



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 356 OF 2017

LUDCO LIMITED.....PLAINTIFF

-VS-

SULEIMAN OMAR MWAROGO & 4 OTHERS.....DEFENDANTS

RULING

1. The Application under consideration is the amended Notice of Motion dated 8th November 2017 in which the Plaintiff/Applicant is seeking the following orders:

1. Spent

2. Spent

3. That pending the hearing and determination of the main suit, the Defendants be restrained whether by themselves, their servants or agents or otherwise howsoever from sub-dividing, fencing or carrying out any illegal subdivisions, demarcation or carrying out further acts of construction with the sole aim of further alienating of the Suit Property and disposition of the Suit Property to third parties on the parcel of land comprised in the suit property.

4. An order by way of mandatory injunction that the Defendants do demolish and/or pull down to ground level the illegal structures standing on the suit land and thereafter vacate with immediate effect the property known as SUBDIVISION NUMBER CR. 1046/9 BEING PLOTS NUMBERS 14297 TO 14327 OF SECTION II MAINLAND NORTH, being title number CR 65095 to TITLE NUMBER CR 65125 with the supervision of an authorized police officer from Bamburi Police Station.

5. That costs of this Application be provided for.

2. The Application is premised on the grounds in the face of the motion, namely that;

i. The Plaintiff is the registered absolute proprietor of the parcel of land comprised in the SUBDIVISION NUMBER 1046/9 BEING PLOTS NUMBERS 14297 TO 14327 OF SECTION II MAINLAND NORTH BEING TITLE NUMBER CR 65095 to TITLE NUMBER CR 65125 and delineated on Land Survey Plan NUMBERS 379081 TO 379111.

ii. Without any lawful justification or explanation and without consent or otherwise obtaining consent of the Plaintiff as the registered owner of the Suit Property, the Defendants have purported to make illegal sub-divisions aimed at further alienation of the Suit Property.

iii. The Defendants by *inter alia* erecting the concrete poles, constructing structures and alienating the suit property have demonstrated an intention of sub-dividing and disposing the suit property to third parties.

iv. If the Defendant succeed in sub-dividing the Suit Property and/or disposing the same to third parties , it will complicate the recovery process in this suit and result in multiplicity of suits thereby exposing the Plaintiff to a protracted and expensive legal tussle.

v. Unless this Honourable Court grants the restraining orders sought, the Defendants will continue to erect pole/fences alienating and/or otherwise further developing the suit property thereby exposing the Plaintiff to irreparable loss and damage.

vi. **The Plaintiff has a *prima facie* case with a probability of success as against the Defendants.**

vii. **The overriding objective contained in section 1A and 1B of the Civil Procedure Act, 2010 will be furthered if the orders sought are granted.**

viii. **It is just and equitable in the circumstances of the case that the orders sought herein are granted.**

3. The Application is supported by the Affidavit and Supplementary Affidavit of David Muema, the Managing Director of the Plaintiff Company sworn on 4th October 2017 and 18th December 2017 respectively in which he reiterates the grounds in support of the motion. In addition, he depones that the Defendants their agents and/or servants have on several occasions threatened the Plaintiff's representatives with violence whenever they attempted to set foot upon the Suit Property to undertake ground work with the aim of developing the Suit Property prompting one of the said representatives to report the matter at Bamburi Police Station. He has annexed photographs taken from the Suit Property which shows the encroachment is in the initial stages and avers that if the court does not intervene, then the said encroachment will escalate to unimaginable levels to the Plaintiff's detriment.

4. The Application is opposed by the Defendants who filed a replying Affidavit dated 20th November 2017 sworn by Suleiman Omar Mwarongo (aka Chibwada). The Defendants deny that they have been sub-dividing, demarcating, fencing, erecting concrete poles and/or carrying acts of construction on the suit property. They aver that they have been enjoying continuous occupation without interruption until 18th November 2017 when their houses were demolished by the Plaintiff and about 40 police officers who told them they had a Court order but which was not shown to them. The Defendants are seeking that the *status quo* on the ground be maintained pending hearing and determination of the Main Suit and that no further demolition should take place without a valid Court Order. The Defendants contend that having occupied the parcel of land for several years, they have a right to file suits for adverse possession and claim ownership against the owner, and that the owner cannot just claim that he is the registered owner yet they have been in possession.

5. The Plaintiff however denies that the Defendants' houses were demolished and maintain that the Defendants together with other squatters invaded the Suit Property on 8th November 2017 and therein committed acts of destruction, including the destruction of the Plaintiff's 3 bedroom house and that the Defendants together with others were apprehended and charged. The Plaintiff has exhibited some copies of charge sheets.

