



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 91 OF 2020**

**JOSEPH BAKER KIAMBA MWANIKI.....PLAINTIFF**

**=VERSUS=**

**ABDI GODANA DIDA & 3 OTHERS.....DEFENDANT**

**RULING**

1. The plaintiff brought this suit through a plaint dated 3/6/2020. He sought the following verbatim orders against the defendants:

*a) A permanent and perpetual injunction restraining the defendants, whether by themselves, their agents, employees, servants and/or otherwise, howsoever, from trespassing, letting, alienating, entering, occupying residing on, remaining on or otherwise claiming title or interest whatsoever in the suit properties or any part thereof and or in any other way interfering with the plaintiff's quiet possession of his suit properties, Parcels of land known as Land Parcel No LR No 209/9002/2 and Land Parcel No LR No 209/9002/3, Grant No I R 32481/1.*

*b) That this honourable court do issue eviction orders for the eviction of the defendants, whether by themselves, their agents, employees, servants and/or otherwise howsoever from the plaintiff's suit properties, parcels of land known as Land Parcel No LR No 209/9002/2 and Land Parcel No LR No 209/9002/3, Grant No I R 3281/1.*

*c) That the defendants, their agents, employees, servants and/or otherwise howsoever be ordered to compensate the plaintiff for damages and for the loss of user of his suit properties since May, 2020 to date.*

*d) A declaratory order that the defendants their agents, employees, servants and/or otherwise howsoever are trespassers on the plaintiff's suit properties.*

*e) A declaratory order that the plaintiff was the rightful allottee from the Government of Kenya of the suit properties.*

*f) General damages for trespass*

*g) Costs of this suit together with interest at court rates*

*h) Any such other or further relief as this Honourable Court may deem just and fit to grant*

2. Contemporaneous with the plaint, the plaintiff filed a notice of motion dated 3/6/2020 seeking the following interlocutory reliefs:

*1) That this application be certified urgent and fit to be heard on priority basis and service thereof to be dispensed with.*

*2) That this honourable court be pleased to issue an interim injunction order restraining the defendant/respondents by themselves, agents, employees and or persons claiming under their behest and or in trust for them or howsoever from trespassing, entering into, remaining upon, alienating, blocking agents and the plaintiff, selling, accumulating building or other materials, undertaking construction of permanent or temporary or any structures, upon or otherwise committing acts of waste, equitable or otherwise, cultivating, fencing or in other manner howsoever interfering with the plaintiff's quiet enjoyment, use, ownership and possession of parcels of land known as Land Parcel No L R No 209/9002/2 and Land Parcel No L R No 209/9002/3, Grant No L R 32481/1 (hereinafter, "the suit properties") pending the hearing and determination of this application inter-parties.*

*3) That this honourable court be pleased to issue a temporary injunction order restraining the defendants/Respondents by themselves, their servants, legal representatives, agents, employees and or persons claiming under their behest and or in trust for them or howsoever from trespassing, entering into, remaining upon, alienating, blocking agents and the plaintiff, selling,*

*accumulating building or other materials, undertaking construction of permanent or temporary or any structures, upon or otherwise committing acts of waste, equitable or otherwise, cultivating, fencing or in other manner howsoever interfering with the plaintiff's quiet enjoyment, use, ownership and possession of parcels of land known as Land Parcel No LR No 209/9002/2 and Land Parcel No L R No 209/9002/3, Grant No L R 32481/1 (hereinafter, "the suit properties") pending the hearing and determination of this suit.*

*4) That the honourable court be pleased to issue a mandatory injunction compelling the defendants/ respondents at their own cost to immediately demolish all their structures illegally and unlawfully erected on the suit properties and remove all debris, building materials or structures on the suit properties and in default the plaintiff/applicant be at liberty to demolish the same at the defendant's/respondents' costs pending the hearing and determination of this suit.*

