



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 1017 OF 2013

ALOIS MUIA..... PLAINTIFF/APPLICANT

-VERSUS-

EDWARD MUTINDA NDETEI.....DEFENDANT/RESPONDENT

RULING

1. The Applicant by a Notice of Motion dated 22nd August, 2013 seeks an order of injunction for the purposes of:

“restraining the Defendant/Respondent whether by himself agents and or servants from trespassing or wasting constructing on, alienating or otherwise interfering or dealing with the Plaintiff’s property being title Number Emali Township Block 1/198 pending the hearing and determination of this suit”.

2. The Applicant also asks the court to make such further or other order as may be deemed just and expedient in the circumstances of this case.

3. The Application is based on the grounds stated on the face thereof as well as the supporting affidavit of the Applicant sworn on the 22nd August, 2013 and a supplementary affidavit also sworn by the Applicant on 19th September, 2013.

4. Briefly, the Applicant contends that he is the registered proprietor of all that registered parcel of land known as title No. Emali Township Block1/198. He holds a Certificate of Lease issued on 17th July, 2001 by the Land Registrar Makueni District Land Registry. The lessor was the County Council of Makueni, now defunct. The property had been allotted to the Applicant in 1995. He does not appear to have developed the same. Come the year 2012, the Respondent occupied and developed a portion of the plot according to the applicant. It would also appear that several other persons also occupied the same property going by the numerous suits filed by the Applicant before the Resident Magistrate’s Court or the High Court at Machakos.

5. The Respondent on the other hand also lays claim to a portion of the suit property. The Respondent has no title but claims to have acquired interest as a bona fide purchaser for value from one Agnes Katalimu.

He says the plot he occupies is Plot No. 556. The Respondent pays rent and rates to Makueni County Council now defunct. The plot was apparently allotted to the Respondent's predecessor in title Agness Katilimu in the year 2001. The Respondent denies that he is a trespasser.

6. Both parties filed their respective submissions on the application. I have read the submissions. I have also carefully considered the evidence on record albeit at a more interlocutory level. I need to answer two simple questions. Firstly, has the Applicant established a prima facie case with a probability of success? Secondly, if I deny the Applicant an injunction will damages be inadequate as a remedy. These were the two principles laid out in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358**.

7. A prima facie case was described by the court of appeal in the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others [2003]eKLR** to constitute but not confined to a genuine and arguable case which points to the fact that one's right has apparently been infringed by the opposite party to call for an explanation or rebuttal from the opposite party.

8. It would appear that the Applicant is the genuine and true holder of the property known as title No. Emali Township Block 1/198. The Applicant has a registered title. A Certificate of Lease, issued by the District Land Registrar. In the absence of any challenge to the same, and there has been none, the Applicant's rights to property should be protected as provided for under both the Constitution and the Land Registration Act, 2012. The Respondent however claims to have bought a portion of the said property from a third party. It is hard to fathom how and when that was done. If truly a portion of title No. Emali Township Block 1/198 was excised then the head title would have been surrendered and by the registered owner for that matter. On the face of the evidence, even absent a search and a survey report I am satisfied that the Applicant has a prima facie case.

9. It is beyond controversy that there has been intrusion into the property, the subject matter of the dispute, by the Respondent. The Respondent freely admits having developed the same. The Applicant states that the intrusion took place in the year 2012. The Applicant wants it stopped. A negative injunction will not stop the intrusion even if granted as the Respondent is already on the plot, whether rightfully or wrongfully and illegally. Yet the Applicant has not sought a mandatory or positive injunction. In the absence of a positive injunction the Respondent will still continue to occupy the suit property. I also do not see how a negative injunction would help. The trespass is a continuing one.

10. So now comes the question of damages. The Applicant has not stated or even suggested that damages may not be an adequate remedy. It would appear that the portion where the Respondent has erected permanent buildings was unoccupied and undeveloped by the Applicant as of 2012. It was not generating any income. I dare to suggest therefore that this was ordinary trespass and the property has not been put to waste. Instead it has been improved. In my view, it will be possible to assess both damages in trespass as well as mesne profits once the trial court ascertains the exact status of the parties. I am therefore not convinced that damages would not be an inadequate remedy when the trial is finally conducted and finalized. Yet the court must be conscious of the fact that the Applicant would have put the property to better use and earn that which may not be calculated or liquidated at the time of trial. There is doubt therefore.

11. The balance of convenience must be called into play. In my view, the granting of a negative injunction would cause more inconvenience to the Respondent than to the Applicant. The Respondent has developed the premises. He is in occupation. A negative injunction would simply be asking him to stop trespassing. Yet there are also others on the same premises. At this interlocutory stage it would not be proper to prohibit the Respondent from accessing the suit property. It may very well turn out at trial that the Respondent was entitled to occupy the premises and by then the property and business would have been brought down. On the other hand the Applicant is not in occupation. He may be entitled to occupation but he is not. He had not invested or developed the property. If the Respondent was to vacate the property, the Applicant would take possession not only of the property but also of the improvements and developments. The scales of justice would not be happy to do so now but would gladly do so after trial when the parties' respective rights have been fully and finally determined. In the circumstances, it would not be convenient to grant an injunction as sought, I decline to grant a temporary negative

injunction. I am aware of the court of appeals decision in **Super Power Cash 7 Carry Ltd –vs- Nairobi City Council & 2 others CA.CA No. 111 of 2002** (unreported) where the Court of Appeal talked of a trespasser giving way to the owner but I am convinced that the circumstances are different in this case.

12. Finally, it is evident that the trial court will have to establish if truly the Applicant's title No. Emali Township Block1 /198 was subdivided and plot No. 556 excised therefrom. If so the question will be by whom and further whether this was procedurally done. Depending on the findings it could be the Applicant to retrieve back his property or it could be the Respondent to walk away with the suit property. It would not be appropriate if the court was to now make a determination that is all but points out to a final finding.

13. A third party, the Makueni County Government who is the holder of the title paramount as the successor in title to Makueni County Council will need to be involved in the intrigues of trial, either as a party or simply as a witness. It would also not be right if the property fell into the hands of yet another party. In consequence and taking cue from the 5th prayer in the Notice of Motion dated 22nd August, 2013, the orders which best commend themselves to the court and which I hereby make are:

a) The plaintiff is to join the said County Government of Makueni as party to these proceedings within the next twenty one (21) days. The said party will be joined as a Defendant.

b) The status quo currently obtaining is to be maintained until the final determination of this suit. The status quo is that the Respondent is to continue being in possession of the suit premises and is not to part with the same and likewise the Applicant as registered owner of title No. Emali Township Block 1/ 198 is also not to dispose of such ownership until determination of this suit.

c) The parties to expeditiously move and comply with all the pretrial proceedings within the next 90 days and set the suit for trial.

d) The Application dated 22nd August, 2013 is otherwise dismissed but with no order as to costs.

14. Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

.....for the Respondent