



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC SUIT NO. 272 OF 2017

JOHN MAINA GITEGI.....PLAINTIFF

- V E R S U S -

BOARD OF MANAGEMENT

MAGOMANO PRIMARY SCHOOL.....1ST DEFENDANT

DANIEL KAMAU.....2ND DEFENDANT

JOSEPHAT KIBE.....3RD DEFENDANT

PAUL KANG'ETHE.....4TH DEFENDANT

SAMUEL KAMAU KARANJA.....5TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 27th September 2016 in which the Plaintiff/Applicant seeks orders of temporary injunction restraining the Defendants/Respondents from interfering with the parcel of land known as No. Nyandarua/Ndemi/5864, 5865 and 5867 ("Suit properties") pending the hearing and determination of this application and/ or suit.

1. The application was premised on the annexed affidavit sworn by the Plaintiff/Applicant Mr. John Maina Gitegi dated the 27th September, 2016.

2. The grounds to which the said application was based on included:

(a) That the defendants have gone amok and embarked on an illegal and unlawful destruction of the plaintiff's properties and/fixtures comprised in land parcel No. Nyandarua/Ndemi/5864, 5865 and 5867.

(b) That the defendants' actions are provocative and calculated to incite the public against the plaintiff.

(c) That unless this Honourable Court intervenes and grant the plaintiff an injunction against the defendants, the defendants will evict the plaintiff from his land rendering him a squatter.

(d) The plaintiff is the lawful owner of land parcel No. Nyandarua/Ndemi/5864, 5865 and 5867.

(e) That sometimes in the year 2015, the defendants attempted to trespass onto the plaintiff's suit properties claiming that the school land extended beyond the official boundary between the school and the plaintiff's land and they tried to establish a new boundary.

(f) That the matter was referred to the Nyandarua County Land Management Board but returned a verdict that the matter was within the jurisdiction of the District Land Registrar, Nyandarua.

(g) That the dispute was then referred to the District Land Registrar, Nyandarua as per the verdict of Nyandarua County Land Management Board who made a determination that the official boundaries between suit properties and the school should remain intact and be respected.

(h) That on the 17th June, 2016, the defendants jointly and in the company of hired goons illegally and forcefully trespassed on the plaintiff's suit properties and embarked on destroying plaintiff's property in the said parcels by demolishing perimeter fence.

(i) That further, on the 24th of June, 2016 the defendants in the company of others trespassed onto the plaintiff's property again and demolished plaintiff's farm house.

(j) That the plaintiff reported the said incident to Kipiriri Police Station under OB No.26 and 27 of 18/6/2016 but was advised to obtain a court order for the police to enforce the same.

(k) That is fair and just that this honorable court does intervene and rein on the defendants who have proved to have no regard to law and order and have no respect to plaintiff's legal rights over the suit properties.

3. On the 10th October 2016 when the Plaintiff/Applicant appeared before Hon. Munyao Sila Judge sitting at the ELC Nakuru to argue his application ex-parte, the court directed that the plaintiff/applicant serves the same for inter-partes hearing which was scheduled for 18th October 2016.

4. On that day, the matter could not proceed for lack of service.

5. Thereafter the matter was transferred to the Environment Land Court Nyahururu wherein the applicant appeared before me on the 24th April 2017 to mention the matter for the purpose of taking a hearing date. The same was scheduled for the 4th May, 2017.

6. On the scheduled day, the Plaintiff/Applicant appeared before me for inter-partes hearing. An affidavit of service dated 2nd May, 2017 had been filed in court on the 4th May, 2017 stating that the 2nd, 3rd, 4th and 5th defendants had been served on the 26th April, 2017, but had declined to receive the hearing notices stating that the Attorney General was representing them suffice to state, the AG had entered appearance on the 24th January 2016 for only the 1st Defendant only.

7. That on the 27th April, 2017 the 1st defendant was served with the hearing notice to which they acknowledged by appending their stamp on the said notice.

