



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 58 OF 2019

KENSINGTON LIMITED.....PLAINTIFF

-VS-

NAOMI MONDA.....DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 1<sup>st</sup> April 2019 which was filed by the plaintiff seeking orders of injunction to restrain the defendant from trespassing into, developing, selling, letting, disposing off or in any manner whatsoever dealing with all that property known as MOMBASA/BLOCK IX/362 (hereinafter referred to as the suit property) pending the hearing of this suit. The application is premised on the grounds that the plaintiff is the registered owner of the suit property and that the defendant, without any colour of right or the plaintiff's authority and approval brought down the plaintiffs fence around the property. The plaintiff states that unless restrained, the defendant will invade the suit property.
2. The application is supported by the affidavit of Mayes Shah, a director of the plaintiff company in which he has deposed that the plaintiff company is the registered owner of the suit property measuring approximately 0.0688 Ha. He has annexed a copy of the certificate of lease in the plaintiff's name. He has further deposed that the plaintiff has developed a portion of the suit property which it continues to use for commercial purposes. It is deposed that on 26<sup>th</sup> March, 2019, the defendant, without any right, trespassed into and invaded the said plot and pulled down the plaintiff's fence which was erected around the suit property. Photographs allegedly taken on 27<sup>th</sup> March 2019 have been annexed. It is averred that the defendant is a trespasser and has no colour of right in the suit property.
3. In opposing the application, the defendant filed a replying affidavit sworn on 9<sup>th</sup> July, 2019. The defendant has deposed that the suit land forms part of the land that was called the "Jua Kali area". The defendant averred that the land where she occupies to do business was allocated to her. The defendant has annexed copies of letters of allocation and correspondences. That initially one Mr. Mwangola claimed the same land and even took the defendant to court, but later withdrew the suit. The defendant has deposed that a certain Mr. James Titus Kisia claimed to have taken over the land from Mr. Mwangola and also claiming title MSA/BLOCK IX/362. The defendant avers that she was forced to go to court in civil suit CMCC No. 2393 of 2010 which she later withdrew and filed ELC No.236 of 2013. Copies of the pleadings have been annexed.
4. The defendant avers that in the meantime, Mr. James Titus Kisia crookedly caused commencement of proceedings in Municipal Case NO. 4668 of 2010 so as to obtain orders to have the defendant's property and the suit premises demolished. Copies of the proceedings have also been annexed. The defendant states that when it became clear that Mr. Titus Kisia had transferred the land to the plaintiff company, the plaintiff company was joined to ELC Case No.236 of 2013 which proceeded to hearing and judgment given in favour of the defendant herein. Copies of the amended plaint and judgment delivered on 20<sup>th</sup> June, 2019 in Mombasa ELC Case No.236 of 2013 have been annexed. It is the defendant's contention that the plaintiff is simply trying to open up a suit which has since been determined. The defendant added that she is doing her business in Title No.348 and not Title No.362.
5. The application was canvassed by way of written submissions. Only the advocates for the plaintiff filed their submissions while the advocates for defendant failed to do so.
6. I have considered the application, the affidavits filed and the submissions made. The issue for determination is whether the plaintiff has presented a prima facie case warranting issuance of the temporary injunction orders sought.
7. The conditions for the grant of temporary injunction were laid down in the case of **Giella -v- Cassman Brown & Company Limited (1973)EA 358** as follows:

**“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.”

8. The question that then arises is whether the plaintiff has made out a prima facie case with a probability of success. In the case of **Mrao Ltd –v- 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.”**

9. The plaintiff’s case is that it owns the suit property known as TITLE NO. MOMBASA/BLOCK IX/362 and that the defendant ought to be kept off the same. The defendant on her part claims that she is in occupation of and carries on business in TITLE NO. MOMBASA/BLOCK IX/348. The defendant has also shown that there were previous proceedings over the suit property, including ELC Case No.236 of 2013 in which judgment was delivered in favour of the defendant herein on 20<sup>th</sup> June, 2019.

10. I have looked at the material before me. I have seen a copy of the certificate of title in the plaintiff’s name which has been annexed to the supporting affidavit. I have also seen copies of the certificate of title for TITLE NO. MOMBASA/BLOCK IX/362 in the name of James Titus Kisia as well as pleadings and judgment in **ELC Case No. 236 of 2013 – Naomi Ngare- v- Municipal Council of Mombasa** and James Tiud Kisia. The defendant has deposed that the plaint in ELC Case No. 236 of 2013 was later amended to join the plaintiff herein in place of James Titus Kisia. The defendant has deposed that this amendment became necessary when she discovered that the said James Titus Kisia had transferred the suit land to the plaintiff herein. There is no dispute that there exists a judgment and decree in Mombasa ELC Case No.236 of 2013 in favour of the defendant. I further note that the plaintiff has not denied the existence of the judgment and decree in ELC Case NO. 236 of 2013 in favour of the defendant herein. There was also no evidence shown that the said judgment and decree have been set aside, if at all. In addition, the defendant has deposed that she is in occupation and carries on her business in TITLE NO. MOMBASA/BLOCK IX/348.

11. Given the above position, and given that the plaintiff has not challenged the averments made by the defendant, I find that the plaintiff has not established a prima facie case with a probability of success. The plaintiff can be adequately compensated in damages if at the end of the trial it is found that the defendant was on the wrong. Even if I was to consider the balance of convenience, the same tilts in favour of the defendant who already has judgment and decree in her favour from previous litigation.

12. The upshot is that the Notice of Motion dated 1<sup>st</sup> April 2019 is dismissed with costs.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 12<sup>th</sup> day of October 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**