



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 609 OF 2017

ANGELA KAGENI.....PLAINTIFF/APPLICANT

VERSUS

SUSAN ADHIAMBO ODONGO.....1ST DEFENDANT/RESPONDENT

ISHMAEL MALOMBE OMARI.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 27th September 2017 brought under Order 40 Rule 1 (b), 2, 3, and 4 of the Civil Procedure Rules, Section 1A, 1B, 3A, 63 (c) and 63 (e) of the Civil Procedure Act (Chapter 21 Laws of Kenya) and all the enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) That a temporary injunction do issue to restrain the 1st and 2nd respondents/defendants, their respective agents, servants, personal representatives and/or assigns, jointly and severally, from alienating, occupying, trespassing, wasting, and/or in any other manner, interfering with the applicant's/plaintiff's ownership of all that parcel of land known as Nairobi Block 62/1229 situate in Fort Jesus Estate, Kibera Jamhuri East, within Nairobi City County pending the hearing and determinations of this suit, Application, further proceedings, court orders and/or directions of this honourable court.

(3) That a mandatory order do issue to compel the 1st and 2nd respondents/defendants, their respective agents, servants, personal representatives and/or assigns to vacate, or be removed forcefully from all that land known as Nairobi Block 62/1229 situate in Fort Jesus Estate, Kibera Jamhuri East, within Nairobi City County pending the hearing and determination of this suit.

(4) That prayer 2 and 3 above be enforced by the officer commanding station OCS, Kilimani Police Station, Nairobi.

(5) That costs of this application be borne by the 1st and 2nd respondents/defendants.

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

4. The application is supported by the affidavit of Angela Kageni, the plaintiff/applicant herein sworn on the 27th September 2017.

5. Upon being served the 1st defendant/respondent instructed an advocate. There is a notice of appointment filed by M/S Odera Osiemo & Co. Advocates dated 11th October 2017. The application is however unopposed as the 1st defendant did not put in any response. On the 27th July 2018, Mr. Otieno holding brief for Mr. Osiemo for the 1st defendant/respondent sought and was granted fourteen (14) days to file their responses. The matter came up for mention on 29th October 2018. The 1st defendant/respondent had not filed any responses and/or submissions and a date for ruling was given. As things stand the plaintiff's notice of motion dated 27th July 2017 is not opposed.

6. It is the plaintiff's/applicant's case that she is the registered owner of LR NO. Nairobi/Block 62/1229 situated within Fort Jesus Estate Kibera-Nairobi. That the defendants/respondents have encroached on the suit property without just or lawful grounds and that the trespass

and wrongful occupation of the suit property by the defendants/respondents has caused the applicant to suffer loss and damage.

7. She has put forward the cases of **Ethics and Anti-corruption Commission vs Njuguna Macharia [2015] eKLR; Engineer Joseph Odera vs Marcus Opande Obondo & Hesborn Ajwang Oruku Kisumu ELC 365 of 2015 and Chacha vs Mwita Manini Kisii HCCC 93/1993.**

8. She has adequately demonstrated her rights over the suit property. She prays that the application be allowed.

9. I have considered the pleadings, the notice of motion, the affidavit in support and the annexures. I have considered the written submissions of counsel and the authorities cited. The issue for determination are:-

(i) Whether or not the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.

(ii) Who should bear costs.

10. At this juncture it is necessary to briefly examine the legal principles governing the application of this nature. In an application for injunction the onus is on the application to satisfy the court that it should grant an injunction. The principles were set down in the precedent setting of **Giella vs Cassman Brown & Company Limited [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125**, the Court of Appeal stated what amounts to a prima facie case.

11. I have considered the submissions of the plaintiff/applicant the case is uncontroverted. 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.”

I am satisfied that the plaintiff/applicant deserves this kind of protection.

12. The plaintiff/applicant is the registered owner of the suit property. From the documents annexed I find that she has established a prima facie case with probability of success at the trial. I also find that she has demonstrated that she will suffer irreparable loss which cannot be compensated by an award of damages, if these orders are not granted. She is likely to lose her land to trespassers.

13. I find that the plaintiff/applicant has made out a clear case against the defendants/respondents to warrant the grant of mandatory injunction. In the case of **Shepherd Homes Ltd vs Sandahm [1971] 1CH 34** Meggery J stated:-

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal to be more drastic in its effect than a prohibiting injunction. At the trial of the action the court will of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought in order to enforce a contractual obligation.....”.

I am also guided by the case of **Muchuha vs Ripples Limited [1990-94] EA 388**.

14. In conclusion I find merit in this application and I grant the orders sought namely:-

(a) That a temporary injunction be and is hereby issued restraining the 1st and 2nd respondents/defendants, their respective agents, servants, personal representatives and/or assigns, jointly and severally, from alienating, occupying, trespassing, wasting, and/or in any other manner, interfering with the applicant's/plaintiff's ownership of all that parcel of land known as Nairobi Block 62/1229 situate in Fort Jesus Estate, Kibera Jamhuri East, within Nairobi City County pending the hearing and determinations of this suit.

(b) That a mandatory order be and is hereby issued to compelling the 1st and 2nd respondents/defendants, their respective agents, servants, personal representatives and/or assigns to vacate, or be removed forcefully from all that land known as Nairobi Block 62/1229 situate in Fort Jesus Estate, Kibera Jamhuri East, within Nairobi City County pending the hearing and determination of this suit.

(c) That order (a) and (b) above be enforced by the officer commanding station OCS, Kilimani Police Station, Nairobi

(d) That 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 3RD day of APRIL 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

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

.....Court Assistant