



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 610 OF 2015

ERNEST NGUGI KARUGA.....1ST PLAINTIFF/APPLICANT

JANE NJERI GEORGE.....2ND PLAINTIFF/APPLICANT

=VERSUS=

J. M MACHARIA T/A MACHIRI LTD....1ST DEFENDANT/RESPONDENT

ROSE WITHERA GITAHI.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 30th June 2015 brought under Order 40 Rules 1 and 3 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks order:-

1. Spent

2. That the defendant by himself, his agents, servants, proxies and/or employees be restrained by way of an injunction from trespassing, excising, entering, fencing, constructing, building, hiving off further, disposing and/or interfering in whatsoever manner with the plaintiff's/applicant's quiet possession of (LR No. 20920/8 pending the hearing and final determination of the suit herein.

3. A mandatory order requiring the defendant by himself, his agents, servants, employees, and/or proxies to remove the concrete poles created on the suit property (LR No. 20920/8) within such a period as the Honourable Court may deem reasonable and in default of which the plaintiff/applicant may be at liberty to remove the said poles at the defendant's/respondent's costs.

4. Spent

3. The grounds are on the face of the application and are set out in paragraphs a to g.

4. The application is supported by the affidavit of Ernest Ngugi Karuga, the plaintiff/applicant sworn on the 30th June 2015 and a supplementary affidavit sworn by Jane Njeri George sworn on 5th February 2016.

5. The application is opposed. There is a replying affidavit sworn by James Mbugua Macharia the defendant/respondent herein sworn on the 10th July 2015.

6. On the 23rd November 2017, the court directed that the application be canvassed by way of written submissions.

The plaintiff's/applicant's submissions

7. The 1st plaintiff/applicant has demonstrated a prima facie case with high chances of success at the trial. The plaintiff/applicant was not yet the registered owner of the suit land hence could not have entered into a sale agreement with the defendant/respondent. The 1st

plaintiff/applicant was an alcoholic suffering from neuropathy and had donated a power of attorney to the 2nd plaintiff/applicant. The plaintiffs/applicants have demonstrated that they will suffer irreparable damage as they might lose the suit property if those orders are not granted. Damages would not be an adequate remedy. The balance of convenience tilts in favour of the plaintiffs/applicants. It is in the interest of justice that suit property is preserved until the suit is heard and determined. They pray that the application be allowed.

The defendant/respondent's submissions

8. The substantive matter before court is one of trespass of land that was beneficially owned by the 1st plaintiff/applicant. The 1st plaintiff/applicant has since passed on and no application for substitution has been made. The supplementary affidavit by Jane Njeri George ought to be struck out as it contains facts which are inadmissible, unsubstantiated and unsupported hearsay evidence.

9. They have relied on the cases of **Kabale Housing Estate Tenant Association Limited vs Kabale Municipal Local Council Supreme Court of Uganda Civil Appeal No. 15 of 2013** and **Leo Investments Ltd vs Trident Insurance Co. Ltd [2014] Eklr**

10. The defendants/respondents are innocent purchasers for value and not party to any alleged fraud and/or misrepresentation. The suit property did not form part of the plaintiffs/applicants matrimonial property as it was yet to be transferred to the plaintiff through transmission.

11. The plaintiffs/applicants application does not meet the threshold for grant of temporary injunctions. They pray that the same be dismissed with costs.

12. I have considered the notice of motion, the affidavits in support and the annexures. I have considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issue for determination is:-

i. Whether the plaintiffs/applicants' application meets the threshold for grant of temporary injunctions.

ii. Who should bear costs?

13. The principles governing the grant of temporary injunctions were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **First American Bank of Kenya Limited & 2 Others [2003] KLR** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

14. It is the plaintiffs'/applicants' case that the 1st plaintiff/applicant was not yet the registered owner of the suit land hence could not have entered into a sale agreement with the defendant/respondent. It is the defendant's/respondent's submissions that the suit property was beneficially owned by the 1st plaintiff/applicant. He has however failed to rebut the claim that the 1st plaintiff/applicant had no capacity to sell.

15. I have considered the facts presented by the plaintiffs/applicants and find that they have established a prima facie case with a probability of success at the trial. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another 1990 KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

16. I am satisfied that the plaintiff/applicant deserves this kind of protection. I am also satisfied by the facts presented by the plaintiff/applicants that there is need to preserve the suit property pending the hearing and determination of this suit.

I am also satisfied that the plaintiffs/applicants have demonstrated that they will suffer irreparably if these orders are not granted. They risk losing the land.

17. I am however not satisfied that the plaintiffs/applicants have made out a good case to warrant the grant of orders of mandatory injunction. I note that on the 15th July 2015 the court ordered that status quo currently prevailing be maintained. It is not clear whether the poles had been erected by then. It is incumbent upon the plaintiffs/applicants to prove that the poles were erected after 15th July 2015. For the reasons I decline to grant orders of mandatory injunction as sought in prayer 3 of the application.

18. In conclusion, I find merit in this applicant and grant the orders sought namely:-

a. That an order of temporary injunction be and is hereby issued restraining the defendant/respondent by himself, his agents, servants, proxies and/or employees from trespassing, excising, entering, fencing, constructing, building, hiving off, further disposing, and/or interfering in whatsoever manner with the plaintiffs'/applicant's quiet possession of LR No. 20920/8 pending the hearing and final determination of the suit herein.

b. The costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30TH day of JANUARY 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the 1st & 2nd Plaintiff

.....Advocate for the 1st & 2nd Defendants

.....Court Assistant