



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 663 OF 2017**

**(formerly Nairobi ELC No. 91 of 2016)**

**ABIJAH WAKARINDI NJOMO.....PLAINTIFF**

**VERSUS**

**JOSEPH AGWATA NYAMONGO.....1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for determination is the Plaintiff's Notice of Motion dated the 4<sup>th</sup> February, 2016 brought pursuant to Order 40 rule 1(a), (b), 2(1) (2) 4(1), (2), 5 and Order 51 rule 1 of the Civil Procedure Rules. It is based on the following grounds which in summary is that the Plaintiff is the owner of property title number 656/Residential Noonkopir Trading Centre hereinafter referred to as the 'suit land' and the 1<sup>st</sup> Defendant has trespassed on it and commenced construction thereon. A mandatory injunction do issue to compel the 2<sup>nd</sup> Defendant to issue a title deed to the Plaintiff in respect of the suit land.

The application is supported by the affidavit of ABIJAH WAKARINDI NJOMO, the Plaintiff herein where she deposes that on 12<sup>th</sup> May, 1999 she bought plot numbers 651 and 656 in Noonkopir Trading Centre (Kitengela) from Stephen Rais Kisemei for a consideration of Kshs. 350,000. She claims prior to entering into the Sale Agreement with Stephen Rais Kisemei, a letter dated the 22<sup>nd</sup> April, 1999 was issued by the Ol Kejuado County Council transferring plot no. 656 Residential Noonkopir Trading Centre to her. She claims she has faithfully paid the land rates and that Official Search conducted at the County Government Land Registry confirm she is the current allottee of the plot 656. On 9<sup>th</sup> June, 2015 she learnt the 1<sup>st</sup> Defendant encroached on her land and she made a report at the Directorate of Criminal Investigation (CID) who wrote a letter to the Officer in Charge of Kitengela CID to carry out investigations on her complaint. She contends that the 1<sup>st</sup> Defendant has continued to construct on her piece of land despite being advised by the County Government of Kajiado vide their letter dated the 5<sup>th</sup> October, 2015 to stop doing so. She contends that the CID in Kajiado have failed to provide her with progress of their investigation in respect of the suit land and she wants the 1<sup>st</sup> Defendant restrained from interfering with her peaceful as well as quiet possession of LR 656/Residential Noonkopir Trading Centre. She prays for a mandatory injunction to be issued to compel the 2<sup>nd</sup> Defendant to issue a title deed to her in respect of LR 656/Residential Noonkopir Trading Centre. Further that the 1<sup>st</sup> Defendant's acts of encroachment on her land which she has sunk her life savings on, is causing her mental anguish and torture.

The 1<sup>st</sup> Defendant did not file a replying affidavit to oppose the application despite being duly served.

The 2<sup>nd</sup> Defendant opposed the application and filed Grounds of Opposition dated the 2<sup>nd</sup> March, 2016 where he stated as follows:

1. That the title deed cannot be issued until the determination of the inter partes hearing.
2. That the application is misconceived, mischievous and an abuse of the court process.

Both the Plaintiff and 2<sup>nd</sup> Defendant filed their respective written submissions that I have considered.

**Analysis and Determination**

The court has considered the materials presented and arguments canvassed by both the Plaintiff and 2<sup>nd</sup> Defendant in respect to the Notice of Motion dated 4th February, 2016, the following are the issues for determination:

- Whether the Plaintiff is entitled to the temporary injunction sought.
- Whether the Plaintiff is entitled to the mandatory injunctive sought

The suit herein is based on a claim over encroachment over the Plaintiff's suit land by the 1<sup>st</sup> Defendant who has commenced constructing thereon. The Plaintiff seeks orders of temporary as well as mandatory injunction as against the Defendants. The Plaintiff relied on various cases including **Giella Vs Cassman Brown (1973) EA 358; Mrao Vs First American Bank of Kenya Limited & 2 others (2003) eKLR; Joseph Mbugua Gichanga Vs Cooperative Bank of Kenya (2005) eKLR** and **Panari Enterprises Limited Vs Lijoodi & 2 others (2014) eKLR** to support her claim. The 1<sup>st</sup> Defendant did not oppose the application but the 2<sup>nd</sup> Defendant contends that the mandatory injunction sought for the issuance of a title deed to the suit land cannot be granted at this stage, but after the suit is heard and determined. The 2<sup>nd</sup> Defendant relied on the case of **Winfred Wangari Chege Vs Faiz Hassan Azzubedi & 2 Others (2015) eKLR** and **Olympic Company Trading Ltd & another Vs Said Mohammed & 4 others (2014) eKLR** to oppose the application.

In the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** the Court established the principles of granting an injunction as follows:

**"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."**

As to whether the Plaintiff has established a prima facie case with a probability of success, I note the Plaintiff claims to be the owner of the suit land and has furnished court with a Sale Agreement dated 12<sup>th</sup> May, 1999; Receipts for Payment of Land Rates; Transfer of plot from Stephen Rais Kisemei to her dated the 22<sup>nd</sup> April, 1999; as well as Certificate of Official Search dated the 29<sup>th</sup> May, 2015 indicating she is the owner of the suit land and a letter dated the 5<sup>th</sup> October, 2015 to the 1<sup>st</sup> Defendant directing him to stop construction on the suit land until the owner was ascertained. Both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not controvert the Plaintiff's evidence of ownership nor dispute the documents annexed to the supporting affidavit. Neither did the Defendants dispute the allegation of encroachment over the suit land by the 1<sup>st</sup> Defendant.

It is against the foregoing that I find that the Plaintiff has indeed a prima facie case with a probability of success.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the 1<sup>st</sup> Defendant commenced developing the suit land and persisted in doing so despite being directed to stop by the County Government of Kajiado. The Plaintiff has produced documents to prove ownership which have not been controverted by the Defendants. Further, the acts of encroachment by the 1<sup>st</sup> Defendant have not been denied. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.**

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as she has demonstrated the harm she will suffer if the injunctive orders sought are denied.

On the question of balance of convenience, from the evidence presented by the parties, I find that this tilts in favour of the Plaintiff who will suffer harm if the 1<sup>st</sup> Defendant persists in constructing on her land.

On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated 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 attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'**

The mandatory injunction sought by the Plaintiff seeking for the issuance of a title deed to the suit land cannot be granted at this juncture. I concur with the 2<sup>nd</sup> Defendant that title deed can only be issued once the suit is heard and determined. I further note that it is not the 2<sup>nd</sup> Defendant who issues title deeds but the same can only be issued upon recommendation from the county Government of Kajiado directing the Chief Land Registrar to provide a Certificate of Title once requisite fee is paid. The prayer for mandatory injunction must hence fail.

It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 4<sup>th</sup> February, 2016 is merited and will allow prayers 3, 4, and 6 only of the said application.

**Dated signed and delivered in open court at Kajiado this 19th day of March, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**

**Present:**

Cc Mpoye

M/s Wanjiru holding brief for Avedi for Plaintiff/Applicant

N/A for Defendant/Respondent