



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 413 OF 2014
VIROMENA WAMBUI KIMANI AND PAUL GIKONYO
(SUING AS THE JOINT ADMINISTRATORS OF THE ESTATE OF
PETER KIMANI NJOROGI (DECEASED).....PLAINTIFF
VERSUS
ROBIN KUNGU.....DEFENDANT

RULING

The Plaintiff filed an application dated **31st March 2014** seeking orders that:

1. Spent.
2. The Court be pleased to grant a temporary injunction against the Defendant, his agents and/or servants from trespassing and interfering with the Plaintiff's quiet possession or otherwise interfering or dealing with the Plaintiff's property being ***Title [particulars withheld]*** The Defendant be ordered to remove all his tools of trade and structures put up by him on the parcel of land known as, ***[particulars withheld]*** and further grant an injunction restraining the Defendant from further interfering or dealing with the Plaintiff's property pending the hearing and determination of the suit.
3. The Court be pleased to order the Defendant to secure the perimeters of the mining area or, in the alternative, bear the costs to be incurred by the Plaintiffs thereto.
4. Costs of the application be borne by the Defendant.

The application is premised on grounds outlined in the application and supported by an affidavit sworn by ***Paul Gikonyo***, who deposes that he and his co-Plaintiff are the joint administrators of the estate of ***Peter Kimani Njoroge***, the registered owner of the property. The Plaintiffs' case is that they entered into a lease agreement with the Defendant wherein it was agreed that the Defendant will extract stones from a portion of one acre. It was also agreed that the Defendant would pay the Plaintiff per one piece of proper cut stones each at Kshs. 3 and grade 2 and 3 stones would be sold at Kshs. 1 until mining was exhausted. It was further agreed that the Defendant would put up a perimeter fence around the mining area to segregate it from the rest of the parcel and be responsible for the disposal of the soil excavated during the mining exercises.

The Plaintiff deposes that the Defendant breached the terms of the agreement by remitting payments for the stones in an untimely manner contrary to the agreed period of weekly payments upon joint reconciliation of records by the parties. Further, that the Defendant declined to put up the fence thereby

exposing other occupants and the general public to possible harm. With respect to the disposal of the soil, it is disposed that the Defendant approached the Plaintiff to contract a third party to carry out the disposal at the Plaintiff's costs which the Defendant undertook to reimburse. However, that the Defendant failed to refund the Plaintiff the costs incurred of Kshs. 80,000/-. The Plaintiff deposed further that as at the time of termination of the lease, the Defendant was in arrears of **Kshs.430,578/-** being the unremitted payments for the stones. Additionally, that despite the termination of the lease, the Defendant continues to occupy the property and to the detriment of the estate of the deceased which cannot enjoy the peace and quiet occupation of the property.

The Defendant swore a Replying Affidavit on **28th October 2014**, in opposition to the application. The Defendant refuted the Plaintiffs' claim that he has trespassed on the property deposing that he vacated and removed all the structures and equipment from the property and thereby gave vacant possession to the Plaintiffs. The Defendant deposed that the lease agreement was terminated under unclear circumstances as all payments to the Plaintiffs were made in full and on time. He deposed that putting up the perimeter fence was not in the agreement neither did he agree to put up the fence. The Defendant maintained that upon termination of the lease, all the parties were discharged of their duties and he is thus not contractually bound to perform the same.

The application was further canvassed by way of written submissions which I have carefully considered. It is not in dispute that a lease was entered into for the Defendant to mine stones on the Plaintiffs' property at a fee. It is also common that the lease was terminated at the instance of the Plaintiffs. It is the Plaintiffs case that the Defendant was in breach of the agreement for failing to remit payments for the stones as agreed and also the costs incurred for the disposal of the soil during the excavation period. Further, that he was supposed to put up a perimeter fence to secure the mining area, which he failed to do. These are issues that cannot be adjudicated upon at the interlocutory stage as there is need for evidence to be furnished to prove the allegation. Therefore, the said issues are shelved to be determined at the hearing.

The Plaintiffs also made an allegation of trespass against the Defendant. It is alleged that the Defendant is still in occupation of the premises, has his structures and equipment thereon which limits the Plaintiff's access to the said portion. These allegations have been denied by the Defendant who deposes that upon termination of the agreement, he vacated the premises and moved out with his equipment. The issue for determination is whether the Plaintiffs have established a prima facie case with chances of success to warrant this Court to grant an injunction. From summary of the pleadings as outlined hereinabove, it is rather evident that it is the Plaintiffs' word against that of the Defendant. Whereas the Plaintiff avers that the Defendant is still in occupation, the Defendant maintains that he gave up vacant possession as soon as the lease was terminated.

The salient principle in law is that he who alleges must prove and it is therefore upon the Plaintiffs to establish that the Defendant is still in occupation of the property. The Plaintiffs have not annexed any photographs of the property to show that the structures and Defendant's equipment and motor vehicles are still on the property. It is my finding, and I do so hold, that the Plaintiffs have not availed sufficient evidence to show an infringement of their rights to warrant a grant of injunction.

Having found that most of the issues herein raised needs to await determination at the full trial, the Court finds that the applicant has not satisfied the principles for grant of injunction as enunciated in the case of **Giella Vs Casman brown 1973(EA) at 358.**

The upshot of the foregoing therefore is that the Plaintiff/Applicants Notice of Motion dated 31st March 2014 is not merited . The same is dismissed entirely with costs in the cause.

It is so ordered.

Dated, Signed and Delivered this 11th day of June 2015

L.GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs

.....For the Defendant

..... Court Clerk

L.GACHERU

JUDGE