



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CIVIL SUIT NO. 20 OF 2017

JOSEPH KITHUKU KITONGA PLAINTIFF

VERSUS

1. DENA KALUME

2. KADENGE KALUME DEFENDANTS

RULING

1. This is the Notice of Motion dated 31st January, 2017. It is brought under Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules 2010, Article 159 of the Constitution of Kenya, Section 1A, 1B, 3A and 63(c) of the Civil Procedure Act and Section 13A, 3, 16 and 19 of the Government Proceedings Act together with all enabling provisions of the law.

2. It seeks orders;

1) Spent.

2) Spent.

3) Spent.

4) That the Defendants by themselves, their agents, employees, representatives or contractors, servants and/or any other person acting and or claiming through or under them by restrained by an order of temporary injunction from undertaking and or continuing any developments constructions and erecting any structures on Plot Known as LR NO. 1043/III/155 Mazeras Township, and or occupying, remaining in occupation and or undertaking any annexation of the same pending the hearing and final determination of this suit.

5) That pending the hearing and final determination of this suit, this Honourable Court be pleased to issue an order of eviction against the Defendants from Plot Known as LR. NO. 1043/III/155 Mazeras Township and demolition of stalls and such eviction and demolition be supervised by the commanding officer Mariakani Police Station.

6) That pending the hearing and final determination of this suit, the District Land Registrar, Kilifi and District Surveyor, Kilifi be ordered to properly survey Plot Known as LR. NO 1043/III/155 Mazeras Township and in particular to restore the Plaintiffs boundary rights of the said plot and title to the property.

7) That costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1-11. I do not need to reproduce them here.

4. The application is supported by the affidavit of Joseph Kithuku Muki Kitonga, the Plaintiff/Applicant herein sworn on the 31st January, 2017.

5. The application is opposed. There is a replying affidavit sworn by Dena Kalume, the 1st Defendant/Respondent on the 18th May, 2017.

6. On 27th November, 2017, it was agreed between the parties that the application be disposed by way of written submissions.

7. THE PLAINTIFF/APPLICANTS SUBMISSIONS.

That the Plaintiff/Applicant is the proprietor of suit property having purchased the same from Gideon Mea Karisa. That the Defendants who own a neighbouring plot 1043/III/156 started constructing on his plot.

The Plaintiff/Applicant has established a prima facie case with a probability of success at the trial as he is the proprietor of the suit property.

8. That he has demonstrated that he is likely to suffer injury or loss if these orders are not granted as the defendants have continued to encroach on his plot.

9. The balance of convenience tilts in favour of the Plaintiff/Applicant who has been denied access and the use of his property. they have put forward the case of *Nelson Omolo Achola –versus- George Omondi Ajwala (2013) eKLR* which quoted the case of *Shepherd Homes Limited –versus- Sandahm (1971) 1 CH 34.*

10. The survey report confirms that the construction is being undertaken by the Defendant on the Plaintiff's plot. They have also put up the case of *P. J. Products Limited & Another –versus- Zadok Furniture Systems Limited & Another (2013) eKLR.* They pray that the application be allowed.

11. THE DEFENDANTS'/RESPONDENTS' SUBMISSIONS.

The Plaintiff/Applicant has not satisfied the requirements for the grant of the orders as held in the case of *Giella –versus- Cassman Brown And Company Limited (1973) EA 358.*

The Plaintiff/Applicant has not shown any title document to confirm that he is the proprietor of the suit property.

12. That the survey report dated 16th November, 2017 and filed in court on 24th November, 2017 cannot be relied on as it is premised on unsubstantiated allegations of ownership of the suit plot by the Plaintiff. The Plaintiff/Applicant has failed to demonstrate that he will suffer irreparable loss that cannot be compensated by way of damages if the orders are not granted.

13. The balance of convenience does not tilt in favour of the Plaintiff/Applicant having failed to establish his proprietorship. That orders of eviction cannot be granted at this stage of the proceedings. There are no special circumstances prevailing to warrant the grant of these orders. They have relied on the case of *Ponangipalli Venkata Ramana Rao & Another –versus- Mandev Limited & Another (2007) eKLR.* They urge that the Plaintiffs'/Applicants' application be dismissed with costs.

