



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC CASE NO. 1232 OF 2014

RONALD OKENDO MUNGUSA.....PLAINTIFF/APPLICANT

-VERSUS-

EMMAH WAMBUI KIMANI.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff seeks an interim relief by way of a negative injunction against the Defendant. The application commenced by way of a Notice of Motion dated 18th September, 2014 in particular seeks injunctive orders to restrain the Defendant whether by self, servants and agents or otherwise howsoever from trespassing and interfering with the Plaintiff's ownership and possession of Plot No 7 Kiambiu Settlement Scheme together with the building and improvements erected and being thereon until the hearing and determination of this suit. The application is supported by the affidavit of the applicant sworn on 18th September, 2014 as well as the grounds stated on the face of the application.
2. Briefly, the Plaintiff states that he is the owner of the suit property which he has developed. He has erected thereon rental houses. He states he bought the suit property from one Lucy Njeri Karogo in May, 2012. He has exhibited a copy of the Sale Agreement as well as a Beacon certificate and other documents to illustrate that the original allottee Lucy Njeri Karogo transferred the suit property to him. He has also exhibited a letter dated 4th September, 2014 from the law firm of Osero & Co. Advocates which demanded that the Plaintiff vacate the Defendant's plot. The Plaintiff states that sometime in early September 2014 the Defendant made good her earlier threats and induced the Plaintiff's tenants into breaching a tenancy agreement with the result that the plaintiff's tenants either failed to pay the agreed rental or simply terminated the tenancies and vacated the suit premises. The Defendant, so continues the Plaintiff, has since persisted with threats not only to demolish the structures erected by the plaintiff on the suit premises but also to institute criminal proceedings against the plaintiff. For all these imminent threats, the plaintiff says he deserves this court's protection.
3. At the hearing of the application, Mr. Mwangi for the Plaintiff reiterated the deposition off the

Plaintiff's affidavit. Mr. Mwangi further stated that the Defendant has no right over the suit property as the Plaintiff is the true and bona fide owner of the suit property, which property the Plaintiff acquired for value in 2012. Counsel further stated that the failure by the Defendant to file any Replying affidavit was an illustration that the Defendant had no genuine interest in the property as if truly the Defendant had any interest, the Defendant would have filed documents to illustrate her claim. Counsel wrapped up his submission by stating that the Plaintiff had demonstrated a prima facie case.

4. It is to be noted on the onset that the application was argued ex parte. The Defendant did not appear in court on the hearing date of 3rd November, 2014 either through self or counsel even though the date had been allocated by the court with parties mutual consent. It is to be noted too that the Defendant did not file any Replying Affidavit or Grounds of objection pursuant to the provisions of Order 50 Rule 14 of the Civil Procedure Rules. This was despite the opportunity afforded to the Defendant by the court on 14th October, 2014.
5. It matters not though that the application was undefended. The Plaintiff still had to satisfy the court to the required standards and burden as laid not in the case of **Giella –vs- Cassman Brown Co. Ltd [1973] E.A 368**. For the court to grant the injunctive orders sought, the Plaintiff had to show that the Plaintiff had a prima facie case with a probability of success and further that in any event damages would not suffice as adequate relief if an injunction was not granted.
6. The dispute apparently concerned ownership and occupation of an unregistered parcel of land. In such cases demonstration of ownership is done by tracing the root of title. To prove this the Plaintiff availed a copy of the ownership list of the scheme where the subject plot was situate. The same revealed that plot 7 was allotted to one Lucy Njeri Karogo. The Plaintiff's deposition under oath was to the effect that said Lucy Njeri Karogo sold to him the suit plot. He provided a copy of the sale agreement dated 11th May, 2012.
7. Whilst, I would not accept in evidence a copy of the said Sale Agreement as it was not stamped contrary to the provision of Section 5 of the Stamp Duty Act (Cap480) Laws of Kenya, it remains an uncontroverted fact that the Plaintiff bought the plot from the original owner/allottee. To further buttress this fact, the Plaintiff availed copies of the beacon certificate as well as of rates payment receipts showing payments made to the title paramount. The title paramount was Nairobi City Council, now defunct. All these pointed to one irrepressible inference that the owner of Plot #7 Kiambiu scheme was originally Lucy Njeri Karogo. A subsequent receipt issued in April 2014 by the holder of the title paramount points to the property having been transferred to the Plaintiff. This also corroborates the entry in the Ownership List that the plot was transferred to the Plaintiff.
8. Having, established prima facie that he is the owner of the plot #7 the Plaintiff was also duty bound to show the Defendant's transgression. It is alleged that the Defendant has threatened to demolish the Plaintiff's structures. Apart from the letter dated 4th September, 2014 written by the Defendant's Advocates M/s Osero & Co. Advocates there is no other allegation against the Defendant which points towards trespass. In fact there is no actual intrusion currently but only a threat of intrusion by the Defendant and further threats of demolition, nay destruction, of the Plaintiff's property. It is also to be noted that the Defendant's advocate letter of 4th September, 2014 actually refers to a totally different plot being Plot #8 within the same Kiambiu Settlement Scheme. Would mere threats be enough to prompt this court into granting an injunctive order? I would answer that question positively simply because of the provisions of Order 40 Rule 1 of the Civil Procedure Rules, which Rule reads as follows:-

“1. Where in any suit it is proved by affidavit or otherwise

- a. *that any property in dispute is in danger of being wasted damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree; or*
- b. *that the Defendant threatens or intends to remove or dispose of his property*

the Court may by order grant a temporary injunction to restrain such act or make such

other order for the purpose of staying or preventing the wasting, damaging, alienation, sale or erecting or disposition of the property as the court thinks fit or until the disposal of the suit or until further orders”. (**emphasis mine**)

9. The Plaintiff’s right to property and safe ownership thereof ought to be protected by way of an injunction against the Defendant who has been consistent in her threats and harassment. An injunction ought to issue as, in my view, damages would not be adequate recompense in the circumstances if the defendant is allowed to carry out her threats.

10. In the end, I allow the application with costs to the Plaintiff. The ex parte orders are confirmed to subsist for the next 12 months or until the final trial of this suit, whichever ever falls earlier.

11. Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent