



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO 390 OF 2016

SAFARI ROPHUS KAINGU.....1ST PLAINTIFF

MARGARET ROPHUS2ND PLAINTIFF

-VS-

ABDALLA MWABUDZUMA.....DEFENDANT

RULING

1. By a Notice of Motion dated 9th December, 2016 brought under Order 40 Rules 1,2, 3(1) and 4, Order 50 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63(c) of Civil Procedure Act and Article 159(2)(d) of the Constitution, the Plaintiffs are seeking the following orders:

1. Spent

2. Spent

3. That pending hearing of the main suit the Defendant, his servants and/or agents or otherwise be restrained from alienating, disposing, selling, constructing structures, misusing, damaging, destroying or in any manner dealing with the suit Property situated in Majaoni Utange.

4. THAT the OCS Bamburi Police Station do give security in effecting this order.

5. THAT costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Safari Rophus Kaingu, the 1st Plaintiff sworn on 9th December, 2016. Briefly, it is the Plaintiffs contention that they are the legal and beneficial owners of the undermacated piece of land in Majaoni having inherited the same from their father. That the Defendant requested for and was given a portion of the Suit Property to settle as he had no land and he paid the sum of Kshs.60,000.00. The Plaintiffs have exhibited a copy of the sale agreement. The Plaintiffs aver that the Defendant later surrendered back the portion of land and was refunded the Sum of Kshs.93,050 which comprised the purchase price and interest. The Plaintiffs have exhibited a "Mpesa" statement. It is the plaintiffs' contention that the Defendant is now encroaching and trespassing into the portion of the Suit Property and building structures thereon and even selling some portions to unsuspecting members of the public. According to the Plaintiffs the Defendant's actions amounts to trespass and is illegal, irregular and has inhibited their use

and enjoyment of the land, hence this Application.

3. The Defendant was duly served with the Application but did not file any response, hence the Application is unopposed. The Plaintiffs' Counsel filed Written Submissions and relied on some authorities.

4. I have considered the Application, the Affidavit in support and the submissions made. It is clear that what the Plaintiffs are seeking are both a Prohibitory Temporary Injunction as well as Interlocutory Mandatory Injunction. The principles to be applied when considering an Application for Temporary Injunctions are well settled. In the case of **Giella –v- Cassman Brown & Co Ltd (1973) EA 358**, the Applicants must show that they have a *prima facie* case with a probability of success and that they stand to suffer irreparable damage and in the event the court is in doubt, it will decide the matter on a balance of convenience. The law as regards the principles to be applied when considering whether or not to grant an Interlocutory Mandatory Injunction is different from the principles set out in the Giella case for the standard of approach is higher.

5. In the case of **Locabail International. Finance Ltd –v- Agro Export & Another (1986)1 AL ER 90**, it was stated:

“A mandatory Injunction ought not to be granted on an Interlocutory Application in the absence of Special Circumstances and then only in clear cases either 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 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 rightly been granted, that being a different and higher than required for a Prohibitory Injunction.”

6. In this case the Plaintiffs admit that they sold the Suit Property to the Defendant who took possession upon paying the sum of Kshs.60,000.00. The Defendant therefore entered the land with the permission of the Plaintiffs and pursuant to the agreement for sale entered into between the Defendant and the Plaintiffs. It cannot be said that the Defendant unlawfully trespassed on the Suit Property because it is clear that he was given possession by the Plaintiffs. The Plaintiffs however allege that the Defendant surrendered back the Suit Property and asked for his refund which the Plaintiffs allege they paid back with interest.

7. I have perused the agreement for sale attached to the Affidavit in support of the Application. The same is dated 15th December 2006. From the statement, the refund is said to have been made in July 2016. However, from the Affidavit, the Plaintiffs have not stated exactly when the Defendant surrendered back the Suit Property and again have not stated when he started encroaching and trespassing into the property.

This is an issue that ought to be determined at the trial.

8. Having carefully considered the material before me, in my humble view a case of a Mandatory Injunction has not been made out. I am also not satisfied that the Plaintiffs have established a *prima facie* case with a probability of success to warrant the Injunction orders sought. The Plaintiffs have also not shown what irreparable injury they will suffer in the event the Injunction is not granted. The demolition and eviction can still be undertaken in the event the Plaintiffs succeed at last.

9. The upshot of this is that the notice of Motion dated 9th December, 2016 lacks merit and the same is hereby dismissed. Each party to bear their own costs.

10. I have also considered the value of the subject matter herein. The Plaintiffs claim they sold it for Kshs.60,000.00 but refunded a sum of Kshs.93,050.00. I am of the view that this is a matter that falls within the jurisdiction of the Magistrate's Court. Accordingly, I *suo moto* transfer this matter forthwith to the Chief Magistrate's Court, Mombasa for trial and determination.

Delivered, signed and dated at Mombasa this 22nd February, 2018.

C. YANO

JUDGE