



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 645 OF 2015

ISHAMEL KIRIUNGI MUKUNYA.....PLAINTIFF/APPLICANT

VERSUS

OSCAR KABWANA T/A

C.D.D CONSORTIUM GROUP.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 6th July 2015, brought under Order 40 Rule 1, 2, 3, 4, 5, 6, 7 -10 of the Civil Procedure Rules, Section 3, 3A of the Civil Procedure Act and any other enabling provisions of the law.

2. It seeks orders;

(1) Spent

(2) Spent

(3) That an injunction do issue restraining the defendant by himself, his agents, employees, servants or any person claiming under him or otherwise be restrained from entering upon plaintiff's property, plot NO. 209/8553/A2, situated at Kariobangi North, Nairobi, from trespassing, constructing, developing, selling, renting and/or dealing in whatever manner and/or interfering with the suit property pending the hearing and determination of this suit.

(4) That the OCS Kariobangi North Police Station to assist in compliance of the orders.

3. The grounds are on the face of the application and are listed as in paragraph a to d.

4. The application is supported by the affidavit of Ishmael Kiriungi Mukunya, the plaintiff/applicant herein sworn on the 6th July 2015.

5. The application is opposed. There is a replying affidavit sworn by Oscar Kabwana, the Chairman of the defendant/respondent sworn on the 26th January 2016.

6. On the 9th May 2016 the court directed that the application be disposed by way of written submissions.

7. It is the plaintiff's/applicant's case that he purchased the plot being: RL 209/8553/A2 from Gitathuru Kariobangi Co. Ltd in 1982 and got a certificate of title on 9th March 2000. That in 2014, the defendant/respondent trespassed and started constructing on the suit property. It is his case that he was living in the suit property until 2007 when during post-election violence he was evicted by rowdy youth. He prays that the defendant/respondent be restrained from further constructing on the said plot.

8. It is the defendant's/respondent's case that the plaintiff/applicant's documents of ownership are not genuine. The suit property is owned by the Ministry of Gender, Children and Social Development who authorized the defendant/respondent to use it for the empowerment of youth and women. The plaintiff's/applicant's certificate of shares is not proof of ownership. The plaintiff/applicant's case has failed to satisfy the conditions as set out in the Giella case. The balance of convenience tilts in favour of the defendant/respondent who has proved the basis upon which they are in occupation of the suit plot. They pray that the application be dismissed with costs to the defendant/respondent.

9. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit, the written submissions of counsel and the authorities cited.

The issues for determination are:-

(i) Whether the plaintiff/applicant’s application meets the threshold for grant of temporary injunctions.

(ii) Who should bear costs?

10. At this juncture, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out, in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358.**

11. In the case of **Mrao Ltd vs First American Bank of Kenya Limited [2003] KLR 125,** the Court of Appeal stated what amounts to a prima facie case.

I am guided by the above authorities.

12. It is the plaintiff’s/applicant’s case that he purchased the suit property from Gitathuru Kariobangi Co. Limited. The defendant/respondent on the other hand claims to have been authorized to use the suit land by the Ministry of Gender, Children and Social Development. They have however not annexed any document to confirm this. The plaintiff/applicant told the court that he has not been on the suit property since he was evicted by rowdy youths in 2007.

13. I find that the plaintiff/applicant has established a prima facie case with a probability of success at the trial.

14. In the case of **Kenleb Cons Limited vs New Gatitu Service Station Limited & 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 a 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”

I am satisfied that the plaintiff/applicant deserves this kind of protection.

15. I also find that the plaintiff/applicant has demonstrated that he will suffer irreparably if the orders are not granted. There is need to preserve the suit property pending the hearing and determination of the suit.

16. I find merit in this application and grant the orders sought namely:

(a) That a temporary injunction be and is hereby issued restraining the defendants by themselves, their agents, employees, servants or any person claiming under them or otherwise from entering upon the Plot No. RL 209/8553/A2 situated in Kariobangi North, Nairobi and from trespassing, construction on, developing, selling, renting and/or dealing in whatever manner and/or interfering with the said plot pending the hearing and determination of this suit.

(b) That the OCS Kariobangi North Police Station to assist in ensuring compliance of these orders.

(c) That cost of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of NOVEMBER 2018

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the defendant

.....Court Assistant