



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC CAUSE NO. 99 OF 2019

MOSES NGUGI MAINA.....PLAINTIFF

=VERSUS=

MUNYAKA KUNA COMPANY LIMITED.....DEFENDANT

RULING

1. This is the notice of motion dated 15th March 2019 brought under order 40 rules 1, 3 (i) of the Civil Procedure Rules, Section 1A, 1B of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) Spent.

(3) That a temporary injunction be and is hereby issued restraining the defendant/respondent, their servants and/or agents, contractors and workmen from trespassing, damaging, wasting, constructing, erecting, any house, structure or buildings of any description, perimeter wall on LR No. 42/30 and 42/31 pending the hearing and determination of this suit.

(4) Spent.

(5) That a temporary injunction be and is hereby issued restraining the defendant/respondent, from transferring LR NO. 42/30 and 42/31 either to itself or any other third party pending the hearing and determination of this suit.

(6) That the Defendant/Respondent be condemned to pay the costs.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (h).

4. The application is supported by the affidavit of Moses Ngugi Maina sworn on the 15th March 2019.

5. The application is opposed is opposed. There is a replying affidavit sworn by Dedan Kimathi Waigera, a director of the plaintiff/respondent sworn on the 10th May 2019 and further replying affidavit sworn on the 17th May 2019. The defendant also filed a notice of preliminary objection dated 10th May 2019.

6. On the 27th June 2019, the court with the consent of the parties directed that the application be canvassed by way of written submission.

7. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the affidavits in reply, the submissions filed on behalf of the parties and the authorities cited. The issue for determination are:-

(i) Whether the plaintiff/applicant meets the threshold for grant of temporary injunction.

(ii) Who should bear costs?

8. It is the plaintiff's/applicant's case that he purchased the suit property from Vincenzo Bernado Demasi who was the administrator of the

Estate of Domencio Demasi in the year 2013.

9. The defendant's/respondent's contention is that the suit property LR No. 42/11 is the property of the deceased Demenico Demasi and is the subject of succession cause HC P & A 625 of 2009 Nairobi. In the matter of the Estate of Domenico Demasi (Deceased). It is also the defendant's/respondent's contention that by consent of parties and further orders issued on 22nd May 2012, the distribution of the estate of the deceased was stayed pending the hearing and determination of ELC 127 of 2011 (OS).

10. The said ELC 107 of 2011 (O.S) has been determined in favour of the defendant/respondent for six (6) acres out of LR No. 42/11. I note that the plaintiff/applicant was not a party to that suit.

It is against this background that I find that the plaintiff/applicant has not established a prima facie case with a probability of success at the trial. The court in ELC 107 of 2011 (O.S) has already determined that the defendant/respondent is entitled to the suit property. The said judgment has not been reviewed or set aside.

11. In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30th day of January 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendant

Kajuju - Court Assistant