



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA

ELC CASE NO. 89 OF 2017

HEZBORNE MULECHI :::PLAINTIFF

VERSUS

ROSE MAKUNGU SALAMBA :::DEFENDANT

RULING

The Application is dated 16th March 2017 and is brought under Order 40 Rule (1), and (2) of the Civil Procedure Rules 2010, Sections 1A, 3 and 63 (e) of the Civil Procedure Act and seeks the following orders;

1. **THAT**, this application be certified as urgent and service of the same be dispensed with in the first instance.
2. **THAT**, a temporary injunction do issue restraining the defendant/respondent, her agents and/or servants jointly and severally from constructing on **KAKAMEGA/MOI'S BRIDGE/1526**, in any way manner whatsoever pending the hearing and determination of this application.
3. **THAT**, a temporary injunction do issue restraining the defendant/respondent, her agents and/or servants jointly and severally from entering or interfering with the applicant's peaceful use and occupation of land parcel No. **KAKAMEGA/MOI'S BRIDGE/1526**, in any way manner whatsoever pending the hearing and determination of this application.
4. **THAT**, a permanent injunction do issue restraining the defendant/respondent, her agents and/or servants jointly and severally from entering or interfering with the applicant's peaceful use and occupation of land parcel No. **KAKAMEGA/MOI'S BRIDGE/1526**, in any manner whatsoever pending the hearing and determination of this suit.
5. **THAT**, costs of this application be borne by the respondent.

The application is supported by the affidavit of HEZBORNE MULECHI and the applicant submitted that, the plaintiff/applicant is the absolute registered owner of land parcel no. **KAKAMEGA/MOI'S BRIDGE/1526**. He entered into a sale agreement with the defendant/respondent for sale of **KAKAMEGA/MOI'S RIDGE/1526** on 7th January, 2014. It was a term of the agreement that the defendant completes payment by June, 2014. The defendant/respondent failed to honour this term of the agreement. The defendant/respondent proceeded to occupy a house on the property without a consent or agreement of both parties. That, the parties had agreed to negotiate on the consideration of the house on the said parcel of land. The defendant/respondent breached terms of the agreement and the plaintiff/applicant has tried in vain to repossess his parcel of land. The defendant/respondent has refused

refunds of her purchase price. The defendant/respondent has no legal or equitable right to occupy the plaintiff's land having breached a term of the agreement. The defendant/respondents have no legal right or interest over land parcel No. **KAKAMEGA/MOI'S RIDGE/1526** and the plaintiff/applicant shall suffer irreparable loss, if the orders sought are not granted.

The defendant/respondent submitted that it is true that on 7th January, 2014 the plaintiff and herself entered into a sale of land agreement in respect of that parcel of land known as KAKAMEGA/MOI'S BRIDGE/1526 at an agreed consideration of Ksh. 928,000/= . She paid the plaintiff Ksh. 750,000/= leaving a balance of Ksh. 178,000/= which sum she was to clear later. They agreed that she was to take immediate possession of the said parcel of land and even use the semi-permanent house that had been built on the said parcel of land. That in the month of January, 2016 as she was planning to clear the said balance of the purchase price her son one Cinton Ngeresa Chogo was involved in a serious road traffic accident and she was constrained to use all the money she had to pay for his medical bills. Meanwhile the plaintiff and his wife one Violet Mulechi had both allowed her to move into the suit premises which had fallen vacant after they had relocated to their new home at Soy Scheme. The defendant/respondent moved into the suit premises in the month of January, 2016. Thereafter she started having difficulties with the plaintiff's wife who had insisted that she should let her sister to come and stay with her in the said premises. On 18th July, 2016 she was summoned by the Assistant Chief in Moi's Bridge sub-location who threatened her with dire consequences for failing to pay the balance. On 19th October, 2016 the area assistant chief came with some hired goons and removed the iron sheets of the plaintiff's house she was living in and left her family exposed to untold suffering. That while all this was happening the plaintiff was aware but not taking any steps to prevent his said wife from attacking the defendant/respondent while he was supported by the area assistant chief – Moi's Bridge sub-location. The plaintiff later caused her to be arrested and charged in ELDORET CMCCR NO. 6187 OF 2016 for an offence of trespass which she took a plea of not guilty and the said case is still pending before court for final hearing and determination. In March, 2017 the defendant/ respondent erected a semi-permanent house to accommodate her family since she did not have anywhere to go. The plaintiff /applicant has now moved to court to seek for eviction orders with a sole purpose of evicting her. That she is currently residing in her said new premises. (annexture marked RMS1). That the plaintiff's advocate is being used to frustrate her by drafting and backdating illegal documents. (annexture marked RMS 2).

This court has considered both the Plaintiff/Applicant's and the Defendants /Respondents' submissions and the supporting affidavits therein. The application being one that seeks injunctions, has to be considered within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and which are:-

- 1. The applicant must show a prima facie case with a probability of success at the trial***
- 2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,***
- 3. If in doubt, the Court will decide the application on a balance of convenience.***

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

The plaintiff/applicant is the absolute registered owner of land parcel no. **KAKAMEGA/MOI'S BRIDGE/1526**. He entered into a sale agreement with the defendant/respondent for sale of **KAKAMEGA/MOI'S RIDGE/1526** on 7th January, 2014. It was a term of the agreement that the defendant completes payment by June, 2014. The defendant/respondent failed to honour this term of the agreement. The defendant/respondent proceeded to occupy a house on the property without a consent or agreement of both parties. That, the parties had agreed to negotiate on the consideration of the house on the said parcel of land. The defendant/respondent submitted that it is true that on 7th January, 2014 the plaintiff and herself entered into a sale of land agreement in respect of that parcel of land known as

KAKAMEGA/MOI'S BRIDGE/1526 at an agreed consideration of Ksh. 928,000/=. She paid the plaintiff Ksh. 750,000/= leaving a balance of Ksh. 178,000/= which sum she was to clear later. They agreed that she was to take immediate possession of the said parcel of land and even use the semi-permanent house that had been built on the said parcel of land. I find that the defendant/respondent has paid a substantial amount of the purchase price and is currently residing on that land. The Court will decide this application on a balance of convenience. The balance of convenience in this matter tilts in favour of the defendant/respondent because she is residing on the suit premises. Indeed in the agreement annexed to the pleadings dated 7th January 2014 she was at liberty to take immediate possession. I find this application has merit to that extend and grant prayer 3 of the application as follows;

1. THAT, a temporary injunction do issue restraining the defendant/respondent, her agents and/or servants jointly and severally from entering or interfering with the applicant's peaceful use and occupation of land parcel No. **KAKAMEGA/MOI'S BRIDGE/1526**, in any way manner whatsoever pending the hearing and determination of this suit.

2. Costs of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10TH DAY OF MAY 2017.

N.A. MATHEKA

JUDGE