



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT NAIROBI**

**ELC NO. 227 of 2015**

**ROBINS NYANGAU MOSONGO.....1<sup>st</sup> PLAINTIFF**

**TABITHA MBUTE LAVI .....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**NGOITOI LEIYIAN..... DEFENDANT**

**RULING**

1. The Plaintiffs seek injunctive orders against the Defendant to restrain the Defendant or his servants and or agents from interfering, trespassing into or claiming the suit property being plot No. 522/ residential- Bulbul Trading Centre. The Plaintiffs' plea is based on the fact that the 2<sup>nd</sup> Plaintiff is the owner of the suit property and that the 1<sup>st</sup> Plaintiff has since bought the property from the 1<sup>st</sup> Plaintiff. The purchase is stated to have taken place on 5<sup>th</sup> Novemevber 2014. Both Plaintiffs swore affidavits in support of the application. The Plaintiffs claim that whisl't in possession the Defendant on or about 18<sup>th</sup> March 2015 demolished some structures on the property and even took away the Plaintiffs' wooden posts.

2. The Defendant in reply, contends that the suit property is owned by the Defendant. The Defendant states that the property is known as plot no 56/Residential- Bulbul Trading Centre. The Defendant further states that he acquired the property in the year 2012 from Joyce Naipanoi and Angela Ngoitoy. The Defendant contends that it is the Plaintiffs who are trespassers as the property the Plaintiffs have described in the Plaint is nonexistent.

3. The property in dispute is an unregistered parcel of land. Ownership of such properties can only be traced through documentation which must lead one to the root of title. The root of title in this case rests with the Kajiado County Government, the successor to the County Council of Ol kejuado.

4. The parties prosecuted the application by way of oral submissions with counsel reiterating the facts as laid out in the affidavits. Counsel for the Plaintiffs also submitted that the Plaintiffs had made out a prima facie case as the Defendant does not deny the intrusion and further as the Plaintiffs had genuine and valid documents of title.

5. On the other hand counsel for the Defendant insisted that the Plaintiffs alleged plot was non-existent with the consequent result that no prima facie case had been made out. Counsel urged that it would be appropriate to have the case heard by the court.

6. The Plaintiffs have annexed documents to both the supporting affidavit as well as the Plaint illustrating that Plot no.522/Residential- Bulbul Trading Centre exists and that the same was previously owned by the 2<sup>nd</sup> Defendant. The Defendants too have exhibited documents showing that Plot No. 56/Residential Bulbul Trading Centre exists and the same is owned by the Defendant. Both sets of documents are owned by the title paramount who seems to have issued them. Suffice to point out that at this stage the Plaintiffs only need show or establish a prima facie case with chances of success and further that they are bound to suffer irreparably: see **Bonde v Steyn [2013]2 EA 8**.

7. I am satisfied that the Plaintiffs have established a prima facie case. The Plaintiffs have demonstrated that they own the property known as Plot No. 522/ Residential – Bulbul Trading Centre either legally or

beneficially. The Plaintiffs have also demonstrated that they are in or were in possession at the time of the Defendant's intrusion. The Plaintiffs' action is based on trespass *quare clausum fregit*. Such action is proven when the claimant demonstrates possession and unlawful intrusion. One need not establish legal proprietorship as actionable trespass is premised on possession.

8. The Plaintiffs have shown that they were in possession before the Defendant started interfering. This the Defendant does not deny, only stating that the Plaintiffs were on the Defendant's plot. The Plaintiffs were on Plot 522. The Defendant claims this is plot no. 56 and that the Plaintiffs' claim should therefore fail. I do not think so. The Plaintiff's hold documents reflecting Plot No. 522 and I do not believe that the same are mere abstract documents. It would be appropriate if the trial court interrogated this alleged mix up but for now it would be more appropriate to hold that the Plaintiffs are entitled to have Plot 522 secured.

9. With regard to the question of whether damages will be adequate, I note that the suit property constitutes unregistered land. Transfer of unregistered land is and can be done informally. In the absence of any restraining order the parties may be tempted to transfer the suit plot. I am also not convinced that parties should always be anxious to hide behind the fact of the ability to pay damages while transgressing other parties' rights.

10. In conclusion, I am satisfied that the Plaintiffs have made out a case for an injunction and an order of injunction ought to issue. It will be pegged to plot no. 522 only. An injunction will thus issue in terms of prayer No. 3 of the Notice of Motion dated 7 April 2015. The Plaintiffs will also be entitled to orders in terms of prayer No. 5 of the same notice of motion. Prayer no. 6 cannot be granted at an interlocutory stage and neither can prayer no. 7 whilst prayers 1,2 and 3 are spent. The Plaintiffs will also have costs of the application.

11. Orders accordingly.

**Dated, Delivered and Signed at Nairobi this 4<sup>th</sup> day of May 2015**

**J.L. ONGUTO**

**JUDGE**