



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 42 OF 2017

CHRISTOPHER KIMARO LAGAT:.....PLAINTIFF

VERSUS

SAMMY KIRWOK:.....DEFENDANT

RULING

INTRODUCTION

The Plaintiff applicant herein filed a Notice of Motion dated 3rd February, 2017 under Certificate of Urgency seeking for an order for injunction to restrain the defendant, his agents, and or servants from trespassing into, using and or ploughing, wasting or in any way using land reference No. **MOI'S BRIDGE BLOCK 2(TUIYOBEI)72** pending the hearing and determination of this suit.

The plaintiff's application was supported by 6 grounds and a Supporting Affidavit by Christopher Kimaru Lagat (Plaintiff herein) sworn on 3rd February 2017.

This matter came up for hearing of the application dated 3rd February, 2017 on 8th February, 2017 when the court certified the same as urgent and asked the Plaintiff's Counsel to serve the application for *inter-parte* hearing on 16th February, 2017.

The defendant herein was served with the application and appeared in court on 16th February, 2017 when he asked for time to file a replying affidavit. The court granted him leave to file a replying affidavit within seven days. The matter was fixed for the hearing of the Notice of Motion on 2nd March, 2017.

PLAINTIFF APPLICANT'S CASE

Counsel for the Plaintiff applicant submitted that for an application for injunction to succeed, a party must demonstrate that he or she has a *prima facie* case with a probability of success.

He stated that the applicant herein has demonstrated this by showing that he is the registered owner of the suit property. He referred the court to the grounds in support of the application, the supporting affidavit and the annexures therein.

Counsel for the Plaintiff further submitted that the defendant has no legally enforceable interest in the Plaintiff's parcel of land. He stated that the annexed sale agreement by the defendant is null and void under the law of contract and the Land Control Act.

The plaintiff applicant filed a supplementary affidavit in response to the defendant's averments in the

replying affidavit. The affidavit reiterated the Plaintiff's submission that he is the registered owner of the suit property and has never sold any portion to the defendant.

The Plaintiff further stated that the agreement annexed by the defendant does not meet the legal threshold of Section 3(3) of the Law of Contract Act and the Land Act. He attached a decision of **NAIROBI C.A NO. 112 OF 1997 AND ELDORET HCC NO. 134 OF 2008** to buttress the position above.

Mr. Momanyi, Counsel for the Plaintiff submitted that the defendant's annexed decisions of the Chief and the Assistant County Commissioner Soi Division have no force in law. He further took issue with the defendant's allegation that he had been assaulted by the plaintiff, which allegation had not been averred in the replying affidavit. If the defendant had been assaulted as alleged, then he should have attached supporting documentation which was not the case. He urged the court to allow the Plaintiff's application as prayed.

DEFENDANT RESPONDENT'S CASE

The defendant Sammy Kirwok opposed the Plaintiff's Application dated 3rd February, 2017 and relied on his replying affidavit dated 27th February, 2017 and filed on the same day.

He stated that he bought the suit parcel of land in the year 2000 when the Plaintiff was selling the land.

The defendant further stated that he built his house on the suit land in the year 2000. He averred that when he asked the plaintiff to transfer the land to him, the plaintiff instead went to the chief to report that he needed more money for the purchase price.

The defendant stated that they wrote an agreement with the Plaintiff at the Chief's office and he has been tiling the land ever since. He averred that the Plaintiff has sold land to other people but has never transferred the land to them.

The defendant further stated that he has been in occupation and has not encroached on the Plaintiff's land. He alleged that the Plaintiff and his son came to his farm and assaulted him. He urged the court to dismiss the application.

DETERMINATION

The application before me is for a temporary injunction and the principles of granting such injunctions are well settled.

I need not re-invent the wheel on temporary injunctions as this was established in the case of **GIELLA - VS- CASSMAN BROWN & CO. LTD (1973)EA, 358.**

The questions that the court needs to address itself to are:

- (a) Has the Applicant established a *prima facie* case with a probability of success?
- (b) Will the Applicant suffer irreparable injury which would not be adequately compensated by an award of damages if the injunction is not granted?
- (c) Where does the balance of convenience lie?

What constitutes a *prima facie* case was defined in the Court of Appeal case of **Mrao Ltd -VS First American Bank of Kenya Ltd & 2 Others (2003) KLR 125, 132** where it was stated as follows;

"a prima facie case in a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as

to call for an explanation or rebuttal from the latter.”

And that:

“.....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.....”

The Plaintiff/Applicant has established before this court that he has a prima facie case with a probability of success. He has shown that he is the registered owner of **LR NO. MOI’S BRIDGE/MOI’S BRIDGE BLOCK 2 (TUIYOBEI)72** by annexing a copy of the title and certificate of official search. This shows that he has proprietary right to the suit property and must be allowed to have quiet possession and enjoyment of the same.

The defendant’s submissions have not controverted the facts above. In the absence of any challenge to the validity of the Plaintiff’s title and the claim of trespass by the defendant on the suit property, I am satisfied that the Plaintiff will suffer irreparable harm if the orders sought are not granted.

I accordingly allow the plaintiff application dated 3rd February, 2017.

Costs of the Application be in the cause.

Dated and delivered at Eldoret on this 9th day of March, 2017.

M.A ODENY

JUDGE