



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

IN THE ENVIRONMENT AND LAND COURT AT MERU

E.L.C. SUIT NO 21 OF 2017

ISIAIAH THURANIRA (Suing as legal representative of

Isaiah Njogu (Deceased).....PLAINTIFF

VERSUS

FRANCIS KIRIMI.....DEFENDANT/RESPONDENT

R U L I N G

1. The applicant in the Notice of Motion filed on 27/01/2017 prays for the following orders:

a) **THAT** pending the hearing and determination of this application interpartes, this Honourable Court be pleased to issue a temporary injunction restraining the Defendant, his servants and or agents from trespassing on the property known as parcel of land No.6361 Akaiga adjudication section and or from occupying, selling, charging, transferring, demolishing any premises erected on the property and or in any manner interfering with the Plaintiff's quit occupation and possession of parcel of land No.6361 Akaiga adjudication section pending hearing and determination of this application.

b) **THAT** pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendant, his servants and or agents from trespassing on the property known as parcel of land No. 6361 Akaiga adjudication section and or from occupying, selling, charging, transferring, demolishing any premises erected on the property and or in any manner interfering with the Plaintiff's quit occupation and possession of parcel of land No. 6361 Akaiga adjudication section pending hearing and determination of the suit.

c) **THAT** cost of this application be provided for.

2. **The Application** is supported by an affidavit of **ISIAIAH THURANIRA** (plaintiff /applicant) where it is stated as follows :-

a) **THAT** the Plaintiff is the lawful and exclusive registered owner of all that parcel of land situate Thuuri known as parcel of land No.6361 Akaiga adjudication section on which the Plaintiff has at all material times lived with his family.

b) **THAT** the Defendant has without any lawful justification trespassed on several occasions onto the Plaintiff's said property and maliciously damaged, tampered, stolen and sold properties and tress of the Plaintiff's said suit land erected in the above parcel of land.

c) **THAT** the Defendant continues to trespass on the Plaintiff's aforesaid parcel of land without any colour of right.

d) **THAT** the Plaintiff stands to suffer irreparable loss and damage if this parcel of land is alienated through unorthodox means.

e) **THAT** the Plaintiff has never sold the parcel of land to anybody and still holds the allocation by the land adjudication office.

f) **THAT** it would be in the interest of justice to grant the Orders sought.

g) **THAT** the Balance of convenience lies in favour of the grant of the orders sought.

3. The application was initially brought before the court on 3/2/2017 where by the court directed that the application be served. On 8/2/2017 when the application came up for inter partes hearing, there was no appearance for the Respondent. An affidavit of service was however on record filed on 7/2/2017 showing that Respondent had been served. The court proceeded to set a date for the ruling.

4. What is there to be analysed?;

i. The discretion criteria

ii. The nature of the injunction and whether the orders sought for can be granted.

5. The discretion criteria.

This being an application that has not been opposed, should this court proceed to grant the orders prayed for? In the case of **Charter house investment Ltd vs Simon K. Sang & 3 Others (2010) Eklr the court of appeal** had observed that;

“Injunction is an equitable and discretionary remedy.....the award of temporary injunction by a court of equity has never been guaranteed as a matter of right”.

6. This court will hence not grant the orders sought for as a matter of right. The court will have to analyze the arguments as well as the record to ascertain whether the application has merits even though the Respondent has not filed any documents to oppose the application.

7. What is the nature of injunction prayed for?

I find that the prayers sought in the present application are not in tandem with the pleadings of the applicant. In the application, the orders sought for are for a **TEMPORARY INJUNCTION RESTRAINING THE DEFENDANT...FROM TRESSPASSING...AND OCCUPYING THE PROPERTY LAND NO.6361AKAIGA ADJUDICATION SECTION.**

8. On the other hand, **PARAGRAPH 5, 6, 7 & 8 IN THE PLAINT** indicate that the Respondent is in occupation of the suit property. It follows then that the injunctive orders the applicant is praying for are **MANDATORY** and **AFFIRMATIVE** in nature. Such orders would in essence bring to an early end one of the main prayers in the plaint.

9. If the prayers in the plaint are mandatory in nature it follows that the application doesn't fit the bill of an interlocutory injunction, and by extension the principles set out in the **Giella vs. Cassman Brown** are not applicable here in.

10. In the case of **Maher Unissa Karim vs. Edward Oluoch Odumbe H.C.C.C No.91 of 2015 in Nairobi, Judge Aburili** was dealing with a case of a mandatory injunction at the interlocutory stage. She stated thus;

“The test for granting a mandatory injunction is different from that enunciated in the Giella vs Casman Brown case which is the locus classicus case for prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the Court of Appeal in the case of Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury’s Laws of England 4th Edition paragraph 948 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 a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory”.

11. In the present suit, the applicant has not demonstrated that the undertakings by the Respondent are simple and or summary in nature. If anything the issues appear complex in view of the fact that defendant is in occupation of the suit land .If the court was to grant the orders sought for ,the defendant will be evicted. It is paramount for the court to establish the basis upon which defendant came to be on the suit land.

12. I therefore find that the issues raised in both the plaint and the application requires proof via evidence. The best way to deal with the matter is to have a full trial.

13. In conclusion, **I find that this application has no merits and the same is dismissed with no orders as to costs.**

14. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 23RD DAY OF FEBRUARY, 2017 IN THE PRESENCE OF:-

CA: Mungai/Kananu

Isaiah Thurania – Plaintiff/Applicant present

Defendant no Appearance

L.N.MBUGUA

JUDGE