



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 207 OF 2017

JAMES GICHERU MATHENGE.....PLAINTIFF

VERSUS

JOSEPH MWANGI WAKABA.....1ST DEFENDANT

JOHN NGURI (ALIAS NGUIRI).....2ND DEFENDANT

RULING

1. This is a ruling in respect of plaintiff's Notice of Motion dated 18th May 2017. The application is brought under Order 40 rule 1 of the Civil Procedure Rules, 2010 and Sections 68 and 69 of the Land Registration Act. The plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That pending hearing and determination of this suit this honourable court be pleased to issue an order of eviction and demolition of any structures erected by the 1st & 2nd defendant/respondents by themselves, their servants, agents, employees, assigns and/or any persons acting at their behest over all that parcel of land known as Elementaita Trading Centre Plot No. 644.

4. That the OCS Elementaita Police Station to provide security in enforcing the orders of this honourable court.

5. That costs herein be borne by the defendants/respondents.

2. The application is supported by an affidavit sworn by the plaintiff on 18th May 2017. He deposed that he was allocated parcel of land known as Elementaita Trading Centre Plot No. 644 (the suit property) by County Council of Nakuru on 25th January 2017 (Sic) and that he paid the requisite fees. He annexed a copy of allocation letter from County Council of Nakuru dated 25th January 2012 and a copy of rates payment receipt dated 2nd May 2017. He further deposed that the defendants invaded the suit property on 7th May 2018, demolished his fence and erected their own. He thus urged the court to grant the orders sought.

3. The defendants opposed the application through a replying affidavit sworn by the 2nd defendant. He cast doubt on the existence of the suit property and stated that the plaintiff's letter of allotment is materially different from the ones issued to other allottees at Elementaita Trading Centre. He further deposed that on 7th May 2017, the plaintiff attempted to enter onto and fence off a portion of an un-surveyed part of Elementaita Trading Centre which was set aside for public use. He thus urged the court to dismiss the application.

4. The application was argued by written submissions. The applicant filed submissions on 4th October 2017 while the respondents filed submissions on 8th November 2017. I have considered the application, the affidavits and the submissions.

5. Though at prayer 2 of the application the plaintiff sought an injunction pending hearing and determination of the application, there is no application for an injunction pending hearing and determination of the suit. The court can only decide on matters placed before it. There being no application for an injunction pending hearing and determination of the suit and prayer 2 of the application being spent, there is nothing more for the court to determine regarding the issue of whether or not an interlocutory injunction ought to issue.

6. The plaintiff also sought an eviction and demolition order in terms of prayer 3 of the application. In effect, the plaintiff seeks a mandatory

injunction. The principles applicable in determining whether or not to grant a mandatory injunction were revisited by the Court of Appeal in Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR where the court stated:

Ultimately the court granted what was for all intents and purposes a mandatory injunction for the eviction of the appellant from the suit property. It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage. ...

Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a march on the plaintiff.

On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a *summary hearing*.

7. A perusal of the plaint reveals that the plaintiff seeks *inter alia* judgment for vacant possession at prayer (b) of the plaint. Consequently, the issue of whether or not eviction and demolition orders should be granted is one that the plaintiff has himself reserved for trial. Granting such prayers at this stage would amount to prematurely determining the suit. In any case, on the basis of the material placed before the court, I am not persuaded that any special circumstances have been established to warrant issuing such orders at this point.

8. In the end, Notice of Motion dated 18th May 2017 is dismissed with costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 20th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Wairimu holding brief for Mr. Kirera for the plaintiff/applicant

Mr. Otieno for the defendants/respondents

Court Assistants: Gichaba & Lotkomoi