*5) That the Officer Commanding Station, Spring Valley Police Station and the Chairman, Sub-County Security Committee, Wetlands Sub-County do supervise and ensure compliance with the terms of the orders of the Court at the defendants/respondents cost pending the hearing and determination of this suit.*

*6) In any event, the costs of the application be awarded to the plaintiff/applicant*

*7) Such other order(s) as this Honourable Court shall deem fit to grant*

3. The said application is the subject of this ruling.

4. The application was supported by the plaintiff's affidavit sworn on 3/6/2020. His case was that he was the registered proprietor of Land Reference Numbers 209/9002/2 and 209/9002/3 (**the suit properties**). The two parcels of land are subdivisions out of Land Reference Number 209/9002. He has held and enjoyed quiet possession of the two parcels since 1977. In Mid-May 2020, a group of people under the name **Kibagare Slums Association**, with the defendants as their officials, trespassed onto the two parcels and commenced construction of illegal structures thereon. This prompted the plaintiff to report the trespassers to the Police. Apprehensive that the said trespassers would continue with the trespass and erect structures on his land, he moved the court for the above reliefs.

5. The application was opposed by the defendants through a replying affidavit sworn on 13/7/2020 by Abdi Godana Dida. He deposed that the slum dwellers of Kibagare have been on the suit properties for over seven (7) decades, during which they have been using the suit properties for farming activities. He added that the allocation of the suit properties to the plaintiff in 1977 was irregular, and that the plaintiff had failed to comply with the conditions of allotment. They contended that they had acquired the land under the doctrine of adverse possession. They urged the court to dismiss the application.

6. The application was canvassed through written submissions. Ms Kamende, learned counsel for the applicant, identified the following as the two issues falling for determination in the application: *(i) Has the ownership of the suit properties been established and if so, do the defendants/respondents have a claim on the suit properties; and (ii) Has the applicant established a case to warrant grant of the reliefs sought?* Counsel submitted that the plaintiff had demonstrated that he was the registered proprietor of the suit properties. She added that the plaintiffs had not proved peaceful and uninterrupted possession for a period of 12 years.

7. On the second issue, counsel for the applicant submitted that the plaintiff had satisfied the criteria upon which injunctive relief is granted. Citing the case of **Teresia Njeri Mwangi v Paul Ndungi [2014] eKLR**, counsel submitted that the applicant had met the criteria for grant of a mandatory injunction.

8. In response, Ms Mireri, counsel for the respondents/defendants, submitted that the issue falling for determination in this application was whether the applicant had met the conditions for grant of injunction. Counsel argued that although it was not disputed that the applicant was the registered proprietor of the suit properties, the applicant's interest in the suit properties had been extinguished by the respondents' quiet, peaceful, open and continuous use of the suit properties for a period of over 12 years. Counsel added that it was curious that the applicant had not developed the suit properties despite the express conditions in the Grant requiring him to develop the suit properties. Counsel added that the applicant had never had possession of the suit properties, hence there was no irreparable injury he stood to suffer by being denied the injunctive order. Counsel further argued that the balance of convenience tilted in favour of the defendants because they had been on the suit properties for more than 12 years.

9. I have considered the application, the response thereto, and the parties' respective submissions. I have also considered the relevant legal framework and principles applicable to the key questions in this application. Two intertwined questions fall for determination in this application. The first question is whether the applicant has satisfied the criteria upon which the courts exercise jurisdiction to grant an interlocutory injunctive order. The second question is whether the applicant has met the threshold for grant of a mandatory injunctive order at the interlocutory stage. I will make brief sequential pronouncements on the two intertwined questions in the above order.

10. The criteria upon which our courts exercise jurisdiction to grant an ordinary interlocutory injunctive relief is well settled [ see **Giella v Cassman Brown (1973) EA 358**]. Firstly, the applicant is required to demonstrate a prima facie case with a probability of success. Secondly, the applicant is required to demonstrate that he stands to suffer irreparable damage that may not be adequately indemnified through an award of damages. Thirdly, should there be doubt on both or either of the above two requirements, the court should determine the application for injunction on a balance of convenience.

