



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 395 OF 2017

HENRY MUNGAI KIMANI.....PLAINTIFF

VERSUS

JEPHETHER KEANCHE MIGOSI.....DEFENDANT

CONSOLIDATED WITH

NAKURU ELC 384 OF 2017

JEPHITHAR KEANCHE MIGOSI..... PLAINTIFF

VERSUS

HENRY MUNGAI KIMANI..... DEFENDANT

RULING

1. Jephithar Keanche Migosi (Jephithar) filed Nakuru ELC Case No. 384 of 2017 against Henry Mungai Kimani (Henry) on 6th October 2017 seeking judgment for:

a) A permanent injunction restraining the defendant, his servants, agents, and/or assigns from dealing with, interfering with the plaintiff quiet possession, use and enjoyment and to stop any act that is inconsistent with the plaintiff's right as the proprietor of all that parcel of land Ol-Jorai Scheme.

b) An order for rectification of the land registers in respect of title deed plot No. 644 Ol-Jorai Scheme by deleting the Defendant's name and immediate cancellation of the fraudulently acquired title deed.

2. A week later on 13th October 2017, Henry filed Nakuru ELC Case No. 395/2017 against Jephithar seeking judgment for:

1. A temporary injunction in the short term and a permanent injunction to restrain the defendant by himself, his agents, servants, employees or others whosoever from selling, transferring, leasing out, building upon, harvesting on, subdividing, charging, dealing or interfering in any other manner with property known as Naivasha/OlJorai Phase II/644.

3. Pursuant to orders of the court made on 14th November 2017 by consent of both parties, both suits were consolidated and ELC case No. 395/2017 was selected as the lead file.

4. Alongside the plaint, Henry filed Notice of Motion dated 13th October 2017 in ELC 396/2017 in which he seeks the following orders against Jephithar:

1. Spent.

2. Spent.

3. The honourable court do grant an injunction to restrain the defendant by himself, his agents, servants, employees or others whosoever from selling, transferring, leasing out, building upon, planting on, harvesting, subdividing, charging, dealing or interfering in any other manner with property title number Naivasha/OlJorai Phase II/644 pending the hearing and determination of this suit.

5. Similarly, Jephithar had also filed together with his plaint, Notice of Motion dated 6th October 2017 seeking the following orders against Henry:

1. Spent.

2. Spent.

3. That pending the hearing and final determination of this suit an interlocutory injunction be granted in favour of the plaintiff/applicant restraining the defendant by himself, his agents and/or his servants from entering, cultivating and interfering with the plaintiff's parcel of land known as Ol-jorai Scheme measuring 2.02 hectares.

6. The respective applications are supported by an affidavit sworn by the respective applicant. Henry has a title deed in respect of Naivasha/Olgorai Phase II/644 which was issued to him on 1st September 2017. He is therefore asserting his rights as a registered proprietor. He accuses Jephithar of trespassing into the said property, planting crops therein and damaging the fence as well as a door to one of the houses therein.

7. Jephithar on his part contends a parcel of land known as plot No. 292 Ol-jorai scheme was allocated to one Johana Oldabash Tome who was a member of Olgorai scheme. That the said Tome sold the plot to him and that Harry's Plot No. Naivasha/Olgorai Phase II/644 is a subdivision of plot No. 292 Ol-jorai scheme.

He claims that Henry used forged documents to obtain title to the plot.

8. The applications were argued by written submissions. Henry's advocates filed submissions on 11th December 2017 while Jephithar's advocates filed submissions on 22nd January 2018. I have considered the applications, the affidavits and the submissions.

9. In an application for an interlocutory injunction such as the present one, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers of the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** and were reiterated by the Court of Appeal in **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR**.

10. There is no doubt that Henry is the registered proprietor of Naivasha/Olgorai Phase II/644. Under **Section 26** of the **Land Registration Act**, the court is bound to accept Henry's Title Deed as conclusive evidence of ownership. Until Jephithar establishes his case at the trial and obtains cancellation of Henry's title, Henry remains the registered proprietor.

11. Though Jephithar claims that Henry's plot came from Jephithar's plot No. 292, I see no evidence that supports that contention. In the circumstances, I am not persuaded that Jephithar has any prima facie case. On the other hand, I am satisfied that Henry has a prima facie case. Damages will not adequately compensate him for any damage to his property or trespass upon his property.

12. In the circumstances, I make the following orders:

a) Jephithar's Notice of Motion dated 6th October 2017 is dismissed with costs to Henry.

b) I grant an injunction restraining Jephithar by himself, his agents, servants or representatives from selling, transferring, leasing, building upon, subdividing, charging, dealing or interfering in any other manner with the parcel of land known as title number Naivasha/Olgorai Phase II/644 pending the hearing and determination of this suit.

c) Costs of Henry's Notice of Motion dated 13th October 2017 shall be borne by Jephithar.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 16th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Ombati for the defendant in ELC 395/2017 and for the plaintiff in ELC 384/2017

No appearance for the plaintiff in ELC 395/2017 and the defendant in ELC 384/2017

Court Assistants: Gichaba & Lotkomo