



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC CASE NO. 486 OF 2017

ALIXANDER NGIGI *alias*

ALEXENDER NGIGI MACHARIA.....1 ST PLAINTIFF

AGOSTINO MAINA WAITARA.....2 ND PLAINTIFF

VERSUS

MARK NDUNGU..... 1 ST DEFENDANT

NDICHU GITERE.....2 ND DEFENDANT

RULING

1. On 8/10/2018, the 2nd defendant, Ndichu Gitere, also known as Benjamin Gitere Kimani (the applicant) brought an application dated 4/10/2018 seeking a temporary injunction restraining the plaintiff (the respondents) together with their agents and servants against “demolishing, bringing down removing, uprooting, stealing, wasting, or in any other manner whatsoever interfering with the structures erected by the 2nd defendant” on Land Reference Number 26/1/2 Eastleigh, Nairobi, pending the hearing and determination of this suit. He also sought a mandatory injunctive order compelling the respondents to allow him to move into the land, pull down and cart away all his property from the suit premises. That application is the subject of this ruling.

2. The application was supported by an affidavit sworn by the applicant on 4/10/2018. The case of the applicant was that he bought land described as “Land Reference Number 36/1/2 Subdivision of Number 20 of Section IV Original Number 11/2/234/2 of Section III” (**the suit property**) from the 1st respondent for Kshs. 2,000,000/-. He stated that he started constructing temporary structures on the suit property using “*mabati*” and timber but the respondents emerged claiming ownership of the suit property. He averred that the respondents had been silently removing the structures and carrying away the material used in construction. The applicant stated that the respondents’ actions had occasioned him loss.

3. The application was canvassed orally on 28/2/2015. The 2nd applicant submitted that he was a purchaser for value without notice and all that he was seeking was to be allowed to pull down and carry away the materials in the suit property. The 1st respondent supported the application. The 2nd respondent opposed the application stating that the applicant had not filed a defence and/or counter-claim and therefore, could not be granted an injunction. He added that an injunction was issued against the applicant on 16/5/2018 and that injunctive order had not been set aside or reviewed. He further argued that the prayers sought in the application could not be enforced because no application for review or setting aside of the earlier injunctive order had been made.

4. I have considered the application together with the parties’ rival submissions. I have also considered the relevant statutory provisions and jurisprudential principles. The first issue falling for determination in this application is whether the 2nd respondent has satisfied the criteria for grant of an interim injunction. The second issue is whether the applicant has satisfied the criteria for grant of a mandatory injunction. The criteria for grant of an interim injunction was laid down in **Giella v Cassman Brown (1973) EA 358**. An 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 injury that cannot not be adequately indemnified through an award of damages if the injunctive order is declined. Lastly, if the court is in doubt, the application is to be decided on a balance of convenience.

5. At this point, the court does not make definitive or conclusive findings on the key issues in the dispute. The focus of the court is on whether the applicant has placed before the court materials that constitute a *prima facie* case and demonstrates the probability of irreparable damage.

6. The plaintiffs (respondents) contend that there is no controverting evidence to the fact that they are the registered proprietors of the suit property. Secondly, on 16/5/2018, by consent of the parties, a temporary injunction was issued against the applicant in relation to the suit property. That injunctive order has not been vacated. Thirdly, the 2nd applicant has not filed any pleadings. It is therefore not certain if he will be defending this suit. He nonetheless seeks both temporary and permanent injunctive orders against the plaintiffs (respondents).

7. In my view, in the absence of pleadings by the 2nd applicant, the court is not in a position to assess the probability of success of his case. Secondly, a defendant seeking an injunctive order under Order 40 is obligated to put forth his case through pleadings. The present suit was filed in July 2017. The defendant appointed a firm of advocates in September 2017. He subsequently entered appearance through the form of Macharia Gakaria Company Advocates on 20/3/2018. Since then, neither a defence nor a counterclaim has been filed. I do not therefore think the applicant (2nd defendant) has satisfied the criteria for grant of an interim injunctive order.

8. I now turn to the question as to whether the applicant has satisfied the criteria for grant of a mandatory injunction. The criteria for grant of a mandatory injunction was spelt out in the English case of **Locabi International Finance Limited v Agro-Export and Another (1986) All ER 901** as follows:

“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.”

9. The above criteria has been applied in Kenyan courts in a line of cases among them **Kamau Mucuha v the Ripples Limited (Civil Application Number Nai 186 of 1992)**; **Jaj Super Power Cash and Carry Limited v Nairobi City Council and two others**; and **Shariff Abdi Hassan v Nadhif Jama Adan (2006) eKLR**.

10. In the absence of pleadings by the applicant, I do not think there has been any serious attempt by the applicant to satisfy the criteria for grant of a mandatory injunction. The court therefore has no proper basis for granting the mandatory injunction sought by the 2nd applicant.

11. In light of the foregoing, it is my finding that the applicant (2nd defendant) has not satisfied the criteria for grant of an interim injunctive order. Similarly, he has not satisfied the criteria for grant of a mandatory injunctive order. Consequently, the Notice of Motion dated 4/10/2018 is dismissed. The applicant shall bear the respondents' (plaintiffs') costs of the application. Because the 1st Defendant supported the unsuccessful application, he will not be awarded costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MARCH 2019

B M EBOSO

JUDGE

In the presence of:-

Ms Ndirangu for the plaintiff

June Nafula - Court Clerk