



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 1262 OF 2015

RESOURCES ENTERPRISES (K) LIMITED.....PLAINTIFF

VERSUS

HON. JAMES MWANGI GAKUYA.....1ST DEFENDANT

TRESMU INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

What is before the court is the plaintiff's Amended Notice of Motion dated 8th March, 2017 seeking a temporary injunction to restrain the defendants from encroaching on and/or carrying out construction on all that parcel of land known as Nairobi/Block 110/339 (Plot No. 748 – THOME 1) (hereinafter referred to as “the suit property”) pending the hearing and determination of the suit. The application was brought on the grounds that the plaintiff is the owner of the suit property having acquired the same in 1989 from one, Ngugi Njuguna who held one share in a company known as Thome Farmers No. 1 Limited who was the initial owner of the suit property. The plaintiff averred that while it was waiting for the title of the suit property to be processed and issued to it, the defendants trespassed on the property and commenced construction thereon. The plaintiff averred that the defendants declined to stop their activities on the suit property even after they were asked to do so. The plaintiff averred that if the trespass continued, it was likely to suffer loss and damage. The plaintiff averred that the defendants had fenced the suit property and were continuing with construction.

The plaintiff annexed to its affidavit in support of the application, a copy of a share certificate that was issued to it by Thome Farmers No. 1 Limited and a copy of the register of the shareholders of the said company. The plaintiff also annexed to the said affidavit, a copy of a receipt for Kshs.650/- dated 13th November, 1989 that was paid by Ngugi Njuguna to Thome Farmers No. 1 Limited for the suit property and a receipt for Kshs.1,000/- that was paid to Thome Farmers No. 1 Limited for the transfer of the suit property from Ngugi Njuguna to the Plaintiff. Finally, the plaintiff annexed to the said affidavit photographs showing the alleged encroachment by the defendants on the suit property.

The application was opposed by the 2nd defendant through affidavit sworn by its director, Salome Nyathira Mwangi on 9th January, 2017. The 2nd defendant averred that it was the owner of the suit property and that the property was registered in its name. The 2nd defendant averred that it was a stranger to the plaintiff's claim over the property. The 2nd defendant averred that it acquired the suit property lawfully from the previous owner thereof. The 2nd defendant also relied on the affidavit that was sworn on 9th January, 2017 by Salome N. Mwangi in support of the 2nd defendant's application to be joined in the suit in which the 2nd defendant had annexed a copy of a title deed for the suit property that was issued to the 2nd defendant on 14th November, 2004. The 2nd defendant had also annexed to the said affidavit a copy of the agreement for sale through which it claimed to have acquired the suit property.

The application was argued by way of written submissions. The plaintiff filed its submissions on 6th February, 2018. The defendants did not file submissions. I have considered the plaintiff's application together with the supporting affidavit. I have also considered the 2nd defendant's affidavits in opposition to the application. Finally, I have considered the plaintiff's submissions and the authorities cited in support thereof. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. An applicant for a temporary injunction must establish that he has a prima facie case against the respondent and that he stands to suffer irreparable harm which cannot be compensated in damages if the order is not granted. If the court is in doubt as to the above, the application would be considered on a balance of convenience. See, the case of *Giella v Cassman Brown & Co. Ltd. (1973) E. A. 358*.

I am satisfied that the plaintiff has established a prima facie case against the defendant with a probability of success. The plaintiff has demonstrated that it acquired the suit property in 1989. Although the 2nd defendant has claimed that it acquired the suit property in 2006 and was issued with a title deed, it placed no evidence before the court showing how and from whom it acquired the suit property which had already been sold to the plaintiff. The agreement for sale which the 2nd defendant produced before the court referred to parcels of land which had no relationship with the suit property. The issue as to who owns the suit property as between the plaintiff and the 2nd defendant can only be determined at the trial. I am also satisfied that the plaintiff is likely to suffer irreparable harm which cannot be compensated in damages. The plaintiff placed before the court uncontroverted evidence that the defendant had already commenced construction on the suit property.

Since the defendant has a title deed for the suit property in its name, unless restrained by the court, nothing would stop it from disposing of the property to third parties after developing the same. If that happens, the property would be put beyond the reach of the plaintiff. In the circumstances, it is necessary that the property be preserved pending the hearing and determination of the suit.

For the foregoing reasons, I will allow the plaintiff's Amended Notice of Motion dated 8th March, 2017 on the following terms:

1. Pending the hearing and determination of this suit or further orders by the court, the defendants by themselves or through their agents, employees or servants are restrained from carrying out any other or further construction on all that parcel of land known Nairobi/Block 110/339 (Plot No. 748 – THOME 1).
2. The plaintiff shall file undertaking as to damages within seven (7) days from the date hereof.
3. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 31st day of January, 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Maina h/b for Mr. Mugalo for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Mr. Okumu-Court Assistant