



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 50 OF 2017

REUBEN MWANGI NGURI.....PLAINTIFF

VERSUS

JAMES NDUNGU WANJIKU.....DEFENDANT

RULING

(An application for injunction to restrain the defendant from interfering with the suit property; application dismissed; suit transferred to subordinate court)

1. This ruling is in respect of plaintiff's Notice of Motion dated 13th February 2017. The application is brought under Order 40 of the Civil Procedure Rules and seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit the court be pleased to issue a temporary injunction restraining the Defendant/Respondent by himself, his agents and/or servants from occupying, further sub-dividing, transferring, entering, selling, trespassing, cultivating, leasing, interfering, blocking, and/or dealing with the plaintiff's/applicant parcel of land Subukia/Subukia block 1/326 (Tetu) and the riparian strip next to the applicant's parcel of land in any manner whatsoever.

4. That the costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff on 13th February 2017. In it, he states that he is the registered proprietor of the parcel of land known as **Subukia/Subukia Block 1/326 (Tetu)**, the suit property. He annexed a copy of the title deed. He bought the land on 26th November 1994 and found on it a water pump structure constructed by the previous owner of the land. The defendant owns **Subukia/Subukia Block 1/325** which neighbours the plaintiff's plot. Sometime in the year 2008 the defendant started claiming part of the plaintiff's land.

3. He further states that on 20th September 2010, the defendant visited the suit property in the company of the area chief and policemen, cut down the plaintiff's trees and erected a fence. The defendant cut more trees in the year 2015 and again on 27th January 2017. The plaintiff annexed copies of various letters from local administration on the matter as well as some photographs. The plaintiff further stated that the defendant has filed two suits against him and that the two suits are still pending. He annexed copies of pleadings in **Nakuru HCCC No. 134 of 2010 James Ndungu Wanjiku –vs- Reuben Mwangi**

Nguri and Nakuru CMCC No. 215 of 2016 James Ndungu Wanjiku –vs- Reuben Mwangi Nguri. He added that he filed the present suit since he has no counterclaim in the pending suits and he couldn't therefore seek an injunction in those suits.

4. The defendant opposed the application through his replying affidavit sworn on 8th May 2017 in which he confirmed that he is the registered proprietor of land known as **Subukia/Subukia Block 1/325 (Tetu)**, hereinafter plot 325, which borders the suit property. He bought the land together with a water pump on it in August 2006. The main reason for buying plot 325 was so that he could use the pump to pump water to his other parcel of land where he engages in farming and rearing of livestock. On realizing that he had bought plot 325 the plaintiff started to interfere with the defendant's occupation of the plot by trespassing on it, destroying trees, the pump house and even the pump. As a result, the defendant filed **Nakuru HCCC 184 of 2010** against the plaintiff. The suit is still pending and an order was issued by the court in the said suit on 23rd July 2010 restraining the plaintiff from interfering with plot 325. The plaintiff was also charged and convicted of the offence of trespassing into plot 325 in **Nakuru CM Criminal Case No. 1498 of 2008**.

5. The defendant further stated that there is another case being **Nakuru CMCC No. 215 of 2016** which he the defendant filed against the plaintiff and which suit is also pending. He denied that there is any riparian land bordering the river as alleged by the plaintiff. Instead, he the defendant owns plot 325 which borders the river and which holds his water pump. He denied trespassing into the suit property or cutting trees as alleged. The defendant annexed a copy of title deed for plot 325, pleadings in **Nakuru HCCC No. 184 of 2010** and proceedings and judgment in **Nakuru CM Criminal Case No. 1498 of 2008** among other documents. He urged the court to dismiss the application.

6. The application was argued by written submissions. The applicant filed submissions on 3rd November 2017 while the defendant filed submissions on 2nd November 2017. I have considered the application, the affidavits filed, the submissions as well as the authorities cited.

7. In an application for an interlocutory injunction, for the application to succeed the applicant must establish a prima facie case with a probability of success. If no prima facie case is established the application fails. Beyond establishing a prima facie case, the applicant must show that he will suffer irreparable damage if an injunction is not granted. Lastly, if the court is in doubt as to whether there will be irreparable damage then the court should determine the application on a balance of convenience. These principles set down in the well-known case of **Giella v. Cassman Brown & Co. Ltd [1973] EA 358** and were recently restated by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**.

8. Clearly, the parties herein have been engaged in a protracted dispute which has resulted in a number of criminal cases and civil suits. I note that at paragraph 24 of his plaint, the plaintiff acknowledges that there are two other suits being **Nakuru HCCC No. 184 of 2010** and **Nakuru CMCC No. 215 of 2016** between the parties herein which are still pending in court. The defendant confirms as much and adds that the plaintiff was also charged and convicted of the offence of trespassing into plot 325 in **Nakuru CM Criminal Case No. 1498 of 2008** and that an order was issued on 23rd July 2010 in **Nakuru HCCC No. 184 of 2010** restraining the plaintiff from interfering with plot 325. He annexed a copy of both the order and the judgment. The plaintiff has not disputed the existence of the order and the conviction.

9. To establish a prima facie case an applicant needs to do more than raising issues. Evidence which shows an infringement of a right, and the probability of success of the applicant's case upon trial must be put before the court. I am not satisfied that the applicant has gone beyond merely raising issues. I am further fortified in this regard in view of the conviction in **Nakuru CM Criminal Case No. 1498 of 2008** and the injunction issued on 23rd July 2010 in **Nakuru HCCC No. 184 of 2010**. In sum, the applicant has not established a prima facie case with a probability of success. Notice of Motion dated 13th February 2017 is thus dismissed with costs to the defendant.

10. I have perused the plaint herein and I note that all that is sought is a permanent injunction to restrain

the defendant from interfering with the suit property. The subordinate court has jurisdiction to deal with such matter. Considering that there is another suit being **Nakuru CMCC No. 215 of 2016** pending between the plaintiff and the defendant, I hereby transfer this suit to the Chief Magistrate's Nakuru for hearing and determination. Parties are encouraged to consider consolidation of the two matters.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of February 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Wangari for the plaintiff/applicant

Mr. Chege holding brief for Mr. Waichungo for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi