



REPUBLIC OF KENYA
IN THE E.L.C. COURT OF KENYA AT EMBU
E.L.C. NO. 140 OF 2015
(FORMERLY KERUGOYA ELC NO. 173 OF 2013)

KATUTA NTHENGE.....PLAINTIFF/RESPONDENT

VERSUS

DANIEL KAMAU MWANGI.....DEFENDANT/RESPONDENT

RULING

1. By a Plaint dated 1st July 2011 and filed in court on 4th July 2011 the Plaintiff pleaded that by a sale agreement made on or about 16th March 1995 he sold a portion of 2 acres of land out of his parcel of land No MAKINA/MBONDONI/1807 Photo No. 211 to the Defendant. He also pleaded that the Defendant had occupied 3 acres of his said land instead of 2 acres in consequence of which he had rescinded the sale agreement.
2. The Plaintiff, therefore, sought for an order of eviction and a permanent injunction restraining the Defendant from trespassing, farming or committing acts of waste on his said parcel of land. He also sought costs, interest and any other relief the court may deem fit to grant.
3. The Defendant entered an appearance and filed a Defence on 18th July 2011 in which he admitted the sale of two acres of land and pleaded that the Plaintiff had also given him ½ an acre as a gift. He, however, denied the rest of the Plaintiff's allegations and especially the allegation that he had occupied 3 acres of the land.
4. On or about 11th January 2017, the Defendant filed a Notice of Motion under Order 40 of the CPR seeking an order of interlocutory injunction against the Plaintiff. The grounds of the application were set on the face of the Motion which was supported by the Defendant's own supporting affidavit sworn on the date of filing.
5. The said application was set down for hearing on 15th March 2017 when the Defendant attended court ready to prosecute his said application. The Plaintiff did not file any response to the application and he did not appear at the hearing. The court allowed the Defendant to proceed ex-parte upon being satisfied that the Plaintiff had been duly served.
6. The Defendant prosecuted his said application through oral submissions. He relied upon his supporting affidavit. He reiterated that he lawfully purchased about 2 acres of the Plaintiff's land and that he was given a gift of ½ an acre by the Plaintiff. He further stated that although he took possession and developed the land by planting various trees and fruits he does not reside there.

7. Although the Defendant denied having occupied 3 acres of the Plaintiff's land instead of 2 ½ he informed the court that no surveyor had, to his knowledge, surveyed the property to ascertain its acreage. He stated that he was simply shown the boundaries by the Plaintiff upon purchase and he had never verified the actual acreage of the portion which he cultivates.

8. The main issue for consideration is whether or not the Defendant has satisfied the requirements for the grant of an interlocutory injunction in accordance with the principles set out in the case of *Giella Vs Cassman Brown & Co Ltd [1973] E.A 358*.

9. The first consideration is whether the Defendant has demonstrated a prima facie case with a probability of success. It was conceded by the Defendant that the acreage of the land he currently occupies has never been ascertained by a professional surveyor. He was not sure whether it was more or less than the 2 ½ acres contained in the sale agreement between the parties, although he denied having occupied 3 acres. The court takes the view that without ascertainment of the acreage which the Defendant is currently occupying, it would not be safe to issue an adverse order against the Plaintiff who is the owner of the remainder of the land.

10. The court has also perused the copy of the sale agreement exhibited by the Defendant. It would appear that the sale was a conditional sale. According to clause 6 of the agreement dated 16th March 1995, the agreement was made:

“Subject to the Land Control Board granting its consent for transfer of the said 2 acres to the purchaser and should such consent be refused, then the vendor shall refund the purchaser the sum already received with no interest.”

11. I have perused the other annexures to the Defendant's supporting affidavit and there is no indication of the consent of the Land Control Board having been granted. There is no averment in the affidavit either of such consent having been granted. So on the basis of the Defendant's own documents, there is no evidence to show that the condition to which the conditional sale was subject was actually fulfilled.

12. In the circumstances of this case and for the foregoing reasons, that is, the uncertainty on the acreage in occupation by the Defendant and the lack of evidence of fulfilment of the condition to which the sale was subject, the court is not satisfied that the Defendant has made out a *prima facie* case with a probability of success. The Defendant has, therefore, failed to satisfy the first requirement for the grant of an order of interlocutory injunction.

13. In view of the above finding, it is not necessary to consider the second principle on irreparable damage which cannot be compensated by an award of damages and the third principle on balance of convenience. The Defendant's application therefore fails at the first of the three hurdles.

14. The upshot of the foregoing is that the Defendant's Notice of Motion dated 22nd January 2017 is hereby dismissed. There shall be no order as to costs since the Plaintiff did not appear or oppose the application.

Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **APRIL, 2017**

In the presence of Daniel Kamau Mwangi, the Defendant and in the absence of the Plaintiffs.

Court clerk Mr Njue

Y.M. ANGIMA

JUDGE

19.04.17