



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 764 OF 2016

1. LYDIA HIUKO MURIUKI

2. ROBERT NJOGU MURIUKI.....PLAINTIFFS

VERSES

JANE NJERI MWANGI.....DEFENDANT

RULING

What is before me is the plaintiffs' Notice of Motion application dated 5th July, 2016 in which the plaintiffs have sought a temporary injunction restraining the defendant from trespassing on, constructing on, wasting, alienating or otherwise dealing with the parcel of land known as Kajiado/Kaputiei-North/31035(hereinafter referred to as "the suit property") pending the hearing and determination of this suit. The plaintiffs have sought a further order that the O.C.S Kitengela Police Station be directed to ensure compliance with the orders that may be issued by the court. The plaintiffs' application was opposed by the defendant through a Notice of Preliminary Objection dated 18th July, 2016 and a replying affidavit sworn on the same date.

The plaintiffs' case:

The plaintiffs' application is supported by the affidavit of the 1st plaintiff sworn on 5th July, 2016. The plaintiffs have averred that they are the registered proprietors of the suit property while the defendant is the registered proprietor of a parcel of land known as Kajiado/Kaputiei-North/31036(hereinafter referred to as "Plot No. 31036"). The plaintiffs have averred that the suit property and Plot No. 31036 are adjacent to each other and that the same were purchased from the same vendor, Unique Homes Properties Limited. The plaintiffs have averred that they purchased the suit property on 1st November, 2012. The plaintiffs have averred that the suit property and Plot No. 31036 among others are subdivisions of land parcel known as Kajiado/Kaputiei-North/24365(hereinafter referred to as "the original plot"). The plaintiffs have averred that they purchased the suit property after the subdivision had been completed. The plaintiffs have averred that they were shown the suit property which was vacant and thereafter were issued with a title for the property and another property, Kajiado/Kaputiei-North/31034 which they had also purchased from the same vendor. The plaintiffs have averred that sometimes in January, 2014, they visited the suit property for the purposes of fencing the same with a view to commencing development thereon. The plaintiffs have averred that during the visit, they found that unknown person whom they later learnt from the vendor of the suit property to be the defendant had just commenced construction on the property.

The plaintiffs have contended that on discovering this encroachment on the suit property, they visited the suit property and Plot No. 31036 owned by the defendant in the company of the defendant and a representative of the vendor and it was pointed out to the defendant that the parcel of land that she was constructing on was Kajiado/Kaputiei-North/31035(the suit property) and not her Plot No. 31036 that was adjacent to the suit property. The plaintiffs have averred that after it was pointed out to the defendant that she was carrying out construction on a wrong parcel of land, the defendant was asked to stop construction. The plaintiffs have averred that they approached Kajiado District Land Surveyor to assist in locating the suit property and Plot No. 31036 owned by the defendant. The said surveyor visited the said properties and prepared a report in which he made a finding that the defendant had encroached on the suit property. The plaintiffs have averred that they visited the suit property again in September, 2014 and noted that the defendant had resumed construction on the suit property. The plaintiffs have averred that they did lodge a complaint against the defendant with the police who after investigations charged the defendant with the offence of forcible detainer at Kajiado Principal Magistrate's Court.

The plaintiffs have contended that even after the defendant was charged and cautioned against continued trespass on the suit property, the defendant continued with construction on the suit property with impunity. The plaintiffs have contended that they are apprehensive that unless the defendant is restrained by an order of this court, the defendant might finish construction and let out the premises to tenants. The plaintiffs have contended that they are ready and willing to comply with whatever condition the court may impose for granting the orders sought.

