



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1024 OF 2013

SIMON NJII MWANGI.....PLAINTIFF

VERSUS

ANDREW SAMMY MUSYOKI..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 26th August 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from trespassing upon or demarcating or constructing on the property known as L.R. Nos. 220/2/204 and 220/2/205 Huruma, Nairobi (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit and that this court do order the costs of this Application to be borne by the Defendant/Respondent.

The Application is premised upon the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Simon Njii Mwangi, sworn on 26th August 2013 in which he averred that in the month of February 2011, he purchased the suit properties from one John Mwangi Nduati who had been allocated the same by the Mathari United Traders and Farmers Company Limited. In support of that assertion, he produced a Sale Agreement between himself and one John Mwangi Nduati, a Certificate of Site Ownership in the name of the said John Mwangi Nduati and two letters dated 26th May 2011 from Mathari United Traders and Farmers Co. Ltd stating that the suit properties belong to the Plaintiff.

He further averred that in early July 2013, the Defendant trespassed on the suit properties and commenced construction thereon without his permission. He further stated that upon informing the Defendant that the suit properties belonged to him, the Defendant failed to acknowledge this and proceeded with his construction. He further averred that he reported the incident to the District Officer of Mathare who summoned the Defendant and ordered him to stop construction on the suit properties. He further stated that the Defendant did not comply with those orders but proceeded with the construction on the suit properties, prompting the Plaintiff to file this suit.

The Application is unopposed. In spite of being duly served, the Defendant merely entered appearance but did not file any response to this Application.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the 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.”

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.”

Looking at the facts of this case, the Plaintiff has based its claim of ownership over the suit properties on two letters issued by Mathari United Traders and Farmers Co. Ltd dated 26th May 2011, a Sale Agreement with the previous owner of the suit properties and the previous owners Certificate of Site Ownership. The Defendant on his part lays no claim to the suit properties whatsoever and in fact failed to enter any opposition to this Application despite being duly served. This means that the Plaintiff’s claim to the suit properties remains unchallenged. In the circumstances, I find that the Plaintiff has indeed established a prima facie case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit properties can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from all of the above reasons, I find that the Plaintiff has reached the threshold for grant of an interlocutory injunction. I therefore allow his Application. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF JULY 2014.

MARY M. GITUMBI

JUDGE