6. The Advocates for the parties agreed to dispose of the Application by way of Written Submissions but only the Advocates for the Plaintiff filed their submissions. The Advocate for the Defendants relied entirely on the Replying Affidavit on record. Relying on the following authorities, **Mahe Unissa Karim –v- Edward Oluch Odumbe (2015) eKLR**; **Locabail Enterprises Finance Ltd –v- Agro Exports and Another (1986) AL ER 901** and **Robai Kadili Aguta and Another –v- Kenya Power & Lighting Company Ltd.(2015) eKLR**; the Plaintiff's Counsel submitted that the Plaintiff had proved special circumstances to warrant the issuance of a Mandatory Injunction as the Defendants have trespassed onto the Suit Property without any justification and have been sub –dividing, demarcating, occupying and carrying out further acts of construction with the aim of alienating and disposing the same to third parties. That the Plaintiff has an undisputed and irrefutable title over the Suit Property and are therefore the lawful owners and has a strong *prima facie* case with a probability of success against the Defendants. It was further submitted that unless the Defendants are restrained by the Court, they will continue to erect poles/fences and develop the Suit Property and dispose of the same to third parties as a result of which the Plaintiff will suffer irreparable harm which cannot be compensated by way of damages.

7. I have considered the Application, the affidavits in support and against and the submissions made as well as the authorities cited. The principles upon which an Interlocutory Injunction may be granted are well settled. One has to establish a *prima facie* case with a probability of success and an Interlocutory Injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the Court will decide the matter on a balance of convenience.

See **Giella –v- Cassman Brown & Co Ltd (1973) EA 358**.

8. It is not in dispute that the Plaintiff is the registered proprietor of the Suit Property. It is the Plaintiff's contention that the Defendants have invaded the Suit Property and claimed ownership and purported to erect poles and structures thereon. The Plaintiffs further contend that during the said invasion, the Defendants have committed acts of destruction to which the Defendants were apprehended and are facing various criminal charges. The Defendants on their part aver that they have been in occupation of the Suit Property until on 18th November 2017 when the Plaintiff in conjunction with the police demolished their houses.

9. Having looked at the facts that have emerged in this case and the evidence adduced by way of Affidavits, it clear that he Plaintiff has established a *prima facie* case with a probability of success against the Defendants. In my view, the Plaintiff has shown their right over the Suit Property being the registered proprietor. As regards irreparable damage, I take the view that the damage the Plaintiff will be subjected to if the Defendants' actions which include alienation to third parties, are not stopped will be enormous that cannot be quantified in damages. The balance of convenience, if I had doubt, would tilt in favour of the Plaintiff who is the registered owner and it is only fair that the same is preserved pending the hearing and determination of the suit.

10. The Plaintiff besides seeking an order of Temporary Injunction is also seeking a Mandatory Injunction to demolish the Defendants' structures on the Suit Property. The law as regards the principles to be applied when considering the prayer for demolition is different from the principles set out in the Giella case for the standard of approach when considering whether or not to grant Mandatory Injunction is higher than that in respect of Prohibitory Injunction.

11. In the case of **Locabail Agro – Export & Another (1986) 1 ALL ER 901**, it was stated that:

“A Mandatory Injunction ought not to be granted on an interlocutory Application in the absence of special circumstances

and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being different and higher standard than required for a prohibitory injunction.”

12. The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is *prima facie* established as per the standard spelt out in the law as stated above that the party against whom the Mandatory Injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

13. It is not disputed that following a complaint to the police, some of the Defendants herein were apprehended and are facing various criminal charges among them willful damage to property. I have perused the copies of the charge sheets on record. The alleged offences were said to have been committed on 27th April 2016 and on 18th November 2017. In my view, the Defendants’ actions amount to attempts to steal a march on the Plaintiff. Whereas the Defendants allege that they have been enjoying continuous occupation of the suit land until 18th November 2017, they have failed to disclose when the alleged occupation began.

14. Having carefully considered the material before me, in my humble view a case of a Mandatory Injunction has been made out. The structures sought to be demolished were put up by the Defendants from April 2016 and immediately prior to the filing of this suit. Having looked at the material placed before me, I can safely consider this clear case that can be decided at once or in a summary manner. I am therefore satisfied that the prayer for Mandatory Injunction can be granted.

15. The upshot of this is that the amended Notice of Motion dated 9th November 2017 is allowed with costs to the applicant. These orders to apply to **ELC Case No. 357 of 2017**. Orders accordingly.

Delivered, signed and dated at Mombasa this 26th July, 2018.

C. YANO

JUDGE