



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 43 OF 2016

PETER OSIROMO JAKAIT.....PLAINTIFF/RESPONDENT

- VERSUS -

1. BARNABAS ETYANG KARAFU.....1ST DEFENDANT/APPLICANT

2. ALBERT EKIRAPA.....2ND DEFENDANT

R U L I N G

1. For determination is the notice of motion dated 20th August 2018 brought under Order 40 rule 1 & 2 of the Civil Procedure Rules. The 1st defendant/applicant prays for Orders that;

a. The plaintiff be and is hereby stopped by way of temporary injunction from any further construction of buildings on the suit land until this suit is heard and determined.

b. The costs of this application be in the cause.

2. The application is supported by applicant's affidavit sworn on the same day. The applicant deposed that the plaintiff embarked on constructing a permanent building on the suit land in spite of being informed to stop. That the plaintiff is aggressive and abusive and it is only an order of injunction that can prevent further aggression.

3. The application is opposed by the plaintiff through his replying affidavit sworn on 27th February 2019. He deposed that the application has not met the threshold set out in the Case of Giella Vs Cassman Brown. Secondly that he applicant is guilty of laches as the respondent has been constructing permanent buildings over a period of time and he has been in occupation therein for over the past 10 years.

4. The parties filed written submissions which I have considered. The principles for granting injunction are well established. For an order to issue, the applicant must demonstrate either of these three;

a. He has a prima facie case or

b. He will suffer irreparable loss unless the order is granted or

c. The balance of convenience tilts in his favour.

5. In his submissions, the plaintiff referred this court to paragraph 9 of the applicant's counter claim which states thus;

“The defendant further avers that contrary to the terms of the transaction of the year 2009 allowing the plaintiff to cultivate crops only on 2½ acres of the defendant's land for 7 years, on or about 30/10/2016 the plaintiff embarked on constructing a semi-permanent building thereon in addition to an earlier permanent building which was stopped in August, 2015”.

Paragraph 10 states thus

“The plaintiff's action constructing buildings on the defendant's land is provocative and a breach of the agreement between the parties and should stop forthwith and the buildings removed at the plaintiff's costs. The defendant, by way of counterclaim, prays for orders stopping the construction and for the removal of the 2 buildings at the plaintiff's own cost”.

6. The action which the 1st defendant wants to stop forms the subject matter in his cause of action against the plaintiff/respondent. Further the Applicant clearly pleads that on 30th August 2016 the Respondent commenced constructing a semi-permanent building in addition to an earlier permanent building stopped in August 2015. In the current application, the applicant wants the respondent restrained from constructing further buildings and he is relying in the letter issued on 18th August 2015.

7. The plaintiff countered and stated that the building complained of is complete and he is in occupation. From this statement and the pleadings on record, I am not persuaded that the applicant has demonstrated that there are new constructions that are on-going. The application is ambiguous in the manner it is presented and if allowed it may amount to granting the 1st defendant judgement in accordance with his claim without hearing out the parties. In effect the 1st defendant/applicant has failed to demonstrate a *prima facie* case.

8. The applicant has also not addressed the court that he is likely to suffer irreparable loss unless the order of injunction is issued. He has already made a prayer in his counter-claim that the plaintiff be ordered to remove the 2 buildings at the plaintiff's costs. It is therefore my considered opinion that since the issues raised are pending determination in the main suit, the balance of convenience does not tilt in favour of the Defendant/Applicant.

9. In light of the foregoing, the court safely concludes that the application lacks merit and is hereby dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered at BUSIA this 15th day of April, 2020.

A. OMOLLO

JUDGE