



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT ELDORET

ELC CASE NO. 28 OF 2017

MONICA JERUTO RUTO.....PLAINTIFF/APPLICANT

VERSUS

SIMON NGUGI.....1ST DEFENDANT/RESPONDENT

CHRISTOPHER IRUNGU.....2ND DEFENDANT/ RESPONDENT

ISAACK KAMAU.....3RD DEFENDANT/RESPONDENT

DAVID KISORIO.....4TH DEFENDANT/RESPONDENT

AMOS MWANGI.....5TH DEFENDANT/RESPONDENT

DENNIS OMONDI.....6TH DEFENDANT/RESPONDENT

NJOROGE KINYANJUI.....7TH DEFENDANT/RESPONDENT

CHARLES MUTISYA.....8TH DEFENDANT/RESPONDENT

DENNIS MOKAYA.....9TH DEFENDANT RESPONDENT

RULING

This is the ruling in respect of an application dated 1st February 2017 brought by way of notice of motion by the plaintiff/applicant seeking for an order of a temporary injunction against the Respondents herein restraining them, their servants and/or agents from dealing in any way with the property known as Eldoret Municipality Block 15/1753 pending the hearing and determination of this suit.

The court ordered that a status quo be maintained pending the hearing of this application inter partes. Counsels thereafter agreed to canvass the application by way of written submissions.

Plaintiff's Counsel's Submissions

Counsel submitted that the application is based on the five grounds as enumerated on the face of the application which include the fact that the Applicant is the registered owner of the suit property known as Eldoret Municipality BLOCK 15/1753, that the Defendants/Respondents in violation of Plaintiff's right of

ownership of the property unlawfully entered the Plaintiff's suit land and illegally erected structures, that the Defendants/Respondents have prevented the Plaintiff/Applicant from using her land, that the sanctity of the title should be protected and the last ground is that the Defendant/Respondents' actions are activated by malice.

Counsel further submitted that the plaintiff has met the threshold for grant of temporary injunction as envisaged in the celebrated case of Giella v Cassman Brown (1973) EA 360 in which it was held as follows:-

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Counsel cited the case of Mrao —Vs- First American Bank Of Kenya Limited & 2

Others (2003) KLR 125 which explained the meaning of prima facie case as follows,

"a prima facie case in a Civil Application includes but is not confined to a genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

It was Counsel's submission that the Plaintiff herein is the registered owner of land known as Eldoret Municipality Block 15/1753 which is evidenced by annexure marked MJR 1 being a copy of title deed. She stated that it is therefore clear that the Plaintiff/Applicant's right to property as envisaged in Article 40 of the Constitution has been infringed by the Defendant/ Applicants hence a prima facie case with a probability of success.

Counsel further submitted that the plaintiff will suffer irreparable loss which cannot be compensated by way of damages if a temporary injunction is not granted as both the Applicant and Respondents herein are in occupation of the suit land. Counsel also urged the court to find that the balance of convenience tilts in favour of the plaintiff as she is the registered owner of the suit land and in possession. Further that the order would be to restrain the defendants from further construction and not eviction of the respondents.

In response to the replying affidavit Counsel took issue with the contents of the replying affidavit and stated that at no time did the plaintiff instruct a real estate agent to subdivide and sell the suit property as evidenced by a letter annexed as SNM2 as such power can only be donated by a duly executed and registered Power of Attorney.

Counsel further submitted that the letter annexed by the Respondents does not confer such powers to the alleged agent as the said agent went further to enter into agreements for sale of the suit land in his name with the Respondents yet he is neither the registered owner nor was he donated any power of attorney by the Applicant herein.

It was Counsel's submission that the allegation that the agent had custody of the Original Title Deed is false as the Original Title Deed is with the registered owner who is the Applicant herein. Counsel therefore prayed that the application be allowed as prayed as the plaintiff has established a prima facie case against the defendants.

Defendants' Counsel's Submissions

Counsel for the defendant/Respondents filed his submissions and opposed the plaintiff's application. He relied on the replying affidavit sworn by one Simon Ngugi Mwangi. He submitted that the issues for determination by the court are as to whether the plaintiff has satisfied that conditions for grant of

temporary injunctions and who is to bear the costs of the application.