11. At this interlocutory stage, the court does not make conclusive or definitive findings on the substantive issues in the suit. Its focus is on whether or not the above criteria has been satisfied. Definitive and conclusive findings are for a different forum.

12. The key complaint of the applicant is that persons calling themselves members of Kibagare Slums Association have invaded his two parcels of land and are erecting thereon illegal structures. On their part, the respondents contend that they have been farming on the suit

properties for seven decades. It is not in dispute that the applicant is the registered proprietor of the suit properties. Secondly, from the title documents, the user of the suit properties is residential, not agriculture. Thirdly, none of the parties to this suit has exhibited proof of approval of any developments on the suit properties, within the context of the relevant physical planning legal regime. Fourthly, the applicant has demonstrated, through photographs, that the defendants have invaded the suit properties and are in the process of erecting illegal structures thereon. Fifthly, from the photographs presented to the court there is no evidence of existing human settlement on the suit properties. As soon as the defendant started erecting the structures, the plaintiff dashed to court and got an interim order. What emerges from the totality of the above *prima facie* evidence placed before the court at this interlocutory stage is that the defendants have organized themselves into a group with the intention of invading and erecting unapproved structures on the suit properties.

13. As a registered proprietor of the suit properties, the applicant's right is protected by Article 40 of the Constitution and Section 25 of the Land Registration Act. This court is obligated to guard that right. No amount of damages can be taken to be an adequate substitute for that right. The court is, in the circumstances, satisfied that the plaintiff has satisfied the criteria for grant of an ordinary injunctive order. I now turn to the plea for a mandatory injunctive order.

14. The criteria upon which a mandatory injunctive order at the interlocutory stage is granted was outlined in the case of **Locabi International Finance Limited v Agro-Export and Another (1986) All ER 901** in the following terms:

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had already been granted, that being a different and higher standard than was required for a prohibitory injunction.”***

15. The Court of Appeal of Kenya has embraced the above criteria in a line of cases among them **Civil Appeal No 298 of 2005 Nation Media Group & 2 others v John Harun Mwau [2014] eKLR** and **Civil Appeal No 332 of 2000 Kenya Breweries Limited & another v Washington O Okeyo [2002] eKLR**.

16. In the present application, there is no evidence of existing human settlement on the suit properties. The respondents were in the process of erecting unapproved structures on the suit properties and they were stopped by the court. The respondents claim to have acquired adverse title to the suit properties through farming activities over the preceding seven decades. In my view, the respondents are entitled to their day in court to prove their case.

17. In the circumstances, it is the view of the court that an ordinary injunctive order barring trespass and/or erection of any structures on the suit properties by the defendants would be an adequate relief. The mandatory injunctive relief which the applicant seeks will await substantive determination of the dispute. The court will endeavour to dispose this dispute within the shortest time possible.

18. Consequently, the notice of motion dated 3/6/2020 is disposed in the following interlocutory terms:

***a) Pending hearing and determination of this suit, the defendants, together with their agents/servants are hereby restrained against trespassing on or erecting any structures on the plaintiff's parcels of land, namely, Land Reference Number 209/9002/2 and Land Reference 209/9002/3 situated in Nairobi.***

***b) The Officer Commanding Spring Valley Police Station shall enforce the above order.***

***c) The plaintiff shall file and serve a single, bound, paginated, and indexed bundle containing pleadings, witness statements, and documentary evidence within 15 days from today.***

***d) The defendants shall file a similar bundle within 15 days from the date of service of the plaintiff's bundle.***

***e) This matter will be mentioned in the month of December 2020 for the purpose of fixing an early hearing date for the main suit.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Mireri for the Defendants

Court Clerk - June Nafula

Note

*This Ruling was supposed to be delivered on 13/10/2020. This was not possible because I was assigned duties outside the station.*

**B M EBOSO**

**JUDGE**