



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE NO. 214 OF 2017

GRACE KASENGE MUTISYAPLAINTIFF

VERSUS

WILLY MWANZIADEFENDANT

RULING

1. By a Notice of Motion application dated 15th June, 2017 brought under Article 159 of the Constitution, Order 40 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, the plaintiff seeks orders.

1. Spent

2. Spent

3. Pending hearing and determination of this suit, a permanent injunction be issued compelling the defendant/Respondent his servants and/or servants, workmen and/or agents, at their own costs, to demolish any of the buildings or structure standing on Residential Plot No. 166- Maganda S.S without the required approval of County Government of Mombasa and/or otherwise in contravention of special conditions of the said plot, Physical Planning Act and County Government Building By- laws. The application is based on the grounds that:

i. The applicant is the rightful and legal owner of Residential Plot No. 166 Maganda S.S

ii. The defendant is unlawfully setting up foundations of structures, buildings and developments on the said residential plot No. 166- Maganda S.S without the required approval of County Government of Mombasa and/or otherwise in contravention of special conditions of the said plot, Physical Planning Act and County Government building Bylaws.

iii. As a result, the unlawful actions of the Respondent is putting extreme risk to the foundational structure and existence of Plot No. 166 Maganda S.S and further continues to violate the rights of the Applicant as he has since refused and/or failed to stop the intended and ongoing development despite being informed of his illegal actions which have now forced the applicant to seek an injunction from the court.

iv. The defendant's actions are contrary to Article 40 of the Constitution as they are aimed at threatening and unlawfully violating the applicant's right to quiet possession, usage and access to his lawfully acquired property.

v. There is thus a need to halt the defendant unlawful and developments on the applicant's property as the same if not prevented shall occasion injustice, loss and irreparable harm to the applicant.

vi. As a result, it is only fair and just that a temporary injunction be granted to prevent the defendant from infringing on the plaintiff's right of usage and quiet enjoyment to her property.

vii. It is therefore in the interest of justice that pending hearing and determination of this suit, a temporary injunction be issued restraining the defendant their servants, workmen, agents, employees and/or otherwise whosoever from occupying, interfering, building developing, setting up structures and/or in any way interfering with the plaintiff's right of access usage and quiet enjoyment of her property.

2. The application is also supported by the affidavit of Grace Kasenge Mutisya the applicant sworn on 15th June 2017 in which she reiterates the grounds in support of the application. The applicant has exhibited copies of a letter of allotment dated 30.11.2011 for the suit property which is in her name as well as a surveyor's report dated 17th may 2017 and floor plan on picking of the suit plot indicating the location of the said plot and the alleged encroachment by the defendant and a demand letter dated 3rd May, 2017. The applicant has also sworn a further

affidavit dated 10th October 2017 in which she has exhibited Photostat copies allegedly showing damage caused by the construction of the defendant's building on the plaintiff's property.

3. The defendant was duly served with the application but did not file any response, hence the application is unopposed. The plaintiff's advocates filed written submissions and relied on the case of *Kiogora Mutai -Vs- Chartwell Holdings Limited & Fred N. Ojiambo (2017) eKLR*.

4. I have considered the application, the affidavit in support and the submissions filed. It is clear that what the plaintiff is seeking is an interlocutory mandatory injunction compelling the defendant to demolish the building or structure allegedly standing on Residential Plot No. 166 – Maganda S.S.

5. The law as regards the principles to be applied when considering whether or not to grant an interlocutory mandatory injunction is different from the principles set out in the case of *Giella -Vs- Cassman Brown & Co. Ltd (1973) EA 358*, for the standard of approach is higher. In the case of *Locabail International Finance Ltd -Vs- Agro Export & Another. (1986) ALL 901*, it was stated:

“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 had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than required for prohibitory injunction”

In the case of *Lucy Wangari Gachana -Vs- Minudi Okemba Love (2015) eKLR*, the court of Appeal stated:

“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 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”

6. In this case, the plaintiff states that she is the lawful and rightful owner of Residential Plot No. 166 – Maganda S.S and that the defendant is unlawfully setting up structures, buildings and developments on the said plot and as a result has greatly interfered with the foundational structure and existence of the said Residential Plot, occasioning cracks on the walls. It is not clear from the pleadings filed whether the actions of the defendant are on Plot No. 166 or on an adjacent Plot. The Photostat copies of photographs attached to the application show some structures whose construction are complete or almost complete. The annexures suggest the plaintiff purchased the plot and not allocated as pleaded.

7. In my humble view, a case for mandatory injunction has not been made out as outlined in the principles already mentioned. No special circumstances have been shown by the plaintiff and the case is not one that I can consider a clear one that can be decided at once or in a summary manner. The demolition sought by the plaintiff can still be undertaken after the trial in the event the plaintiff proves her case at the trial.

8. The upshot of this is that the Notice of Motion dated 15th June, 2017 lacks merit and the same is dismissed with no order as to costs.

Delivered and signed at Mombasa this 26th day of April 2018.

C. YANO

JUDGE