



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 222 OF 2017

LENNY MWAKIMA.....PLAINTIFF

VERSUS

1. HUSSEIN ABDALLA KAI

2. FATHIYA ABDALLA ALI.....DEFENDANTS

RULING

1. This is the Notice of Motion dated 20th June, 2017. It is brought under Order 51, Order 40 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders;

1) Spent.

2) Spent.

3) That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining the Defendants/Respondents by themselves, their servants and/or agents from selling, alienating, fencing, constructing, taking possession or otherwise interfering with the Plaintiff's quiet enjoyment of the suit property known as Plot No. 372 Vikwatani Estate.

4) That the costs of this application be provided for.

3. The grounds are on the face of the application and are;

1) That the Plaintiff/Applicant is the legal owner of the property in question.

2) That the 2nd Defendant/Respondent has illegally moved into the suit property and started erecting structures without any justifiable cause or excuse.

3) That the 1st Defendant/Respondent not having ownership to the said parcel of land, purportedly sold the said parcel with full knowledge of the Plaintiff/Applicant's ownership to the said parcel of land.

4) That no prejudice will be occasioned by the granting of the orders.

4. The application is supported by the affidavit of Lenny Mwakima, the Plaintiff/Applicant herein sworn on the 20th June, 2017.

5. The application is opposed. There is a replying affidavit sworn by Hussein Abdalla Kai, the 1st Defendant/Respondent sworn on the 26th September, 2017. There is also a notice of preliminary objection dated 26th September, 2017.

6. On the 26th September, 2017 it was agreed between the parties that the application be disposed of by way of written submissions.

7. THE PLAINTIFF'S/APPLICANTS SUBMISSIONS.

It is the Plaintiff's case that he acquired the suit property from Christopher Mwachie Mbogo for valuable consideration. That he started paying rates to the development group known as Concorda Development Group.

That he legitimately purchased the said plot from the previous owner. They have relied on the case of *Giella –versus- Cassman Brown and Company Limited (1973) EA 358, Mrao Limited –versus- First American Bank of Kenya Limited and 2 Others (2003) KLR 125.*

8. The Plaintiff/Applicant will suffer if these orders are not granted as the Defendants/Respondents are in the process of putting up structures on the suit property. He prays that the application be allowed.

9. THE DEFENDANTS/RESPONDENTS SUBMISSIONS.

The application has failed to disclose any cause of action as the Plaintiff/Applicant has not shown any ownership in evidence of acquisition of the plot.

The 1st Defendant/Respondent is the registered owner of the suit property and has been in actual possession since the year 1998.

They have put forward the case of *Giella –versus- Cassman Brown and Company Limited (1973) EA 358, Kenya Commercial Finance Co. Limited –versus- Afraha Education Society 2001 IEA 86.*

10. The Plaintiff/Applicant is not entitled to the orders of injunction. They have put forward the case of *Mrao Limited –versus- First American Bank of Kenya Limited and 2 Others (2003) KLR 125, Bharat Petroleum Cooperation Limited –versus- Harochand Sachdeva, AIR 2003.*

The Plaintiff/Applicant has not established a prima facie case since he has no proof of ownership. The Plot did not belong to Christopher Mwachie Mbogo but to one Mzee Njue who sold it to the 1st Defendant. They pray that the application be dismissed with costs.

11. I have considered the pleadings, the Notice of Motion and the annexures. I have considered the replying affidavit and the annexures. I have considered the written submissions and the authorities cited.

The issues for determination are;

- i. Whether or not the Plaintiff/Applicant's application meets the threshold for grant of temporary injunctions.**
- ii. What orders should the court make?**
- iii. Who should bear costs?**

12. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an 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.

13. 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.*

14. In the case of *Mrao Limited –versus- First American Bank of Kenya Limited and 2 Others (2003) KLR 125* the Court of Appeal determined what amounts to a prima facie case. I am guided by the above authorities.

15. The Plaintiff/Applicant claims to have acquired the suit property from one Christopher Mwachie Mbogo. He has however annexed no sale agreement to his affidavit. He has failed to prove that he owns the suit property.

I find that he has failed to establish a prima facie case with a probability of success.

16. I am not 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 Limited And Another (1990) KLR 557*, Bosire J(as he then was) held 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.”

The Plaintiff/Applicant herein does not deserve this kind of protection. I also find that the Plaintiff/Applicant has failed to demonstrate that he will suffer irreparable injury or loss that cannot be compensated by an award of damages if these orders are not granted.

In the case of *Paul Gitonga Wanjau –versus- Gathuti Tea Factory Co. Limited and 2 Others (2016) eKLR*, Mativo J. held;

“The court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on one hand would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the Applicant.”

I am of view that in the present case, the Plaintiff/Applicant has failed to discharge this burden to the required standard.

All in all, I find that the application herein lacks merit and the same is dismissed. The costs of the application do abide the outcome of the main suit.

It is so ordered.

DATED and SIGNED at MOMBASA on the 20th day of June 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at MOMBASA on the 20th day of June 2018.

A. OMOLLO

JUDGE