



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 643 OF 2017

JACQUELINE AKOTH OKUMU.....PLAINTIFF

VERSUS

JAMES MARURI MBOCHI.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 20th April, 2017 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1, 2, 3, 4 & 9 and Order 51 of the Civil Procedure Rules and all the other enabling provisions of the law. The Plaintiff seeks injunctive orders against the Defendant in respect of land parcel number KAJIADO/ KITENGELA/ 15894 hereinafter referred to as the 'suit land'. It is premised on the following grounds, which in summary is that the Defendant has unlawfully entered on the suit land and commenced construction of illegal structures as well as destroying the structures thereon. The Defendant has ignored notices issued by the Plaintiff including the Plaintiff's advocate on record demanding he ceases to trespass, demolish any structures and stop interfering with the Plaintiff's quiet enjoyment of the suit land. By reason of the Defendant's action, the suit property has been wasted and/or will be wasted and the Plaintiff stands deprived of the use including enjoyment of the said property. The Plaintiff is apprehensive that the Defendant unless prevented by the Honourable Court, intends to permanently invade and remain on the suit land without any authority or consent from her.

The application is supported by the affidavit of JACQUELINE AKOTH OKUMU the Plaintiff herein where she avers that she is the registered proprietor of the suit land, which she purchased from Railway Housing Cooperative Society Limited around 2008/9 , and has been enjoying quiet possession. She deposes that as the registered owner, she is entitled to enjoy all the rights and privileges belonging or appurtenant thereto including but not limited to the right to possession as well as quiet enjoyment thereof without hindrance or restriction. She confirms visiting the suit land from time to time as she made plans to construct thereon, and she also undertook searches to confirm ownership, with the latest search being undertaken in January, 2016. She claims in late 2016 her sister including brother in law had visited the suit land and noted interference thereon. Further, upon her visitation to the suit land in 2017, she found that a stranger had unlawfully entered into the suit land without her authority or consent and built a concrete structure thereon. She contends that she contacted the Railway Housing Cooperative Society Limited who reassured her that the suit land belonged to her as per their records but on contacting the Defendant, he informed her the suit land belonged to him and had sold it to his daughter who was undertaking the construction thereon. She insists she has been occupying and been in ownership of the suit property openly, exclusively and without any interruption from the year 2008/9 and during the said period, the Defendant nor his personal representatives as well as assigns never took any step to assert ownership nor interfere with her ownership including possession of the suit land. She further claims that she has made several attempts to keep away the Defendant as well as his agents to stop construction on the suit land but they persist in doing so. She is apprehensive the Defendant intends to continue trespassing on the suit land unless evicted. She reiterates that she has a good case against the Defendant for trespass, which has high chances of success with the balance of convenience tilting in her favour.

The application is opposed by the DEFENDANT JAMES MARURI MBOCHI who filed a replying affidavit where he deposes that he is the proprietor of land parcel number KAJIADO/ KITENGELA/ 15893 and KAJIADO/ KITENGELA/ 15894 respectively that are adjacent to each other. He avers that he is a member of the Coffee Workers Cooperative Savings & Credit Society Ltd as well as an employee of KPCU. He confirms that he was allocated land parcel number KAJIADO/ KITENGELA/ 15894 (suit land) by the Coffee Workers Cooperative Savings & Credit in 2001 that subsequently processed his title at the Kajiado Lands Registrar's office and the same was handed over to him in 2003. He insists he has been enjoying quiet and peaceful possession of the suit land which is situated in Tuala area but because of financial constraints five years ago, he sold the same to his daughter Florine Mugure Maruri. He explains that the said daughter commenced construction on the suit land, which remains in progress to date and she has spent a lot of money. He reiterates that the Plaintiff purchased the suit land after he had been allocated the same and issued with a title deed and no one has ever claimed its ownership. He contends that if the Plaintiff indeed bought the suit land in the year 2002, then she should have inquired and carried out due diligence with the SACCO before buying it. He states that the claim by the Plaintiff over ownership of the suit land is driven with malice, fraud and is in bad faith as he wonders why she claims that he trespassed on the suit land, yet it was allocated to him and has been in occupation to date. He confirms that he came to know about the claim by the Plaintiff when he was served with the instant application and it is trite law that where there are two equitable interests of the same property, the first in time prevails. He reaffirms that he is the rightful owner of the suit land and is a total stranger to the Plaintiff's claim.

Both parties filed their respective submissions.

In her submission, the Plaintiff reiterated her claim of ownership over the suit land and insisted it is the Defendant who had trespassed thereon. She relied on various judicial authorities including **Evelyne College of Design Limited Vs Director of Children's Department & the AG, HC Nairobi Petition No. 228 of 2013**; **Sergio Lieman Vs Tonica Investments Limited & National Museums of Kenya Mombasa HCCC No. 4 of 2007**; **Multiple Hauliers East Africa Limited Vs AG & 11 others Nairobi HC Petition No. 88 of 2010** as well as **Giella vs Cassman Brown & Co Ltd (1973) EA 358** to support her claim. The Defendant opposed the application and insisted he was the rightful owner of the suit land and to grant the Plaintiff an injunction would amount to eviction. Further, that the Plaintiff has not been in occupation of the disputed parcel and that his daughter halted constructions thereon when she learnt of the ownership dispute. He relied on the case of **Giella vs Cassman Brown & Co Ltd (1973) EA 358** to support his arguments.

I have considered the respective arguments in the parties' submissions.

Analysis and Determination

Upon perusal of the application dated the 20th April, 2017 together with the supporting as well as replying affidavits, including the parties' submissions, at this juncture the only issue for determination is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

The fulcrum of the suit revolves around ownership and trespass over the suit land. I note both the Plaintiff and the Defendant each have their respective title deeds in respect of the suit land. The Plaintiff's title deed is dated the 12th January, 2010 while the Defendant's title deed is dated the 22nd October, 2003, which they were both issued with by the Kajiado Land Registry. However as per the search done in January, 2016, it is the Plaintiff who is indicated as the proprietor of the suit land.

It is not disputed that the Defendant's daughter has commenced construction on the suit land and is in occupation, although the Defendant confirms that since learning of the dispute herein, she has stopped construction. The Plaintiff seeks the Court intervention to stop the Defendant from constructing on her land while the Defendant insists the suit land is his.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, the Court will proceed to interrogate whether the applicant has established a prima facie case with a probability of success at the trial. It is the Plaintiff/Applicant's contention that she is the proprietor of the suit land and the Defendant has trespassed thereon and commenced construction. The Defendant stated that he was allocated the suit land by the **Coffee Workers Cooperative Savings & Credit** in 2001 that subsequently processed his title at the Kajiado Lands Registrar's office and the same was handed over to him in 2003.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. In annexure 'JMM 2' in the Defendant's replying affidavit, which is a letter dated the 17th May, 2017 from **the Coffee Workers Cooperative Savings & Credit Society Ltd**, they confirm selling to the Defendant the suit land, and indicate that the Plaintiff had also been sold the same by Railway Sacco, which they had contracted to sell some plots on their behalf. They blame the Land Registrar Kajiado who issued the title deed to the Defendant but failed to record it in the Green Card and later issued a title deed to the Plaintiff over the same plot. They intimate in paragraph three (3) of the said letter as follows: **'As a practice at the Kajiado Lands office, Ms Okumu's title which was issued in the year 2010, seven years after Mr. Mbochi's was issued, should be deregistered and Mr. Mbochi registered then Ms. Okumu can be allocated a new plot by the Railways Sacco where she made payment of the plot in question. Also the Railway did not confirm before it sold the same to Ms. Okumu. Also, we have a mutual agreement that in the event of a double allocation like Mr. Mbochi and Ms. Okumu both Coffee Sacco and Railways Sacco find a way of compensating either of the two and in this case, Ms. Okumu will be given a new allocation.'**

I note the issue of the allocation of the suit land to both the Plaintiff and the Defendant was already being dealt with by the respective Coffee and Railway saccos but the Plaintiff still moved to Court seeking injunctive orders. Insofar as I find that the Plaintiff has established a prima facie case as she has a valid title over the suit land, I note the Defendant too holds a title deed to the land, which was issued earlier. Further, based on the averment from the Coffee Sacco, it is clear they noted the mistake and were already dealing with the issue of double allocation. I hence find that the issue of ownership of the suit land cannot be determined at this interlocutory stage but only once oral evidence is adduced.

On the second principle as to whether the Applicant will suffer irreparable loss, which cannot be compensated by way of damages. Both the Plaintiff and Defendant claim ownership of the suit land, with each of them having a title deed, and Defendant already constructing thereon. 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.'**

In relying on the above cited judicial authority and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative but she indeed can be compensated by way of damages as already the two saccos have acknowledged the mistake of double allocation and have an established remedy to that effect.

On the question of balance of convenience, from the evidence presented by the parties, I find that if the substratum of the suit is not preserved pending the outcome of the case herein, it may be wasted away.

From the foregoing, insofar as I find that Plaintiff's Notice of Motion dated 20th April, 2017 is merited, I will not grant the orders as sought,

but proceed to make the following order:

- An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/KITENGELA/ 15894 measuring 0.03 hectares of any dealings, lease or charge pending the hearing and determination of the suit.
- The obtaining status quo be maintained pending the hearing and determination of the suit.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 25th day of June, 2018.

CHRISTINE OCHIENG

JUDGE