



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MILIMANI
ELC CASE NO. 1117 OF 2016

JAMES NDINA GITONGA.....PLAINTIFF/APPLICANT

VERSUS

MARIAS PAKINE TENKEWA.....DEFENDANT/RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated **14th September 2016**, in which he seeks injunctive orders against the Respondent or his agents. The applicant contends that he is the beneficial owner of plot No. 1292/Residential Ongata Rongai T Centre (suitland). On 9th December 2005, the Respondent entered the suit land and erected a fence round it with an intention of developing it.
2. The applicant complained to the local councillor and chief who after confirming that the suit land belonged to him directed that the fence be pulled down. Thereafter a surveyor from the defunct Olkejuado County Council confirmed that the suit land existed on the ground.
3. The Respondent went to his lawyers who wrote a demand letter addressed to the applicant claiming that the suit land belonged to the Respondent. This prompted the applicant to file a civil suit in the lower Court where he sought injunctive orders against the Respondent. The Court ordered that the parties maintain status quo until hearing and determination of the suit.
4. The suit in the lower court was later dismissed for non-attendance on the part of the applicant. On 5th September 2016, the Respondent delivered one lorry full of ballast to the suit land. He also delivered another lorry full of ballast on the following day. This is what prompted the applicant to file this suit where he seeks injunctive orders against the Respondent.
5. The Respondent has opposed the applicant's application based on a Replying affidavit sworn on 11th November 2016. The Respondent contends that the suit land is non-existent. That what the applicant is claiming to be the suit land is part of his plot which is plot no. 83 and the other part is a road reserve. That the applicant has his own plot which is adjacent to his, and is plot No.84 on which the applicant has put up a school.
6. I have carefully considered the applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the applicant's counsel. The applicant is seeking a temporary injunction. The purpose of a temporary injunction is to preserve the suit property pending determination of the dispute. This being an equitable remedy, the same is granted at the discretion of the Court which must be exercised judiciously.

7. In the instant case, the facts emerging are that the Respondent first made a move on the suitland in the year 2005. This prompted the applicant to file a suit in the lower court where an order of maintenance of **status quo** was made. It would appear that the Status quo was maintained until the applicant's suit was dismissed in the year 2012. The Respondent thereafter brought in two lorries of ballast to the suit land.

8. This being an application for injunction, the applicant has to meet the threshold set out in the case of **Giella Vs Cassman Brown Co.Ltd (1973) EA 358.** Has the applicant demonstrated that he has a prima facie case with probability of success?. The applicant does not dispute the fact that his plot which is plot No. 84 is adjacent to the Respondent's plot No.83.This fact is admitted in the submissions by the applicant's counsel. The applicants counsel further states in the submissions that the suit land is in between plot No. 84 owned by the Respondent and plot No. 83 owned by the applicant.

9. The Respondent has annexed a plan of the area which shows that plot No. 83 is adjacent to Plot 84. There is no plot in between the two. It is therefore a contradiction for the applicant to claim that the suit land is in between plot no. 83 and 84. To this extent, I do not see what prima facie case the applicant has. The plan annexed to the Respondent's replying affidavit has not been challenged.

10. The other consideration is whether the applicant will suffer loss which may not be compensated in damages. At the moment, there is no demonstration by the applicant that he will suffer loss which will not be compensated in damages. The Respondent has only put on the suit land two Lorries of ballast. The alleged trespass started in 2005. Since then there is nothing major which has been carried out. No construction is going on. If the court finally finds that the suit land exists and that there was trespass on the part of the Respondent, that is something which can be easily compensated.

11. The Respondent contends that what the applicant is claiming is partly his land and partly a road reserve. If the Respondent has accumulated ballast on the suit land, he is the one in possession and no injunction can be granted in the circumstances for to do so will amount to giving a mandatory injunction when no special circumstances exist for the same. The balance of convenience tilts in favour of the Respondent who is in possession.

12. The applicant is contending that the suit land exists whereas the Respondent contends that it doesn't. In the face of these competing arguments, the only way to resolve this is through evidence in a full trial. I therefore find that the applicant's application lacks merit in the circumstances. The same is hereby dismissed with costs to the Respondent. Injunctive order which were given on **15th September 2016**, and subsequently extended are hereby discharged.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **27th** day of **March 2017**.

E.O .OBAGA

JUDGE

In the Presence of :-

Mr Kimemia for Plaintiff

Court Assistant: Kevin

E.O .OBAGA

JUDGE