8. However on the hearing date, none of the defendants appeared in court to prosecute the said application despite service.

9. The court noted that service had been effected upon the defendant/Respondents on the 26th and 27th April 2017 respectively, time which was thus sufficient within which they could have filed their responses respectively.

10. No responses had been filed by either of them by the time came up for hearing on the 4th May 2017.

11. The court then proceeded to hear the Applicant/Plaintiff on their unopposed application dated the 27th

September, 2016.

12. The plaintiff/applicant's application arose from a dispute that involved three parcels of land hence Nyandarua/Ndemi/5864, 5865 and 5867 to which the plaintiff claims ownership vide their annexures in the form of tile deeds.

13. The plaintiff submitted that sometime in the year 2015, the defendants claimed the boundaries of the school extended into the plaintiff's parcel of land and tried to establish a new boundary, but were repulsed by the plaintiff. They then hired a private surveyor to conduct a survey on the land.

14. Subsequently the matter was reported to the Nyandarua County Land Management board who referred the parties to the District Land Registrar Nyandarua who then made a determination that the official boundaries do remain intact.

15. Thereafter the defendants incited members of the public who then trespassed into his property on the 17th June 2016 and destroyed property therein including the perimeter fence citing him to be a land grabber.

16. This happened again on the 24th June 2016 where a farm house was destroyed.

17. The matter was reported at Kipiriri police Station vide OB No. 26 and 27 of 18th June 2017. Wherein the plaintiff was advised to get court orders before he could be assisted.

18. Initially the suit had been filed at the Engineer Senior Principle Magistrate's court vide SPMCC No. 108 of 2016 but was withdrawn, due to jurisdiction issues, and filed in the Nakuru ELC (annexure JMG 4)

19. The matter then stayed in abeyance in Nakuru for lack of hearing dates to the effect that it prompted the plaintiff to file his application dated the 7th April 2017 praying for a date to have his application dated the 27th September 2016 heard and determined.

20. It was further submitted that due to the actions of the 2nd, 3rd 4th and 5th Defendants, the plaintiff has been unable to utilize his land.

21. The issue I must determine is whether or not to grant the Plaintiff/Applicant the temporary injunction he seeks.

22. The celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** sets out conditions for the grant of an interlocutory injunction were settled as follows:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

23. Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

24. Has the Plaintiff/Applicant demonstrated that he has a genuine and arguable case? In asserting his ownership rights over the suit property, the Plaintiff/Applicant produced his document of ownership. Specifically, the Plaintiff/Applicant produced copies of the title deed in respect of the suit properties which showed that he was the registered proprietor of the suit properties. The law is very clear on the position of a holder of a title deed in respect of land.

25. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge...”

26. This fact was uncontroverted by either of the Defendants/Respondents.

27. In light of the above, this court finds that the Plaintiff/Applicant has established that he is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto unless otherwise proved during the hearing of the main suit.

28. It had been demonstrated that despite service, the respondents have failed to file their papers and/or defend the application, and further that the continued harassment of the plaintiff by the Respondents has led to destruction of property leading to irreparable injury.

29. Arising from the foregoing, and further to preserve the said property from further destruction, damage and/or being wasted, I allow the plaintiff/ Applicant’s application having established a prima facie case with a high chance of success at the main trial and grant prayers No. 1,2,3,and 4 of the same to wit:

(i) Spent.

(ii) spent

(iii) That pending the hearing and determination of this suit, this Honorable Court be pleased to restrain the Defendants, by themselves, their agents, servants, hooligans, hoodlums, hirelings and or proxies from further trespassing unto, entering, dealing and tampering with, alienating, cultivating, selling, disposing or in any way interfering with land parcels No. Nyandarua/Ndemi/5864, 5865 and 5867 (“Suit properties”).

(v) That costs of this application be borne by the Defendants.

30. I now direct parties to comply with order 11 within 30 days from today.

Dated and delivered at Nyahururu this 11th day of May 2017.

M.C. OUNDO

JUDGE OF ELC NYAHURURU