



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC NO 98 OF 2019

SIMON PEER WERU MAINA.....PLAINTIFF/APPLICANT

AND

MUNYAKA KUNA COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 15th March 2019 brought under order 40 rule 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, construction, erecting any house, structure or building or any description, perimeter wall or LR No. 42/32 and 42/33 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. 42/32 and 42/33 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 (g).

4. The application is supported by the affidavit of Simon Peter Maina the plaintiff/applicant, sworn on the 15th March 2019.

5. The application is opposed. There is a replying affidavit sworn by Dedan Kimathi Waigera, a director of the defendant sworn on the 10th May 2019 and a 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 parties directed that the application be canvassed by way of written submissions.

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

(i) Whether the plaintiff's application 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 Damasi who was the administrator of the Estate of Domenico Demasi in the year 2012 and 2013.

9. The defendant's/respondents contention is that the suit property LR No. 42, is the property of the deceased, Domenico Demasi and is the subject of succession cause HCP &A 626 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 107 of 2011 (O.S).

10. The said ELC 107 of 2011(O.S) has been determined in favour of the defendant/respondent for 6 acres out of LR No. 42/11. The plaintiff/applicant was not a party to that suit. It is against this background that I find that he plaintiff/applicant has not established a prima facie case with probability of success at trial.

11. The court in ELC 117 of 2011(O.S) has already determined that the defendant is entitled to the suit property. The said judgment has not been reviewed and or set aside.

12. I find no merit in this application and the same is dismissed. Cost 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 Applicant

Kajuju - Court Assistant