



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 17 OF 2018**

**SAM & STEVE PROPERTIES LTD.....PLAINTIFF**

**VERSUS**

**EUNICE MUTHONI.....DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's application dated the 8<sup>th</sup> February, 2018 brought pursuant to section 51 (1) and 40 (1) (a) (b) 2 (1) (2) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. The applicant seeks injunctive orders against the Defendant in respect of land parcel number Kajiado/ Kipeto/ 3462 to 3554 hereinafter referred to as the 'suit lands' and the eviction of the Defendant's security guards stationed thereon.

The application is premised on the grounds that the suit lands are duly registered in the Plaintiff's name. The Plaintiff undertook subdivision of a 12 acre land resulting into Kajiado/ Kipeto/ 3462 to 3554. The Defendant has secretly encroached on the suit lands without consent of the Plaintiff and placed beacons thereon. The Defendant is aimed at selling the suit lands. The Plaintiff's representatives were chased away from the suit lands by six goons who threatened to shoot them with bows and arrows.

The application is supported by the affidavit of SAMUEL NDIBA KAHARA who is a director and shareholder to the Plaintiff. He avers that in 2009, the Plaintiff bought 12 acres of land located at Isinya/ Pipeline Road at Isinya Township. He claims the Plaintiff thereafter subdivided the said land into 91 titles, which were all registered into its name. He contends that the said suit lands have been on sale with prospective buyers being taken thereon. He states that in 2017, the Plaintiff's representatives took some prospective buyers to the suit lands but they were denied entry by six goons who were armed with arrows. Further, the said goons claimed the suit lands belonged to the Defendant. He denies that the Plaintiff has ever sold the suit lands to anybody and the Defendant's acts of occupying the same including placing security therein amount to trespass, encroachment as well as infringing on the Plaintiff's rights. He insists the Defendant is a stranger and a land grabber whose intentions are to defraud the Plaintiff.

The Defendant EUNICE MUTHONI opposed the application and filed a replying affidavit where she deposed that she is a director of BEDEROEUMA COMPANY LTD and they entered into a Sale Agreement with the Plaintiff in respect of the suit lands. Further, that the agreed purchase price was Kshs. 23 million but they paid a deposit of Kshs. 6 million after which they took possession, put a temporary structure thereon and employed a person to take care of it, so as to ward off land grabbers or comen. She claims she fell critically ill and the purchaser could not pay the balance of the purchase price as agreed. Further, she met the directors of the Plaintiff, who agreed to vary the terms of the Sale Agreement dated the 5<sup>th</sup> October, 2013 and gave the purchaser more time to pay the purchase price. She confirms she has not recovered from her illness and is yet to raise the balance of the purchase price, which fact she communicated to the Plaintiff through a Mr. Kihara. She insists the Plaintiff has concealed material facts as they took possession of the suit land on 5<sup>th</sup> October, 2013 and have not interfered with the properties at all. Further, that the Plaintiff's director Mr. Kihara is well aware she is a director of BEDEROEUMA COMPANY LTD. She contends that the Plaintiff is yet to give the purchaser the completion notice as envisaged under the Sale Agreement and that she has been sued wrongfully. Further, that to grant the orders sought would amount to rewriting the Sale Contract between them.

The Plaintiff through SAMUEL NDIRA KIHARA filed a supplementary affidavit where he insists the Defendant has not filed any documents including CR 12 and Authority to prove she is a director of BEDEROEUMA COMPANY LTD. He denies that the Plaintiff handed over vacant possession of the suit lands to the Defendant and insists the said lands have been without a guard before the company offered to purchase it. He contends that the resolution referred to as EM2 on the replying affidavit is not accompanied with the minutes from the board. Further, that the document firmly tackled the issue of extension of a period to a further 6 months from 7<sup>th</sup> November, 2016. He is not aware of the Defendant's illness as this was not communicated to him and the suit herein concerns trespass including illegal occupation but not non completion. Further, that the Defendant has not filed any documents to confirm authority to occupy suit lands and the said act has not been sanctioned by the Plaintiffs. He explains that the Sale Agreement dated the 5<sup>th</sup> October, 2013 was between the Plaintiff and BEDEROEUMA COMPANY LTD but not the Defendant. He avers that the Plaintiff seeks for the Defendant to stop illegal occupation before the Purchaser completes payment of purchase price. Further, that the Defendant has not given any indication on when the balance of the purchase price would be paid.

Both the Plaintiff and the Defendant filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the Notice of Motion dated the 8<sup>th</sup> February, 2018 together with the supporting and replying affidavits including the parties' submissions, the only issue for determination at this juncture, is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

Both the Plaintiff and the Defendant are staking claim over the suit lands. The Plaintiff insists he is the registered proprietor of the suit lands and has been issued with various title deeds to that effect. The Defendant on the other hand contends it purchased the suit lands from the Plaintiff and paid Kshs. 6 million out of Kshs. 23million, which was the purchase price after which she took possession and stationed a guard thereon to ward off land grabbers. Further, that she was unwell and was unable to pay the remaining purchase price and informed the Plaintiff, which fact is denied.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with the first principle as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff is the registered proprietor of the suit lands and have title deeds to that effect. The Defendant claims to be a director of BEDEROEUMA COMPANY LTD that entered into a Sale Agreement to purchase suit lands. She has annexed the said Sale Agreement to prove her claim. She however admits that the purchaser only paid Kshs. 6 million out of the Kshs. 23 million. Further, that they took possession to protect the land from land grabbers. From the Agreement she annexed, I note there was no proviso indicating the purchaser was to take up possession of the suit lands upon payment of the deposit. The Plaintiff has submitted that it has established a prima facie case to warrant the grant of an injunction and relied on the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**. The Defendant on the other hand submitted that the Plaintiff has not established a prima facie case to warrant the grant of an injunction and relied on various cases including **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Francis Jumba Enziano And Others Vs Bishop Philip Okeyo and 2 Others Nairobi HCCC No. 1128 of 2001; and Yego V Tuiya and Another (1986) KLR 726** to support her argument. Even though there was an agreement between the Plaintiff and BEDEROEUMA COMPANY LTD but since the Plaintiff is still the registered proprietor of the suit lands and BEDEROEUMA COMPANY LTD having failed to fully pay for the suit land, I am unable to rewrite the terms of said sale agreement. In the circumstances, I find that the Plaintiff is indeed entitled to protection of the law as enshrined in section 24(b) of the Land Registration Act and also rely on the case **Ahmed Ibrahim Suleiman & Anor Vs Noor Khamis Surur (2013) eKLR** where Justice Mutungi held that a registered proprietor of land is indeed entitled to protection of the law. It is against the foregoing that I hold that the Plaintiff has indeed established a prima facie case with probability of success at the trial.

On the second principle as to whether the Plaintiff stands to suffer irreparable loss, which cannot be compensated by way of damages. Since the Defendant is not disputing the Plaintiff's title to the suit lands but denies trespassing thereon and insists she stationed the guards thereon to safeguard her interests; I will rely on the **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where the Court of Appeal held that in an application seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. In the current scenario, I opine that the Plaintiff's injuries are not speculative as it has demonstrated that the Defendant has taken possession of the suit lands without fully paying for it and stationed guards thereon without its consent. This in my view is evident that the Plaintiff stands to suffer irreparable harm if the orders sought are not granted.

On the question of balance of convenience, I find that at this juncture the balance tilts in favour of the Plaintiff as it is the registered proprietor of the suit lands.

It is against the foregoing that I find the application dated the 8<sup>th</sup> February, 2018 merited and will allow the prayers as sought.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajado this 14th day of May, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**