The defendant's case:

In her Notice of Preliminary Objection, the defendant has contended that the suit herein was filed while an earlier suit that had been filed by the defendant against the plaintiffs' attorney, Michael Muriuki Ngibuini namely, Nairobi ELC No. 706 of 2016 over the same subject matter was still pending. The defendant has contended that this suit should be struck out as an abuse of the process of the court. On the merit of the plaintiffs' claim, the defendant has contended that she purchased Plot No. 31036 from Unique Homes and Properties Limited on the strength of a proposed subdivision scheme for the mother title, Kajiado/Kaputiei-North/24365(Original Plot). The defendant has contended that this subdivision scheme was a true representation of how the resultant plots from the subdivision of the original plot were arranged and numbered. The defendant has contended that the mutation for the subdivision of the original plot that was to be registered at the Land Registry at Kajiado was to be in accordance with the said subdivision scheme. The defendant has contended that she was taken to the site to choose a plot that she was interested in and she chose Plot No. 7 which was second from the road and which after the formal subdivision of the original plot was registered as Kajiado/Kaputiei-North/31036(Plot No. 31036). The defendant has averred that she paid the purchase price of Kshs.450,000/- and had the said parcel of land transferred and registered in her name. The defendant has averred that soon after purchasing the suit property in 2010, she started developing the same by erecting a perimeter fence made of iron sheets and thereafter put up a residential house made of iron sheets which she occupied with her family until the year 2012 when she commenced the construction of a permanent house. The defendant has contended that as at the time the plaintiffs purchased the suit property, she had already constructed a permanent house on Plot No. 31036. The defendant has contended that Unique Homes and Properties Limited who sold the properties in dispute to the parties had admitted that there was a problem with the reference numbers which were given to the plots that resulted from the subdivision of the original plot which may have caused confusion as to the location of the various plots. The defendant has contended that when he purchased Plot No. 31036, it was on the basis of the subdivision scheme and not the mutation form. The defendant has termed the suit herein as an afterthought and has contended that the same was brought after she had sued the plaintiffs' attorney and attempted to serve him on 28th June, 2016 when he refused service. The defendant has contended that she has been in occupation of the suit property since 2010 and if the orders sought by the plaintiffs are granted she would suffer irreparable damage as she will be rendered homeless together with her family.

The rejoinder by the plaintiffs:

The plaintiffs filed a further affidavit sworn by Michael Muriuki Ngibuini on 13th September, 2016. Michael Muriuki Ngibuini was the attorney of the plaintiffs. In his affidavit, he denied that the defendant had constructed a permanent house on the suit property by 2011 as she has claimed. He contended that the defendant commenced construction on the suit property in January, 2014 by which time she was aware that the said construction was being carried out on the plaintiffs' parcel of land. He also denied that the defendant had attempted to serve him with the pleadings in ELC No. 706 of 2016 on 28th June, 2016 and that the plaintiffs were aware of the existence of that case as at the time this suit was instituted.

Analysis and determination of the application:

The application was argued by way of written submissions. I have considered the application together with the affidavits in support thereof. I have also considered the defendant's Notice of Preliminary Objection and replying affidavit which were filed in opposition to the application. Finally, I have considered the submissions dated 16th January, 2017 and 24th July, 2017 by the plaintiffs' and the defendant's advocates respectively. What the plaintiffs have sought in the application before me is a temporary injunction pending the hearing and determination of the suit herein. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent and must also show that he might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages unless the order is granted. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal stated as follows:-

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

From the material before the court, I am satisfied that the plaintiffs have satisfied the conditions for granting the injunction sought. There is no dispute between the parties over the ownership of the suit property which is owned by the plaintiffs and Plot No. 31036 which is owned by the defendant. What is disputed is the location of the two parcels of land. The two parcels of land are subdivisions of Kajiado/Kaputiei-North/24365 (Original Plot). The Original Plot was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). According to the Registered Land Rules made under section 160 of the Registered Land Act, the subdivision of land registered under the Act was supposed to be carried out by submitting to the registrar a Mutation Form (R.L 29) duly completed. During the subdivision of the Original Plot, a Mutation Form was completed and registered on 12th August, 2009.

According to this Mutation Form, the Original Plot was subdivided into eight(8) portions of various sizes which were shown in the sketch plan on the said Mutation Form as A,B,C,D,E,F,G, and H. These portions of the Original Plot were given new numbers as follows, A-Kajiado/Kaputiei-North/ 31030, B-Kajiado/Kaputiei-North/ 31031, C-Kajiado/Kaputiei-North/ 31032, D-Kajiado/Kaputiei-North/ 31033, E-Kajiado/Kaputiei-North/ 31034, F-Kajiado/Kaputiei-North/ 31035, G-Kajiado/Kaputiei-North/ 31036, H-Kajiado/Kaputiei-North/ 31037.

