



REPUBLIC OF KENYA

IN THE ENVIRONMENT AT LAND COURT

AT KAJIADO

ELC CASE NO. 940 OF 2017

GEORGE NGURE KARIUKI.....PLAINTIFF

VERSUS

KIPAILONOI OLE NKUYAA ORUMA.....DEFENDANT

RULING

The application before Court for determination is dated the 27th November, 2017 brought pursuant to Order 40 rules 1, 2, & 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all the other enabling provisions of the law. The Plaintiff seeks temporary and mandatory injunction against the Defendant in respect of land parcel number KAJIADO/ KIPETO/ 1743 hereinafter referred to as the 'suit land', pending the outcome of the suit. It is premised on the following grounds, which in summary is that the Plaintiff is the registered owner of the suit land that measures approximately 50 acres and the Defendant has severally interfered with his quiet possession and enjoyment of the same by physically stopping his employees from accessing it. The Defendant has trespassed/ encroached on the Plaintiff's parcel of land, unlawfully pulled down the houses he constructed for the employees and erected illegal structures thereon without any colour of right. The Defendant's illegal as well as unlawful action of encroaching on and construction of illegal structures is occasioning the Plaintiff irreparable loss and damage. It is in the interest of justice that the Defendant be restrained by way of injunction from trespassing on the Plaintiff's parcel of land. Further that the Defendant be compelled by way of mandatory injunction to pull down illegal structures erected on the Plaintiff's land.

The application is supported by the affidavit of GEORGE NGURE KARIUKI the Plaintiff herein where he confirms that he took possession of the suit land when he was issued with a title deed and commenced planting hay for sale on it. He contends that the Defendant trespassed on the suit land in September, 2017 without his consent.

The application is opposed by the Defendant KIPAILONOI NKUYAA ORUMA who filed a replying affidavit where he deposed that the Plaintiff's affidavit is full of falsehood and perjury. He contends that if the Plaintiff is the owner of the suit land and that if he has a title to it, then he obtained it fraudulently. He denies transferring any portion of his land to the Plaintiff. He insists the Plaintiff has never been in possession of the suit land and denies ever bringing down houses constructed thereon. He claims the Plaintiff is trying to use the court to advance fraud and illegality to dispose off his land. He states that the Plaintiff should produce all necessary documents in respect of the suit land and that the Court should decline to grant the orders as sought.

Both the Plaintiff and the Defendant filed their respective written submissions that I have considered.

Analysis and determination

Upon perusal of the Notice of Motion dated the 27th November, 2017 together with the supporting and replying affidavits including the parties' submissions, the only issues for determination at this juncture, are whether the interim and mandatory injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

Both the Plaintiff and the Defendant are staking claim over the suit land. The Plaintiff insists he is the registered proprietor of the suit land and has been issued with a title deed. The Defendant on the other hand contends that if indeed the Plaintiff has a title deed to the suit land, he obtained it by fraud and should present all the relevant documents in respect of the suit land. He denies trespassing on the suit land and demolishing structures thereon. The fulcrum of this suit revolves around two parties staking a claim to one parcel of land, with one party already in possession.

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 made out a prima facie case with a probability of

success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff has a title deed to the suit land, which title is being challenged by the Defendant who is in actual possession of the said land. The Plaintiff has submitted that he is entitled to protection as enshrined in section 24(b) of the Land Registration Act. He relied on the case of **Ahmed Ibrahim Suleiman & Anor Vs Noor Khamis Surur (2013) eKLR** to support his argument. The Defendant relied on the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** to oppose the application.

Looking at the documents presented by the Plaintiff, it is clear that his claim over the suit land is not baseless. Although several issues are curious about how the Plaintiff and the Defendant both stake a claim over the suit land with the Defendant insisting the Plaintiff obtained his title through fraud. The Plaintiff however does not explain how he acquired the land and who sold it to him. I find that, these are issues best heard and determined at a full trial.

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 and it is not in dispute that the Defendant is in actual occupation therein. There are also allegations of fraud by the Defendant who insists he never sold the land to the Plaintiff. In the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held as follows '**that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit**'. In the instant case I find that it would be pertinent if both the Plaintiff and the Defendant are granted an opportunity to be heard to enable the court make a determination over the ownership of the suit land..

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the suit property is not preserved, it may be wasted away.

On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, '**a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

The mandatory injunction sought by the Plaintiff seeking to pull down structures illegally erected on the suit land by the Defendant can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. Even though both the Plaintiff and Defendant are both staking a claim to the suit land, I note that the Defendant alleges that if indeed the Plaintiff has title to the suit land, he obtained it fraudulently. It is trite law that where fraud is alleged, it is pertinent that viva voce evidence ought to be adduced to enable the Court arrive at a proper determination of the dispute at hand. The Court has taken judicial notice that the Defendant also resides on the suit land and that from the averments in the replying affidavit and other pleadings filed herein, which were not controverted by the plaintiffs, there seems to be a history between the two parties. It is in these circumstances and in relying on the above cited judicial authority that I decline to grant the mandatory injunction sought for the removal of structures, pending the determination of the suit.

Since both the Plaintiff and the Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the Defendant in occupation thereon, I will decline to grant the orders as sought but will proceed to make the following order:

1. An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/KIPETO/1743 measuring approximately 50 acres, of any dealings, lease or charge pending the hearing and determination of the suit.
2. Prevailing Status Quo be maintained pending the outcome of the Suit.
3. The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 18th day of June, 2018.

CHRISTINE OCHIENG

JUDGE