in favour of the plaintiff who has come to court 7 years after the defendant's entry into his property.

The upshot of the foregoing is that the plaintiff's Notice of Motion application dated 25th August, 2020 is not for granting. The application is dismissed with costs to be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Anyonje for the Plaintiff

Ms. Shikali for the Defendant

Mr. Mabachi for the Interested Party

Ms. C.Nyokabi-Court Assistant