



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 256 OF 2017

FELIX KIMUTAI.....PLAINTIFF

VERSUS

PAULINE C. LERAYAN.....DEFENDANT

RULING

1. By Notice of Motion dated 19th June 2017, the plaintiff seeks the following Orders:

a. Spent.

b. Spent.

c. That the Officer Commanding Kaptembwo Police Post be directed to ensure compliance with the orders of this honourable court.

d. That pending the hearing and determination of this suit, the honourable court be pleased to issue a temporary injunction restraining the defendants herein whether by themselves, their agents and/or servants from invading, trespassing, grazing, cultivating or in any way whatsoever interfering with the Plaintiff's quiet possession and use of LR No. Miti Mingi/Mbaruk Block 3/4118 which is currently occupied by the plaintiff.

e. That costs of this application be in the cause.

2. The application is brought inter alia under the provisions of Order 40 rules 1, 2, 3 and 9 of the Civil Procedure Rules. It is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that the plaintiff is the registered proprietor of a parcel of land known as Miti Mingi/Mbaruk Block 3/4118 (Barut), the suit property. A copy of the title deed and a certificate of search as at 9th May 2017 are annexed. The plaintiff has been occupying and cultivating the suit property since he was issued with the title deed in the year 2014.

3. The plaintiff further deposed that sometime in May 2017, the defendant trespassed into the suit property and started carrying out cultivations thereon. The defendant continues to carry out the said activities. The plaintiff annexed two photographs said to depict the defendant's said activities. He therefore seeks an injunction as prayed.

4. The defendant opposed the application through her replying affidavit filed on 9th October 2007. She

deposed that on 1st February 2000 she entered into an agreement for sale of the suit property with one Zakayo Kiptoo Cheruiyot (now deceased). The total purchase price was Kshs.50, 000/= and upon execution of the agreement and payment of the whole purchase price, she settled on the property with her family. Zakayo Kiptoo Cheruiyot and she started the process of having her registered as owner on 19th February 2014 but before the transfer could be completed, Zakayo Kiptoo Cheruiyot passed away on 28th April 2014.

5. The defendant further stated that she built a permanent house on the land wherein she has been residing with her family since the year 2000 to the time of swearing the affidavit. She also constructed a semi-permanent structure for her boys on the other part of the land. She added that considering that Zakayo Kiptoo Cheruiyot passed away on 28th April 2014 and that the title deed in the plaintiff's name was issued on 4th July 2014, the transfer documents in respect of the plaintiff's title must have been forged. She annexed a copy of the sale agreement, unregistered transfer form dated 19th February 2014 and some photographs. She therefore urged the court to dismiss the application.

6. The plaintiff did not file any further affidavit to respond to what is stated in the replying affidavit.

7. The application was heard by way of written submissions. The plaintiff/applicant filed submissions on 15th February 2018 while the defendant filed submissions on 14th March 2018. I have considered the application, the affidavits filed and the submissions.

8. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers to the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

9. There is no dispute that the plaintiff herein is the registered proprietor of the suit property. As a registered proprietor, he would ordinarily be entitled to the protection and benefits accorded by **Sections 24 and 25** of the **Land Registration Act** which provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.....

10. According to the plaintiff, the defendant trespassed onto the suit property in May 2017. The defendant on the other hand maintains that she bought the suit property on 1st February 2000, constructed a permanent house on it in the year 2000 and has been living on it since the year 2000. Besides the permanent house, she also constructed a semi-permanent house. The plaintiff did not file any further affidavit to respond to or challenge the defendants' contentions, especially as regards the status on the ground. The defendant has gone to great length to explain that she has been on the ground and in occupation for almost 18 years now and has constructed a permanent house.

11. The plaintiff ought to have been more forthright as regards the full picture of the situation on the ground and the background thereto. Whereas the plaintiff's title must be upheld until it is validly cancelled, the court cannot ignore the defendant's contention as regards occupation and development of the suit property, which contentions I accept as the true position on the ground since they have not been challenged by the plaintiff.

12. If I were to mechanically allow the application, the result would be that the defendant will be evicted or dispossessed since the orders sought seek to stop her from in any manner entering or dealing with the suit property. Such an outcome at an interlocutory stage would be manifestly unjust.

13. Though I am persuaded that on the basis of being the registered proprietor the plaintiff has established a prima facie case and that damages will not adequately compensate him, I am of the considered view that the justice of the case demands that whatever injunction is granted should focus on preserving the suit property pending hearing and determination of the suit as opposed to resulting in an eviction.

14. The plaintiff also sought an order that the Officer Commanding Kaptembwo Police Post be directed to ensure compliance with the orders made by this court. This is a civil case and any injunctive orders issued should be self-executing upon service. Parties and their agents or representatives are under an obligation to obey court orders. In case of disobedience, the court itself will impose appropriate sanctions. I therefore see no reason to involve police in the matter at this point.

15. In the end I make the following orders:

a. An injunction is hereby granted restraining the defendant whether by herself, agents and/or servants from selling, leasing, transferring or carrying out any further constructions on LR No. Miti Mingi/Mbaruk Block 3/4118 (Barut) pending hearing and determination of this case

b. Costs to the plaintiff.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mwalo holding brief for Mr Geoffrey Otieno for the plaintiff/applicant

Ms Gitau holding brief for Mrs Ndeda for the defendant/respondent

Court Assistant: Gichaba