



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 415 OF 2013

JACKSON MOKAYA PLAINTIFF

VERSUS

JAMES ONCHANGWA MACHARIA DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 10th October 2013 seeking an order for the eviction of the defendant from all that parcel of land known as Plot No. 19 Barongo Market (hereinafter referred to as “the suit property”). In his plaint of the same date, the plaintiff averred that at all material times he was a lessee of Gusii County Council in respect of the suit property and that on or about 7th October, 2013, the defendant encroached on the suit property and commenced construction of structures thereon. Simultaneously with the plaint, the plaintiff filed an application by way of Notice of Motion dated 10th October, 2013 brought under Order 40 rule 1 (a) of the Civil Procedure Rules seeking the following orders:

1. Spent

2. Spent

3. That this honourable court be pleased to grant a temporary injunction restraining the defendant/respondent either by himself, agents, servants and anyone claiming under the defendant/ respondents from entering into, trespassing onto, building structures or interfering in any other manner, whatsoever, dealing with the said plot that is Plot No. 19 Birongo Market (“the suit property”) and/or portion thereof pending the hearing and final determination of this suit.

4. That costs of the application be borne by the defendant/respondent.

The plaintiff’s application was premised on grounds among others that, the plaintiff was a lessee of the suit property and that in violation of the plaintiff’s rights as such lessee, the defendant trespassed on the suit property and started erecting structures thereon. The plaintiff contended that the defendant refused to cease his acts of trespass despite protests from the plaintiff. The plaintiff contended that the defendant’s said activities on the suit property have altered the character of and interfered with the suit property.

2. The plaintiff averred further that the actions of the defendant complained of have hindered and/or restricted his access to the suit property and that he stands to suffer irreparable loss if the orders sought herein are not granted as the defendant is ill bent on continuing with the said acts of trespass unless he is restrained from doing so by the court.

3. The application was opposed by the defendant. In his replying affidavit sworn on 11th November 2013 the defendant averred that he does not own any land or property within Birongo market. The defendant averred that contrary to the plaintiff's allegations, it is his son, one, Robert Macharia Onchangu Iteba who owns a parcel of land at the said market known as Plot No. 34 which measures approximately twenty five feet by one hundred feet (25ft x 100ft). The defendant averred that at the town planning and markets committee meeting held on 12th May 2011, his said son's application for registration as a lessee/owner of Plot No. 34 within Birongo market was approved. The defendant has averred further that construction works complained of by the plaintiff are being carried out by his said son on Plot No. 34, Birongo market and not on the suit property. The defendant has contended further that his said son is developing the said property with express permission from the lessor, County Council of Gusii now under the County Government of Kisii.

4. The defendant averred further that it is in fact the plaintiff who has trespassed on Plot No.34 aforesaid by wrongfully and maliciously creating an illegal and unauthorized door facing Plot No. 34 on top of which he has constructed a seven feet roof-cape which protrudes into Plot No. 34. The defendant has averred further that in addition to the said door and roof cape, the plaintiff has also constructed a permanent four (4) feet verandah below the said illegal door and roof-cape. The defendant averred that it is the plaintiff and members of his family who are interfering with the defendant's said son's plot. The defendant averred that neither the defendant nor his said son trespassed on the suit property on 7th October 2013 as alleged by the plaintiff. The defendant contended that his son stands to suffer irreparable loss if the orders sought are granted. The defendant's son Robert Macharia Onchangu Iteba (hereinafter referred to only as "the defendant's son") also swore an affidavit on 11th November 2013 in opposition to the plaintiff's application. The defendant's son reiterated the contents of the defendant's affidavit that I have referred to herein and denied that he has trespassed on the suit property as claimed by the plaintiff.

