



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC. NO. 196 OF 2017

VERONICAH KIMOI KIMITEI.....PLAINTIFF

VERSUS

FRACIS KOSGEI ARGUT.....DEFENDANT

RULING

This is the ruling in respect of an application dated 12th may 2017 brought by way of Notice of motion by the plaintiff/applicant for orders:

a) Spent

b) **THAT** the defendant be restrained whether by himself, his servants and/or agents from trespassing, interfering with, alienating, obstructing the carrying out of developments, destroying property or carrying out any acts inconsistent with the plaintiff's user of the land parcel known as KABARNET TOWNSHIP/ 177 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.

c) **THAT** an interlocutory mandatory injunction to compel the defendant to remove the fence and any barriers erected on the land parcel known as KABARNET TOWNSHIP/ 177 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.

d) **THAT** the Officer Commanding Kabarnet Police Station or any other police station or post near the land parcel known as KABARNET TOWNSHIP/ 177 to assist in enforcing the order and ensuring compliance.

e) **THAT** the costs of this application be provided for.

The matter was brought under certificate of urgency and the court directed that the same be served upon the respondent within 7 days. The same was served and the defendant/ respondent filed a replying affidavit together with a defence.

The application came up for hearing on the 17th July, 2017 when Counsel agreed to canvass the application by way of written submissions.

Plaintiff's Counsel's submissions

The plaintiff's Counsel submitted that the plaintiff has established that she has proprietary interest in the suit land by annexing a copy of a certificate of official search dated the 7th. March, 2017 and the certificate of lease dated the 15th December, 2016. He further submitted that the defendant has not tendered before the court any title document to the suit land. That the defendant seeks to rely on an allotment letter and grant relating to a different land parcel described therein as a grant no. I.R.N. 4820 relating to I-R. No. 9038/ 204.

Counsel further submitted that the grant is at variance with the allotment letter which was issued on the 19th May, 1995 after the grant. He stated that the measurements in the grant is 0.0330 while the suit-land measures 0.0348 Hectares and that the annual rent in the defendant's allotment letter is Ksh. 920/ while the annual rent for the suit land as is evident from the lease certificate is Ksh. 1,400/.

It was Counsel's submission that the County Government of Baringo and the National Land Commission confirmed the plaintiff's interest in the suit land. He therefore submitted that the plaintiff has satisfied the conditions for the grant of an interlocutory mandatory injunction as laid down in volume 24 Halsbury's Laws of England, 4th Edition paragraph 948, where the learned authors state as follows:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special

circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff.... a mandatory injunction will be granted on an interlocutory application. "

He cited section 25 of the Land Registration Act, 2012 which provides,

"(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. "

Mr. Kigamwa Counsel for the plaintiff submitted that the defendant has not lodged a counter-claim to challenge the plaintiff's title or seek for its cancellation on account of fraudulent acquisition. Counsel cited the case of Jai Super Power Cash and Carry Ltd vs. Nairobi City Council and two Others Civil Appeal No. 111 of 2002 in which the Court of Appeal observed,

"This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it. "

It was Counsel's submission that the plaintiff has indeed established a prima facie case with a probability of success as she is the sole registered proprietor of the leasehold interest in the land parcel known as KABARNET TOWNSHIP/ 177 within Baringo County which measures approximately 0.0348 Hectares. That the certificate of official search and the certificate of lease demonstrated this fact and that she acquired her interest in the land vide an allotment contained in the letter dated 19th. May, 1995 issued by the Commissioner of Lands. He stated that the plaintiff has paid the requisite fees to formalize the allotment and obtained a lease certificate as follows: -

- a) Stand premium and plot rent of Ksh. 7,820/-. The receipt dated the 25/7/2016 is marked as D.
- b) Registration fees, conveyancing fees, survey fees, stamp duty and approval fees of Ksh. 6,520/-. The receipt dated 31/ 10/2016 is marked as E and the bankers' cheque dated 2/8/2016 is marked as F.
- c) Registry Index Map costs Ksh. 13,000/-. The receipt dated 21/9/2016 is marked as G and the bankers' cheque dated 21 / 9/2016 is marked as H.
- d) Hoarding fees of Ksh. 3,500/-. The miscellaneous receipt is as I.

Counsel also submitted that the plaintiff duly complied with the requisite conditions for the offer and was duly issued with a lease for a term of 99 years commencing the 1st. May, 1995. With the Government Departments confirming her ownership also as follows:-

- a. The Kabarnet Town Administrator confirmed having no objection to the processing of documentation for the land for the plaintiff vide the letter dated 24th. November, 2015. Marked as K is the letter dated 24th. November, 2015.
- b. The Kabarnet Town Administrator also confirmed that the plaintiff was entitled to hoard the suit-land on the 29th. November, 2016. The letter is dated the 29th November, 2016 marked as L.
- c. The National Land Commission confirmed the allotment and even demanded that the Director of Surveys to forward the amended RIM. The letter is dated 3rd August, 2016 marked as M.
- d. The Director of Surveys amended the Registry Index Map and forwarded the same vide the letter dated the 27/9/2016. The letter is marked as N.
- e. The office of the Chief Land Registrar forwarded the lease for registration to the County Land Registrar Kabarnet vide the letter dated 23rd November, 2016. The letter is marked as O.