The owner of the Original Plot, Unique Homes and Properties Limited sold to the defendant the portion of the Original Plot known as Kajiado/Kaputiei-North/ 31036(Plot No. 31036). Plot No. 31036 is marked as "G" in the Mutation Form. The same owner of the Original

Plot sold to the plaintiff, the portion of the Original Plot known as Kajiado/Kaputiei-North/ 31035(the suit property). The suit property is marked as “F” in the Mutation Form. According to the sketch plan in the Mutation Form, Plot No. 31036 owned by the defendant is third row from the existing road while the suit property is in the second row from the said road.

It is not disputed that the parcel of land on which the defendant has constructed a building is on the second row from the main road. I am satisfied from the evidence before me that the defendant’s building has been put up on the suit property and not on Plot No. 31036. The defendant has contended that Plot No. 31036 was sold and pointed out to her on “a proposed subdivision map” which placed the said parcel of land on the second row from the existing road. I have looked at the said proposed subdivision map which is annexed as exhibit “JNM1” to the defendant’s replying affidavit sworn on 18th July, 2016. I am in agreement with the defendant that according to the said proposed subdivision map, Plot No. 31036 was on the second row from the road while the suit property was on the third row. The problem however is that this proposed subdivision map is not a mutation form and the same was not used to subdivide the Original Plot. As I have stated earlier, land registered under the Registered Land Act could only be subdivided through a Mutation Form. In this case, there was a Mutation Form duly completed and registered. I am of the considered view that in the event of a conflict between a registered Mutation Form and any other form or document a proprietor of land may have wished to use in subdividing his land, the Mutation Form must prevail. On the material before me, I am of the view that the plaintiffs have established a case of trespass against the defendant with a probability of success. I am also satisfied that the plaintiffs stand to suffer irreparable injury which cannot be compensated by an award of damages unless the injunction sought is granted.

The defendant had raised a preliminary objection to the application herein and the entire suit on the ground that this suit was brought while there was a suit pending between the parties over the same subject matter. I have considered the objection and the response thereto by the plaintiffs. I am not satisfied that the objection is properly taken. Where a suit is filed while there is another suit pending, the court is supposed to be moved to stay the suit pursuant to the provisions of section 6 of the Civil Procedure Act. That in my view is the proper procedure rather than moving the court by way of a preliminary objection and seeking the striking out of the suit. Although it is not disputed that when this suit was filed the defendant had already filed a suit against the plaintiffs’ attorney over the same subject matter, I am reluctant to strike out this suit on that account. There is no evidence that the plaintiffs were aware of the existence of that suit when the present suit was filed. There is a dispute as to when the plaintiffs’ attorney became aware of the earlier suit. The determination of the dispute would require evidence and as such cannot be resolved in a preliminary objection. For the foregoing reasons, I find no merit in the defendant’s preliminary objection.

The upshot of the foregoing is that the Notice of Motion dated 5th July, 2016 is well founded. I have agonized over the appropriate order to make in this matter. As I have found above, the defendant has developed and is in occupation of the suit property. The plaintiff has not sought a mandatory injunction for the eviction of the defendant from the property. The injunction sought is prohibitory in nature. Since the defendant has entered and occupied the suit property, only a mandatory injunction can remove her from the premises. Doing the best I can for the plaintiffs, I hereby make the following orders:

1. Pending the hearing and determination of this suit or further orders by the court, the defendant by herself, her agents, servants or employees is restrained from carrying out any other or further development or construction on, wasting, selling or leasing all that parcel of land known as Kajiado/Kaputiei-North/31035.
2. The cost of the application shall be in the cause.

Dated and Delivered at Nairobi this 5th day of April 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Plaintiffs

No appearance for the Defendant

Catherine Court Assistant