5. When the application came up before me on 5th December 2013 for hearing, I directed that the same be argued by way of written submissions. The advocates for both parties filed their written submissions and the same are on record. I have considered the plaintiff's application and the affidavits filed by the defendant and his son in opposition thereto. I have also considered the submissions by the advocates for the parties and the authorities cited in support thereof. This being an application for a temporary injunction, it has to be considered on the principles that were set out in the case of **Giella –vs- Cassman Brown Ltd 1973 E. A 358**, namely;

I. The applicant must satisfy the court that he has a prima facie case with a probability of success.

II. The applicant must also satisfy the court that he will otherwise suffer irreparable injury which cannot be compensated in damages if the injunction is not granted and;

III. If in doubt, the court will determine the application on a balance of convenience.

I would wish to add that an injunction is equitable and discretionary remedy. Those seeking an order of injunction must therefore demonstrate that they deserve the exercise of the court's discretion. They must also approach the seat of justice with clean hands. It follows therefore that, even if the necessary conditions are satisfied, an injunction may not issue if it is proved to the satisfaction of the court that the applicant is undeserving of such equitable relief.

6. From the material placed before me, I am not satisfied that the plaintiff has established a prima facie case with a probability of success. I am also of the view that the plaintiff is guilty of material non disclosure which should disentitle him to an equitable remedy. The plaintiff in my view has also approached the seat of justice with unclean hands. The plaintiff has contended that the defendant has encroached on the suit property and started putting up structures thereon. The defendant has denied this allegation and has placed sufficient material before the court to show that he has been wrongly sued as the person carrying out the construction complained of by the plaintiff is the defendant's son and not the defendant. The plaintiff has not contested the documents that have been placed before the court by the

defendant which all point to the fact that the defendant's son is the owner of Plot No. 34 which shares a boundary with the suit property and that it is on that plot that the defendant's son is carrying out the construction works complained of by the plaintiff. In the circumstances, the plaintiff's claim against the defendant has no basis and has no chances of success.

7. The other point is that the plaintiff had failed to disclose to the court the fact that the defendant and his son have an interest in Plot No.34 which shares a common boundary with the suit property and that there has been a dispute over the boundaries of the two parcels of land. The plaintiff also failed to disclose that prior to the filing of this suit a surveyor had been sent by the defunct County Council of Gusii to determine the said boundary dispute and that according to the report of the said surveyor, the defendant was found to have encroached on Plot No. 34 by constructing a seven (7) feet roof cape which protrudes into Plot No.34. He was also found to have constructed a permanent four(4) feet veranda below the said unauthorized cape and created an illegal and unauthorized door opening towards Plot No.34. The plaintiff may not have agreed with the decision of the said surveyor, however, when he came to court for an injunction, he had a duty more particularly when he approached the court ex parte on 10th October, 2013 to disclose to the court the fact that the dispute that he has with the defendant and his son revolves around the boundary of the suit property and Plot No.34.

8. It is my finding therefore that the plaintiff is guilty of lack of candor and as such he is not deserving of an equitable remedy of an injunction. The plaintiff has also come to court with unclean hands. As pointed out above, the plaintiff was found to have put up illegal and unauthorized structures on the suit property which are offensive to the owner of Plot No.34. The plaintiff did not file any supplementary affidavit to deny the contents of the letter dated 25th August, 2013 by the clerk to Gusii County Council which contains the finding of the surveyor who had gone to determine the dispute between the plaintiff and the defendant's son over the boundary between the suit property and Plot No. 34. The plaintiff who was found to have engaged in illegal and unauthorized undertakings cannot approach this court for assistance the effect of which will be to perpetuate the said illegalities.

9. In the case of **Mrao vs. First American Bank of Kenya & Two Others (2003) KLR 125**, a prima facie case was described as follows: "a prima face 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."

10. On the material before me, I am not satisfied that the plaintiff has established a prima facie case against the defendant. Even if he had established such a case, I would still not have granted the orders sought for the reasons of lack of candor and for coming to court with unclean hands. Due to the foregoing, the plaintiff's application dated 10th October, 2013 is not for granting. The same is dismissed with costs to the defendant.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Bigogo for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE