



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1578 OF 2016

DAYKIO PLANTATIONS LIMITED.....PLANTIFF/APPLICANT

VERSUS

PETER WAMBUGU MWANGI.....DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 15/12/2016 brought under order 40 rule 1 and 2, order 51 rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders

(1) Spent.

(2) Spent

(3) Spent

(4) An injunction be issued restraining the respondent, his agents, employees and/or servants from entering, trespassing, damaging and/or in any way howsoever dealing with Land Reference Number 8442 located at Mwiki Njiri in Nairobi County pending the hearing and determination of this application.

(5) The officer commanding police division (OCPD) at Kasarani station be directed to effect this honourable court's orders.

(6) This honourable court be pleased to make any such order as may be fit and just in the interest of justice.

(7) That costs be provided for.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 7.

4. The application is supported by the affidavit of Sheila Kahaki Muya Muindi, Executive Director of the plaintiff/applicant herein sworn on the 15th December 2016.

5. The application is opposed. There is a replying affidavit sworn by Peter Wambugu Mwangi, the defendant/respondent herein sworn on the 10th October 2017.

6. On the 11th October 2017, the court directed that the application be canvassed by way of written submissions.

7. It is the plaintiff's/applicant's submissions that it is the registered owner of the suit property herein. It is the absolute and indefeasible proprietor of the suit property. In paragraph 8 of the supporting affidavit, the plaintiff has adduced evidence of the extent of trespass and encroachment by the defendant on the suit property. The defendant intends to illegally subdivide and sell the same to third parties.

8. The plaintiff/applicant further submitted that it has satisfied the required standard to merit the grant of injunction as established in the case of **Giella vs Cassman Brown [1973] EA 358**. It has also put forward the cases of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**; **Naftali Ruthi Kinyua vs Patric Thuita Gachure & Another [2015] eKLR**.

9. The plaintiff/applicant further submitted that it would suffer irreparable loss which would not adequately be compensated by an award of damages. About 700 people have already purchased the subdivisions to the land and the titles are at advanced stage of processing. It has put forward the case of **Panari Enterprises Ltd vs Lijoodi & 2 Others [2014] eKLR**. The balance of convenience tilts in favour of the plaintiff/applicant who is the registered owner of the suit property. The plaintiff/applicant prays that the application be allowed.

10. It is the defendant's/respondent's submission that he has been sued wrongly as he has not trespassed on the suit property as alleged by the plaintiff/applicant.

11. The plaintiff/applicant has not proved the connection between the defendant and the acts of trespass. The photographs are undated which makes it impossible to establish when they were taken nor do they capture the defendant on the site. He has put forward the cases of **Daniel Katumo Nyamai vs Gilbert Kanungu Mwanganda & 6 Others [2014] eKLR; Nils Bernard Fride Nelson & 3 Others vs Dunson Kuru & 7 Others [2013] eKLR**.

12. The defendant/respondent further submitted that the plaintiff/applicant has failed to demonstrate to the required standard that it has a prima facie case against the defendant. He prays that the application be dismissed with costs.

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

i. Whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunctions.

ii. Who should bear costs?

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

15. 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. It is the plaintiff's/applicant's case that it is the registered proprietor of the suit property. I find that it has established that it deserves this kind of protection.

17. I also find that it has established a prima facie case with a probability of success at the trial. I have gone through the replying affidavit of the defendant/respondent and I find that he makes general denials to the plaintiff's claim without adducing any evidence.

18. The plaintiff/applicant in paragraph 8 of the supporting affidavit has adduced evidence of trespass and encroachment by the defendant/respondent on the suit property. The defendant/respondent ought to be stopped. I find that the plaintiff/applicant has demonstrated that damages would not be an adequate remedy. The balance of convenience tilts in favour of the plaintiff/applicant who is the proprietor of the suit property.

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

(a) That an order of temporary injunction be and is hereby issued restraining the defendant, whether acting by himself, his agents, employees and/or servants from entering, trespassing, damaging and/or many way dealing with Land Reference No. 8442 located at Mwiki Njiru in Nairibi County pending the hearing and determination of this suit.

(b) That costs of the application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 26th day of September 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant