



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 36 OF 2016

JOHN NJERU MURATHO.....PLAINTIFF

VERSUS

DANIEL MURIITHI MWITA.....DEFENDANT

RULING

1. By a notice of motion dated 23rd May 2016 filed under certificate of urgency under the provisions of **section 63 (c), 1A and 3A of the Civil Procedure Act (Cap 21); Order 40 Rules 2, 3 and 4 of the Civil Procedure Rules; section 13 of the Environment and Land Court Act 2011; and all enabling provisions of the law**, the Plaintiff sought the following orders;

a. That this application be certified urgent and service be dispensed with in the 1st instance.

b. That pending the hearing and determination of this application a temporary injunction do issue restraining the Defendant from trespassing, accessing or in any other way whatsoever interfering with the Plaintiff's user over land reference No. Kagaari/Kanja/9707.

c. That pending the hearing and determination of this suit, this honourable court be pleased to issue an injunction restraining the Defendant from trespassing, accessing or in any other way whatsoever interfering with the Plaintiff's user over land reference No. Kagaari/Kanja/9707.

d. That the Defendant be condemned to pay the costs of this application and of the suit generally.

2. The said application was based upon the several grounds on the face of the motion which stated, *inter alia*, that the Defendant had trespassed upon the Plaintiff's *Title No. Kagaari/Kanja/9707* (hereinafter described as the suit property) and cut down and destroyed crops thereon.

3. The said application was supported by an affidavit sworn by the Plaintiff on 23rd May 2016. It was stated that the Plaintiff was the registered proprietor of the suit property and that the Defendant had unlawfully entered thereon and destroyed some crops. It was further stated that the Defendant had demolished the Plaintiff's semi-permanent house on the suit property. It was further disclosed that the Plaintiff had bought the suit property from the Defendant. The Plaintiff also filed a further affidavit sworn on 13th September 2017 in support of his application.

4. The Defendant filed a replying affidavit sworn on 22nd September 2016 in opposition to the Plaintiff's said application. The Defendant stated that he entered into two (2) sale agreements for the sale of part of his land *Title No. Kagaari/Kanja 8114* (hereinafter described as parcel No. 8114) between 2012 and 2014. It was his case that the sale did not materialize because the Plaintiff defaulted in payment of the full purchase price.

5. The Defendant further stated that he never applied for consent of the Land Control Board to subdivide or transfer any part of his parcel No. 8114. He denied having instructed any surveyor to sub-divide his land or having signed any mutations or transfer forms with respect thereto. He, therefore, contended that the Plaintiff had fraudulently sub-divided his parcel No 8114 in order to create the suit property.

6. It was the Defendant's case that no surveyor had ever visited his land to fix any beacons and that he did not know where the suit property was located within his land. He invited the court to visit the site. He also denied that the Plaintiff had ever taken possession of any part of parcel No. 8114. He was of the view that the Plaintiff had filed the instant application in order to use it as a means of gaining possession to enable the Plaintiff undertake actual sub-division and place beacons on the ground.

7. The Defendant further averred that at all material times he and his family have been in occupation of parcel No. 8114 which he had extensively developed. He had a matrimonial home thereon, coffee stems, tea bushes and other crops. He contended that restraining him

from accessing or using his own land would cause him great prejudice and hardship since he had no other home.

8. It would appear from the record that the parties herein had appeared before the Deputy Registrar and agreed to dispose of the Plaintiff's said application through written submissions sometime in 2017. The Plaintiff filed his written submissions on 2nd October 2017 whereas the Defendant filed his submissions on 27th November 2017.

9. The court has considered the Plaintiff's said application, the Defendant's response thereto and the respective submissions of the parties herein. The main issue for consideration is whether or not the Plaintiff has satisfied the requirements for the grant of an injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**.

10. The court has considered the material evidence on record. The existence of the two sale agreements between the parties dated 2012 and 2014 respectively is not denied. What is disputed is whether there was completion. The Plaintiff contended that there was completion but the Defendant contended that the Defendant defaulted in payment of the full purchase price hence there was no completion. The Defendant contended that he did not sign any transfer forms and that the signature on the mutation forms for sub-division of parcel No. 8114 was a forgery.

11. The court shall not make any interim findings on the fate of the two sale agreements since that may prejudice the fair trial of the suit. It will be the function of the trial court to make a determination thereon.

12. The Defendant also denied ever seeking or obtaining the consent of the Land Control Board for the sub-division of parcel No. 8114. The court has examined the material on record on the issue of the Land Control Board consent. The Plaintiff appears to have followed a very unusual procedure in obtaining an exemption from the Magistrate's Court. He filed a civil suit No. 16 of 2015 at Runyenjes Law Courts whereby the presence of the Defendant before the Land Control Board was dispensed with.

13. The court has also considered the Plaintiff's claim that his semi-permanent house was demolished by the Defendant. The court has examined the photographs exhibited by the Plaintiff as "SN 2" in his supporting affidavit sworn on 23rd June 2016. The said photographs do not display the existence of any semi-permanent house. What they show are remains of a temporary iron-sheet structure. It is also apparent from the poles appearing in the photographs that the structure was newly constructed. It does not appear to have been habited since its floor had some green grass and shrubs growing thereon. They could be a reflection of a party who was hurriedly trying to take possession or occupy the land. In my opinion, there is no evidence of the Plaintiff having occupied or developed any part of the suit property or parcel No 8114.

14. The court believes that the Defendant has been in occupation of parcel No. 8114 even though it may be unclear at this stage how much thereof he has occupied and developed. It may cause great hardship to restrain the Defendant from accessing any part of parcel No. 8114 when the boundaries between parcel No. 8114 and the suit property are contested.

15. The court is, therefore, not satisfied that the Plaintiff has demonstrated *a prima facie* case with a probability of success at the trial. The Plaintiff, will however, have his day in court at a later stage to prove his case while the Defendant shall, too, have his day to urge his defence.

16. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 21st May 2016 and the same is hereby dismissed with costs to the Defendant.

17. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21ST** day of **JUNE, 2018**.

In the presence of Mr Momanyi holding brief for Mr Mugendi for the Plaintiff and Mrs Njuguna for the Defendant.

Court clerk Mr Muinde

Y.M. ANGIMA

JUDGE

21.06.18