14. I have considered the pleadings, the Notice of Motion dated 31st January, 2017, the affidavit in support and the annexures. I have considered the Replying affidavit and the annexures. I have considered the written submissions of counsels and the authorities cited. The issues for determination are;

i) Whether the Plaintiffs'/Applicants' application meets the threshold for grant of temporary injunctions.

ii) What orders should the court make?

iii) Who should bear costs?

15. At this juncture, it is necessary for the court to briefly examine the legal principles governing the applications of this nature. In an application for Interlocutory injunction the onus is on the Applicant to satisfy the court that it should grant an injunction. An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles. The conditions for grant of temporary injunctions were set out in the celebrated case of *Giella –versus- Cassman Brown And Company Limited (1973) EA 358.*

16. In the case of *Mrao Limited –versus- First American Bank of Kenya Limited And 2 Others (2003) KR 125* the Court of Appeal in determining what amounts to a prima facie stated;

“A prima facie case in a civil application includes but not confined to a “genuine and arguable” case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

I am guided by the above authorities.

17. The plaintiff/Applicant stated that he is the proprietor of the suit property having purchased it from one Gideon Mea Karisa. In paragraph 10 of the replying affidavit of Dena Kalume, the Defendants/Respondents state that they have no claim on Plot NO. 155 and that they have not encroached on Plot No. 155.

18. On the 20th September, 2017 by consent of both counsels the court ordered that a joint survey be undertaken on the two Plots by the Kilifi County Surveyor. The same was done on 16th November, 2017 and a report filed in court on 24th November, 2017.

The Defendants/Respondents in their submissions have urged the court not to rely on the report. I find this rather curious. Could it be because the report favours the Plaintiff/Applicant? I find that the Defendants/Respondents have shown no justifiable cause why the court cannot rely

on this survey report.

It is the surveyors report that Plot No. LR No. 1043/III/155 measuring approximately 0.67 hectares exists. That part of the Plot cannot be accessed because there is an existing structure blocking the whole frontage of the plot. There is no other survey report challenging this one. I find that the Plaintiff/Applicant has established a prima facie case with a probability of success at the trial.

19. I am persuaded by the facts presented by the Plaintiff/Applicant that he deserves the orders sought. In the case of *Kenleb Cons Limited – versus- New Gatitu Service Station & Another (1990) KLR 557* it was held by Bosire J. (as he then was) that;

“to succeed in an application for injunction an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”

I find that the Plaintiff/Applicant herein deserves this kind of protection.

20. I also find that the Plaintiff/Applicant has demonstrated that he will suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted. There is a structure blocking part of his plot. He will not be able to develop his plot if this structure is allowed to remain. The Defendants/Respondents have stated that they have no claim on Plot LR No. 1043/III/155.

21. In the case of *Lucy Wangui Gachara –versus- Minudi Okombe Lore, Malindi Civil Appeal No. 4 of 2015* the Court of Appeal referred to the case of *Shepherd Homes Ltd –versus- Sandahm (1971) 1CH 34*, where Meggary J. stated;

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will of course grant such injunctions as the justice of the case requires, but at the interlocutory stage when the final result of the case cannot be known and the court has to do the best it can. I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation on motion as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction, than it would be to grant a comparable prohibitory injunction. In a normal case, the court must, inter alia, feel a high decree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

I am satisfied that the Plaintiff/Applicant herein has a clear and strong case to warrant the grant of orders of mandatory injunction.

The surveyor report confirms that construction is being undertaken by the Defendants on the Plaintiff’s plot and it has blocked access to his plot.

22. The balance of convenience tilts in favour of the Plaintiff/Applicant who stands to lose if the structure is allowed to remain.

23. All in all I find merit in this application and I grant the orders sought namely;

a) That an order of temporary injunction be and is hereby issued restraining the Defendants by themselves, their agents, employees, representatives or contractors, servants and/or any other person acting and or claiming through or under them from undertaking and or continuing any developments, constructions and erecting any structures on Plot Known as LR. NO. 1043/III/155 Marezas Township and occupying, remaining in occupation and/or undertaking any annexation of the same pending the hearing and final determination of this suit.

b) An order of eviction be and is hereby issued against the Defendants from Plot Known as L.R. NO. 1043/III/155 Mazaras Township and demolition of stalls AND such eviction be supervised by the OCs Mariakani Police Station.

c) That costs of this application do abide the outcome of the main suit.

It is so ordered.

DATED and SIGNED at MOMBASA on the 26th day of June 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at MOMBASA on the 26th day of June 2018.

A. OMOLLO

JUDGE