



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 34 OF 2017

TEITA ESTATE LIMITED.....PLAINTIFF

-VERSUS-

JIMMY MNENE.....DEFENDANT

RULING

1. The plaintiff vide a plaint dated 9th February 2017 filed a suit against the defendant seeking several reliefs. Alongside the plaint, it also moved the Court vide a notice of motion of the same date but later premised amended on 10.5.17. The motion is premised on article 40, 48 and 159 (2) (d) of the Constitution and Order 40 of the Civil Procedure Rules. The plaintiff seek orders that:

1. Spent

2 (a) Spent

(b) After the hearing of this application inter-partes this honourable Court do issue a further temporary injunction restraining the Respondent and his servants and/or agents and other persons under his control and direction, from wrongfully entering, occupying and/or trespassing and/or continuing to wrongfully enter, occupy, interfere with and/or from erecting structures or in any way whatsoever from dealing with the Applicant's parcel of land known as Teita Estate in Taita Taveta County and more particularly comprising the parcels of land known as Land Reference Numbers 3880, 3881, 6924, 9487 and 1137 ('the suit property') belonging to the Applicant pending the disposal of this suit.

3. That the County Commissioner, Taita Taveta County, the Officer Commanding Police Division, Taita Taveta, and all police stations in the vicinity of the suit property be directed to provide security to the Plaintiff in effecting service of the order of this honourable Court upon the Defendant .

4. That costs of this application be provided for.

2. The application is supported by several grounds listed on its face inter alia;

a. The Respondent is a trespasser on the suit property and has ignored various requests by the Applicant who is the registered proprietor of the suit property to deliver vacant possession of the suit property to it *and instead has continued his trespass with full knowledge of the Applicant's proprietary rights.*

b. The Respondent is in the process of destroying the Applicant's mature sisal crop and is likely to ensure that all the land on which he is currently trespassing is cleared of sisal unless appropriate restricting orders are issued by this Court pending the hearing and outcome of this application and suit.

c. The Respondent is in the process of erecting permanent structures upon the property of the Applicant and is likely to accelerate and complete such structures before completion of this suit, and such erection of permanent structures leading to the destruction of the Applicant's valuable sisal *crop will cause substantial and irreparable detriment and harm to Applicant.*

3. The application is further supported by the affidavit of Philip Kyriazi sworn on 9th February 2017. Mr Kyriazi deposed that the applicant is the registered owner of all the suit properties and annexed copies of their titles. The applicant also annexed photographs showing the structure the Respondent is currently building. The applicant avers that the Respondent alongside other unnamed persons have and continue to build temporary and permanent houses on various parts of the suit property which acts amount to trespass.

4. That the Applicant's staff have complained to the local administration but no help has been forthcoming. Mr Kyriazi deposes that the Respondent cannot claim any right of title to the suit property. That it is in the interests of justice to uphold the applicant's property rights by granting the orders sought.

5. In opposing the application, the Respondent deposed that his forefathers have been in occupation of the suit property since time immemorial. That his parents and relatives continued to live in the suit premises peacefully and have all long enjoyed quiet possession and occupation. The Respondent deposed further that an area measuring 2000 of the land was excised and earmarked for allocation to community members and he alongside other locals reside within this area. That instead the applicant has on several occasions threatened them with dire consequences if they do not hand over vacant possession. The Respondent states further that ownership of the suit land is yet to be established since it bears a name different from that of the plaintiff i.e. Teita Estate (1972) Ltd instead of Teita Estate Ltd. He urged the Court to dismiss the application with costs.

6. The parties filed written submissions which discussed the three principles of prima facie case, reparable loss and balance of convenience. These principles are well grounded in law and I do not have to repeat them pursuant to the said submissions. From the pleadings, it is not in dispute that the Respondent alongside other not parties to this suit is in occupation of a part of the plots being claimed by the applicant. The applicant did not however specify which plot number the Respondent is occupying. The Respondent states that he has lived on the portion which was initially occupied by his fore fathers and later his parents. The Applicant did not plead both in the plaint and affidavit in support of the motion the specific period when the Respondent began the acts of trespass complained of.

7. The Applicant annexed the investigating diary of a report made to the Police Base on 16th January 2017. The report by the scene of crime officer states that the accused (Respondent) went ahead and erected a house structure without the consent from the management. This report appears to suggest that the Respondent started constructing a house on the date the report was made. This contradicts the assertion made in paragraph 8 of the supporting affidavit that the Respondent has been a squatter on the suit property. Because of the uncertainty on when the Respondent took occupation of the suit property, I am not satisfied that the interests of justice will be served to issue orders restraining an action of occupation that is already in place without the occupier having an opportunity to present his claim he has pleaded.

8. Further among the orders sought was that this order was to apply to even persons under the control and direction of the Respondent. In paragraph 4 of the supporting affidavit, the Applicant referred to the Respondent and other un-named persons but fell short of saying how the unnamed persons were under the control or direction of the Respondent. I don't think in the absence of the link, the Respondent should be made to account for the "*wrongful acts or trespass of the unnamed*" persons at this stage.

9. In paragraph 4, the applicant complained of the defendant building the structure in the photograph annexed as '**PK – 2**' of the supporting affidavit. The Respondent did not deny that the house belongs to him. In paragraph 14, he deposed that the photo clearly shows he is not occupying the entire suit property. The Respondent has not denied being in occupation of a portion of the suit premises.

10. In light of the analysis of the facts presented, I hold that the application partially has merit. It will succeed to the extent that the defendant/respondent is restrained from continuing to erect any new structures on any part of the suit titles Nos 3880, 3881, 6924, 9487 and 1137 pending hearing and determination of suit. The alternative prayer 3 which seeks mandatory injunction does not lie against the Respondent at this interlocutory stage as I am not satisfied the case is clear and simple. For this reason even the orders seeking to bar him from occupation is disallowed. The application thus succeeds to the extent specified with an order that each party to bear their costs.

Dated, signed & delivered at Mombasa this 15th February 2019

A. OMOLLO

JUDGE