



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 527 OF 2017

(Formerly Machakos HCCC No. 101 of 2015)

JENNIFFER S. LEWETT

(alias Jennifer Sainapei Njomo).....PLAINTIFF/APPLICANT

VERSUS

EVASIO NJAGE CHABARI.....DEFENDANT/RESPONDENT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion dated the 25th March, 2015 brought pursuant to Order 40 rule 1 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 legal allottee of plot No. 395/Business – Noonkopir T. Centre hereinafter referred to as the 'suit land'. The Defendant has commenced and continues to erect a development on the Plaintiff's property. Unless the Defendant is restrained by the Court, he will continue in the said construction to the Plaintiff's detriment.

The application is supported by the affidavit of JENNIFER S. LEWETT the Plaintiff herein where she deposes that the suit land is an open ground that is normally rented to churches who put up tents thereon for their services. She avers that on 15th March, 2015 one of their caretakers informed her husband that there were men digging extra ordinary trenches on the suit land and on 16th March, 2015 they established it was the Defendant. Further, that the Defendant deposited building materials on the suit land on 16th March, 2015 and on being contacted he insisted he had bought it a long time ago. She confirms reporting the matter to the Kitengela Police Station and was given an OB Number 64/16/3/2015 and on 17th March, 2015 together with the husband, they reported to the County Government of Kajiado Offices who gave them a letter dated the 17th March, 2015 stating that no developments should take place on the suit land until the dispute is resolved. Further that despite the husband trying to serve the Defendant with the said letter, he tore it. She reiterates that she never sold the suit land to anybody and she has paid the requisite ground rent to the County Government of Kajiado. She confirms that as per the Certificate of Official Search obtained from the County Government Offices, it confirms she is still the current allottee of the suit land. She claims the encroachment has been to her detriment as it has deterred her from enjoying the suit land and she is bound to suffer irreparable damage should the development continue.

The Defendant EVASIO NJAGE CHABARI opposed the application and filed a replying affidavit sworn by himself where he deposed that he is the owner of plot number 244/Residential – Noonkopir Trading Centre which plot he purchased from Allan Mbugua vide a transfer dated the 28th August, 2013. He avers that the said Allan Mbugua purchased the plot No. 244/Residential – Noonkopir Trading Centre from one Nahason P. Kabuu vide a Transfer dated the 21st September, 1994. He claims in March 2015 he decided to develop his land by sending the contractor to take building materials and erecting a fence thereon. Further, that he has been paying ground rent to the County Government of Kajiado. He insists as per the survey map dated 14th April, 2015, plot 244/Residential Noonkopir Trading Centre is situated on the ground on which he has moved his building materials and constructed a perimeter wall. He reaffirms that he was personally taken to plot No. 244/Residential - Noonkopir Trading Centre by the County Surveyor after the purchase and even shown the beacons that he is willing to point out. He reiterates that as per the official search conducted on 15th April, 2015 in respect of plot No. 244/Residential – Noonkopir Trading Centre, it clearly confirms he is the registered owner of the suit land. He denies setting foot on the suit land and insists he is constructing on his land and that the Court has issued a restraining order against him in respect of a plot he does not own. He reiterates that the Plaintiff should identify the locality of the suit land and to cease laying claim on his. Further that the Plaintiff will not suffer any damage.

The Plaintiff filed a further affidavit sworn by herself where she reiterated the contents of her supporting affidavit sworn on 25th March, 2015 and averred that Allan Mbugua had purchased plot 244/Residential – Noonkopir Trading Centre from Nahason P. Kabuu vide a transfer dated the 21st September, 1994. Further that Charles Peter Mari purchased the said plot from Allan Mbugua vide a transfer dated the 27th March, 2002. She insists the allegations made by the Defendant that he bought the said plot from Allan Mbugua are therefore untrue and misleading as the said Allan had already transferred the said plot to Charles Peter Mari and therefore lacked any locus to sell the suit land plot to Evasio Njage Charles. She reaffirms that the current owner of plot No. 244 is therefore Charles Peter Mari and not Evasio Njage Chabari as alleged by the Defendant. She contends that the plot on which the Defendant has already erected a perimeter wall and is

developing is plot No. 395. Both parties 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 Defendant in respect to the Notice of Motion dated 25th March, 2015, I find that the only issue for determination at this juncture is whether the Plaintiff is entitled to the temporary injunction orders sought.

The fulcrum of the suit herein is a dispute over ownership of a plot allotted by the County Government of Kajiado. Each party is claiming ownership of the suit land which bears different numbers. The Plaintiff holds letters of allotment to plot No. 395/Business – Noonkopir T. Centre while the Defendant's number is plot 244/Residential – Noonkopir Trading Centre. The Plaintiff claims the Defendant has encroached on the suit land and commenced construction thereon, while the Defendant contends he is constructing on his land.

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 both the Plaintiff and the Defendant have letters of allotment over their respective parcels of land. However from the Plaintiff's averments it seems it is the same plot. The Defendant has commenced construction thereon and insists it is his plot which he bought in 2013 and has been paying land rates. The Plaintiff on the other hand contends that she is the owner of the suit land that she had been leasing to the church and that the Defendant encroached on it in 2015. Each party produced copies of their respective letters of allotment and receipts for the payment of land rates.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that:

' In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'

In relying on the above cases, I find that since the Plaintiff has furnished court with Letters of allotment, Certificate of Official Search showing suit land is hers as well as receipts of payment of land rates, she has indeed established 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 Defendant commenced developing the suit land and vide a letter dated the 17th March, 2015, the Administrative Officer County Government of Kajiado, directed both parties to stop developing the suit land until dispute as to ownership was resolved. I note the Plaintiff has furnished court with its letters of allotment. 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 the 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 the Defendant who is also claiming the suit land is already in the process of developing it, and she has hence demonstrated the harm she will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, who are claiming the same parcel of land with each one having a different title to it, I am not in doubt that it is pertinent to preserve the respective titles to the suit property until the suit is determined

It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 25th March, 2015 is merited but since both parties are staking claim over the suit land and each one having a document to prove title, I will allow the application in the following terms:

1. The parties will observe and maintain the obtaining status quo pending the hearing and determination of the suit.
2. None of the parties nor their respective agents should undertake any developments on the suit land pending the hearing and determination of the suit.
3. An inhibition order do and is hereby issued to the County Land Registrar Kajiado to register an inhibition against plot No. 395/Business – Noonkopir T. Centre and plot 244/Residential – Noonkopir Trading Centre, pending the outcome of the suit.

4. The costs of the application will be in the cause

Parties are urged to comply with Order 11 within 30 days from the date hereof, and set the suit down for hearing as soon as possible

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

CHRISTINE OCHIENG

JUDGE

Present :

Cc Mpoye

Macharia holding brief for Kibatia for Plaintiff

Ms Wanjiru for Defendant