Counsel submitted that the plaintiff applicant has failed to present any evidence to show that she has a right to the suit property and thus no right has been infringed to warrant the issuance of an injunctive order. It was Counsel's further submission that the plaintiff instructed a Real Estate Agent named Hillary Kipkosgei Kiboinett T/ a Sweetland Consultants to subdivide her parcel of land and sell the same to settle a debt owed by her son. Sweetland Consultants advertised the sale of the parcel of land after which the Defendants/ Respondents got interested to purchase the parcels of land being offered for sale. She stated that this is evident from the Letter dated 17th November, 2012 annexed to the Replying Affidavit and marked as SNM 2.

Counsel further submitted that at the time the parcels of land were advertised, an offer was made which was then accepted by the Plaintiff/ Applicant as she was bound by the terms as stipulated by Sweetland Consultants, the agents of the Plaintiff/ Applicant in this particular transaction.

It was Counsel's conclusion that the Plaintiff/ Applicant has failed to establish a prima facie case as she has not presented any evidence before the court as proof that the Defendants/ Respondents illegally acquired possession of the suit parcels of land and thus undeserving of the injunctive reliefs.

Counsel cited the case of Simon Kipngetich Bett vs. Richard C. Kandie [2012] whereby Munyao J while addressing what would amount to an irreparable harm rendered himself thus;

"To me, the assessment of irreparable harm has to be done on case by case basis. The court must assess whether the subject matter of the case will be so wasted as to make the final determination, if in favour of the Applicant a nullity. In my view, if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit as it is at the time of the Application for injunction, then there is no irreparable harm (Emphasis by Respondents) Such harm must also be harm that cannot adequately compensated by an award of damages. In other words it is the sort of harm which will render victory in the suit empty and devoid of any substance... "

Counsel further submitted that the Plaintiff/ Applicant has not attempted to show or explain why it took her more than 5 years or thereabouts to move this Honourable Court after the Defendants/ Respondents took possession of the suit land which begs the question as to what harm the Plaintiff/ Applicant stands to suffer if the orders sought in her Application are not granted.

Counsel stated that conversely the Defendants/ Respondents stand to suffer irreparably if the orders sought by the Plaintiff/ Applicant are to be granted as they have made several developments and improvements on the subject parcel of land. That the defendants reside on the suit land with their families and any interference with their occupation will have far reaching ramifications.

Counsel further submitted that the defendant/respondents stand to suffer higher risk of injustice should the orders sought be granted as the balance of convenience tilts in favour of the defendants. He cited the case of Films Rover International [1986] EALL ER where Hoffman J. stated that "In granting injunctive orders, the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been wrong.'

In conclusion Counsel urged the court to dismiss the plaintiff's application with costs as she has failed to demonstrate any legal or equitable right to the suit property and that the application does not meet the threshold for grant of temporary injunctions.

Analysis and Determination

This is an application for temporary injunction restraining the defendants from constructing or developing the suit land. The principles for grant of temporary injunctions are well settled and I need not reinvent the wheel. I will not go to the nitty gritty of this application as I have noticed very glaring errors in the plaint

and the application itself.

The procedure requires that a plaint must be accompanied by a verifying affidavit sworn by the plaintiff to verify the correctness of what is averred in the plaint. The plaint upon which this suit is hinged is not dated and the verifying affidavit is not attested to by a commissioner for oaths or a Magistrate. It is also not dated. To make matters worse the supporting affidavit by the applicant is also not attested to. This is a requirement under the law and thus the application has no legs to stand on. This does not amount to technicality but a requirement under the law and procedure. The verifying affidavit and the supporting affidavit do not qualify as affidavits for the reasons stated above. They are therefore expunged from the court record.

The upshot is that the application is not supported and is therefore dismissed with costs to the defendants.

Dated and delivered at Eldoret this 26th day of February, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Githang'a holding brief for Kenei for Defendant/Respondent and in the absence of Kibichy & Co. Advocates for the Plaintiff/Applicant.

Mr. Koech: Court Assistant.