



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 170 of 2012

ROSEMARY NYANGAO.....PLAINTIFF

VERSUS

THE TRUSTEES,

MATHARE CENTRAL SDA CHURCH, NAIROBI.....DEFENDANT

RULING

The Plaintiff in an application dated **23rd September 2014**, sought an order that the Court be pleased to issue temporary order of injunction restraining the Defendants from alienating, disposing off, fencing, constructing, selling or otherwise howsoever charging, leasing, letting or interfering with the Plaintiff's possession, occupation, use and or ownership of title in the parcel of land known as **Plot No. 19 on LR No. 36/VI/252, Juja Road, Eastleigh**.

The application is premised on grounds stated on the face of the application and these grounds are that the Defendant has commenced construction of permanent illegal structures on the suit premises and therefore the Plaintiff stands to suffer loss and damage in the event that the order sought is not granted.

The application is supported by an affidavit sworn by the Plaintiff. She deposed that she was allocated the said property as a beneficiary of her father's estate and has been paying Land rates to the County Government. It was her disposition that she learnt that that the Defendant has encroached on her property by constructing a permanent building and that unless the Court intervenes, she stands to suffer loss.

Samson Mutuku Mwilu, a Trustee of the Defendant, swore a Replying Affidavit on **10th October 2014**, in response to the application. The deponent stated that the suit was instituted vide a Plaint in 2012, wherein the Plaintiff averred that the Defendant had constructed a perimeter wall and church building on the property. Therefore, that the application herein is an afterthought as the Plaintiff has on two occasions failed to prosecute her case. Further, the admission made on her pleadings that the Defendant has constructed permanent buildings is evident that there is nothing to stop.

The deponent stated that the Defendant has peacefully and continuously occupied Plots No. 17 and 18 on **LR No. 36/VI/252**. As the bonafide purchaser and proprietor of the said plots since 1996, the Defendant has successfully applied for installation of water supply and sewerage connections, electric power supply, erected a perimeter wall around the two plots, and put up a temporary structure which has gradually been

replaced by permanent building. It was deposed that the Defendant's multimillion shilling construction has reached 1st floor of the proposed 3- storey building. Therefore, the Defendant would be greatly prejudiced if the application was to be allowed.

In a Further Affidavit sworn on **22nd October 2014**, the Plaintiff reiterated that Plot 19 belongs to her and deposed that Plots 17 and 18 belong to **Roselyn Ngeso Nyangao** and **Rosemary Akinyi Nyabongo** as exhibited in the Certificate of Confirmation of Grant.

The application was further canvassed by way of written submissions which I have carefully considered and to which I render my decision as follows.

The dispute is between sub-divisions of property known as **LR. No. 36/VI/252**. The Plaintiff, a beneficiary of the Estate of **Vitalis Nyangao**, claims to have been allocated Plot 19 therein. It is her averment that the Defendant has trespassed on to her parcel and commenced construction of permanent structures. The Defendant, in response, denies the said allegation claiming to be in occupation of Plots No. 17 and 18 therein.

At this stage, the Court is called upon to determine whether the Plaintiff has met the conditions for the grant of an order of injunction as was well established in the case of **Giella Vs Cassman Brown & Co. Ltd (1973) E.A 358**; where it was held that:-

“First, an applicant must show a prima facie case with the probability of success. Secondly, an interlocutory injunction will not normally be granted unless applicant will suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience”.

The Plaintiff claims trespass on her parcel Plot No. 19 which has been denied by the Defendant who claims to be in possession of Plots No. 17 and 18. From the documents in support of the Defendant's case, the Defendant purchased two adjacent parcels from the Plaintiff's mother (deceased from 2010), in 1996 before the entire property was sub-divided. The Defendant avers that it took possession of the two parcels after the purchase and constructed temporary structures. Further that it constructed a perimeter fence around the property in 2002 and in 2004 commenced the construction of permanent building replacing the temporary structures. The Defendant contends that as at the time of filing the suit in 2012, and the application herein in 2014, it had been in possession for over 12 years.

From the foregoing, it is evident that the Plaintiff's ownership of the Plot No. 19 is not in dispute. However, the allegation of encroachment, in the circumstances, has not been established. I say so because the Plaintiff availed photographs showing the construction of a permanent building which the Defendants do not deny and contend that they are within the confines of the two adjacent plots, that is plots **No.17** and **18**. Devoid of evidence or a report from a surveyor that there is trespass on another's property, this court is unable to ascertain the Plaintiff's claim. It is thus my finding that the Plaintiff has failed to establish a prima facie case to warrant the grant of a temporary injunction.

Having failed to meet the first condition for the grant of temporary injunction, there is no need to address the other two conditions as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

Having now considered the pleadings in totality and the written submissions, the Court finds that the Plaintiff/Applicant's Notice of Motion dated **23rd September, 2014** is not merited. The same is dismissed entirely with costs to the Defendant.

It is so ordered.

Dated, Signed and Delivered this **4th** day of **May** day of **2015**

L. GACHERU

JUDGE

In the Presence of:-

Plaintiff present in person (Rosemary Nyangao)

Mr Maweu for the Defendant/Respondent

Hilda: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling Read in open Court in the presence of Mr Maweu for the Defendant/Respondent and the Plaintiff/Applicant Rosemary Nyangao in person, though the advocate was aware of this Ruling date.

L.GACHERU

JUDGE

4/5/2015