Counsel submitted that the plaintiff has met the threshold for grant of injunctions. As regards whether damages shall be an adequate remedy, Counsel stated that a clear breach of the law by the defendant's acts has been established. Monetary compensation should not be taken as a substitute for an accrued remedy of injunction. He cited the case of Joseph Siro Mosiomo Vs Housing Finance Company of Kenya, Nairobi HCCC No. 265 of 2007 [2008] eKLR in which the Hon. Justice Warsame held:-

"Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in

lieu of his crystallized right which can be protected by an order of injunction".

Counsel further cited the case of Waithaka —vs- Industrial and Commercial Development Corporation, (2001) KLR 374 in which Ringera J (as he then was) observed at page 381:-

"As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal Couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy if the adversary has been shown to be highhanded or oppressive in its dealings with the applicant this may move the court of equity to say: 'money is not everything at all times and in all circumstances and don't you think you can violate another citizen's rights only at the pain of damages.' In the instant case, although I have found myself in doubt as to the existence of a prima facie case. I have said enough to show that the Plaintiff has an arguable case and that the Defendant's conduct may be regarded as high handed and probably unfounded in law. "

On the third principle on the balance of convenience, Counsel submitted that no doubt exists regarding the first two principles thus the court need not delve into an inquiry of the same. He therefore prayed that the application be allowed with costs.

Defendant's Counsel's Written Submissions

The defendant opposed the application and relied on the replying affidavit dated 5th June, 2017 and Further Affidavit dated 25th September, 2017 sworn by Francis Kosgei. It was Counsel's submission that the Respondent's father Philemon Argut Koskei was allotted the property by the Government of Kenya on 19th May, 1995 and he was to hold it coterminous with L.R 908/204 which had been allotted to him earlier. It was the defendant's averment that the applicant attempted to grab the property after the demise of the said Philemon Koskei Argut and has even obtained ownership documents yet the Defendant has been in continuous occupation of the property.

Counsel submitted that the applicant has not made out a case for grant of the orders sought as per the laid down principles of Giella Casman Brown case. Counsel listed issues which he stated that all work against the applicant namely that;

- a) Both the Applicant and Respondent have allotment letters. For the Applicant it is 'Annexure C' while for the respondent it is 'Annexure FKAI'
- b) Both of which were issued on the same date of 19th May, 1995
- c) The Respondent has title to the property being L.R 9038/ 204 (Annexure FKA -2)
- d) The Respondent has been in continuous occupation of the property since 1995 to date and the efforts by the Applicant to gain possession has been thwarted by the Plaintiff.
- e) The plaintiff had been given allotment letter in 1995 but started paying rates and rent in 2016 about 20 years later.

Counsel further submitted that the defendant has been legally and properly in possession of the property and prayed that the application be dismissed with costs.

Analysis and determination

This is an application for temporary injunction. The principles of granting injunctions are well settled. The question to ask is whether the plaintiff has fulfilled these principles. Has a prima facie case been established with a probability of success, will the plaintiff suffer irreparable injury which cannot be adequately compensated by an award of damages? If the court is in doubt, will it decide on a balance of convenience. The grant of temporary injunction is discretionary and the court should look at the circumstances of the case.

From the documents annexed by the applicant in support of the case, and from a cursory glance of the same it is evident that the applicant has a prima facies case against the defendant. The applicant attached an allotment letter and various approvals from the County Government and the National Land Commission. Even though the respondent also annexed some documents claiming the same suit of land, there is some discrepancy on the title numbers. This calls for the preservation of the suit land to enable the issues be determined during the full hearing of the case.

In respect of whether an award of damages would adequately compensate the plaintiff, I agree with the case of Joseph Siro Mosiomo Vs Housing Finance Company of Kenya, Nairobi HCCC No. 265 of 2007 [2008] eKLR in which the Hon. Justice Warsame held:-

"Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction".

The defendant cannot be allowed to benefit from breach of the law even if he is able to compensate the plaintiff by way of damages.

The applicant also prayed for mandatory injunction in prayer no. 2 of the application. The threshold in mandatory injunctions is higher

than in the case of prohibitory injunctions and the Court of Appeal in the case of **Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109** had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury's Laws of England 4th Edition paragraph 948 that:-

“ A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

In the English case of Locabail International Finance Ltd vs Agro Export & Another (1986), ALI ER 901 which the Court of Appeal in Kenya has followed with approval in many decisions, the court held that:-

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 had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

From the above narrative it is clear that the plaintiff has not established any special circumstances to deserve an order for a mandatory injunction. This limb of the application therefore fails.

I have carefully considered the plaintiff's application together with the annexures. I have also considered the replying affidavit and the submissions by both Counsel and come to the conclusion that the plaintiff/applicant has established a prima facie case against the defendant. The balance of convenience also tilts in favour of the plaintiff.

The upshot is that I partially allow the plaintiff's application dated 12th May 2017 and decline to grant an order for a mandatory injunction as prayed for in prayer No. 2.

The costs of the application to the plaintiff/applicant.

Dated and delivered at Eldoret on this 8th day of February, 2018.

M. A ODENY

JUDGE

Ruling read in open court in the presence of Miss Cheronno holding brief for Mr. Kigamwa for Plaintiff/ Applicant.

Mr. Koech – Court Assistant.