



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 190 OF 2016

ELIZABETH WANGOI MBURU.....1ST PLAINTIFF

JOHN MURARI KAMAU.....2ND PLAINTIFF

-VERSUS -

PETER GITAU.....DEFENDANT

RULING

The Plaintiffs were allocated all that parcel of land known as un-surveyed Residential Plot No. “A” Thika Municipality by the Commissioner of Lands on 1st September, 2002 on the terms and conditions which were set out in the letter of allotment of the same date. The Plaintiffs have averred that the said parcel of land (hereinafter referred to as “the suit property”) was allocated to them in vacant possession. The Plaintiffs have averred that they have not developed the suit property since the same was allocated to them in the year 2002.

The Plaintiffs brought this suit against the defendant on 1st March, 2016 contending that on or about 10th February, 2016 the Defendant entered the suit property and started construction and quarrying activities thereon. The Plaintiffs contended that despite demand and notice of intention to sue, the Defendant had failed and/or refused to vacate the suit property. In their plaint dated 24th February, 2016, the Plaintiffs sought general damages and a permanent injunction restraining the Defendant from trespassing, constructing on and excavating the suit property.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 24th February, 2016 seeking a temporary injunction to restrain the Defendant from dealing with, interfering, alienating, constructing on and/or in any other way encroaching on the suit property pending the hearing and determination of the suit. In their affidavit which was sworn by the 1st Plaintiff in support of the application, the 1st Plaintiff reiterated the contents of the plaint which I have highlighted above. The 1st Plaintiff stated that prior to the filing of the suit herein, she engaged the services of Kapanga Land Surveys and Consultants to identify the suit property and indicate its beacons. The 1st Defendant stated that the said firm undertook the assignments successfully. The 1st Defendant stated that in the course of carrying out survey on the suit property, the said surveyors noted that there were people constructing a building on the suit property. The 1st Plaintiff contended that the said construction was being undertaken by the Defendant and that the Defendant had refused to vacate the suit property despite her protests. The 1st Plaintiff annexed to her affidavit a copy of her letter of allotment dated 1st September, 2002, and the report from Kapanga Land Surveys & Consultants dated 10th February, 2016.

The application was opposed by the Defendant through Notice of Preliminary Objection and replying

affidavit both dated 11th April, 2016. In his preliminary objection, the Defendant contended among others that the Plaintiffs' application was fatally defective and should be struck out. The Defendant contended further that the Plaintiffs had no *locus standi* to bring this suit. In his replying affidavit, the Defendant denied that he was in occupation of the suit. The Defendant denied that he had any interest in the suit property as owner or otherwise. The Defendant denied that he had trespassed on the suit property and termed the suit herein fatally defective and an abuse of the process of the court. The Defendant contended that the letter of allotment which was the basis of the Plaintiff's claim over the suit property did not appear genuine.

The Plaintiffs' application and the Defendant's preliminary objection were argued together by way of written submissions. I have considered the application and the opposition thereto by the Defendant. I am satisfied that the Plaintiffs have satisfied the conditions for granting the orders sought. As was held in the case of Giellavs. Cassman Brown & Co. Ltd. (1973) E. A. 358, an applicant for a temporary injunction must establish a prima facie case with a probability of success against the respondent and must also demonstrate that he stands to suffer irreparable harm unless the order is granted.

The Plaintiffs have established that the suit property was allocated to them by the Commissioner of Lands in the year 2002. The Plaintiffs have demonstrated by way of a survey report that someone had entered the suit property without their permission and commenced construction of structures thereon. On the material before me, I am satisfied that the Plaintiffs have a genuine and arguable case against the person who has trespassed onto the suit property. The Plaintiffs have demonstrated that their rights over the suit property have been infringed. I am of the view that the Defendant did not serve this court well. A perusal of the Defendant's Notice of Preliminary Objection, Replying Affidavit and submissions gives the impression that the Defendant intentionally chose to be evasive in his response to the Plaintiffs claim. There is no doubt that the Defendant for reasons only known to him failed to disclose to the court all that he knows concerning the dispute before the court. In his Preliminary Objection, the Defendant contended that the Plaintiffs are not the owners of the suit property and that the Plaintiffs have purported to bring the suit on behalf of the registered owner. The Defendant contended further that the registered owner or proprietor of the suit property should have been joined in the suit. The Defendant seems not to be a stranger to this dispute as he claims. The Defendant seems to know other persons who are claiming to be the owners of the suit property. In the replying Affidavit, the Defendant contended that he was a stranger to these proceedings. The Defendant contended that he was not the legal owner of the suit property neither was he in occupation thereof. The Defendant failed however to mention the alleged owner of the suit property who should have brought the suit. In his submissions, the Defendant submitted that it would be futile to issue any order against him as he had no interest in the suit property. The Defendant submitted further that;

“This court has no jurisdiction to grant an order of injunction as sought in the Plaintiff's application as the application affects entities who are not parties to the cause as any order issued would amount to condemning them unheard thereby denying them a right to a fair hearing...”

This submission leaves no doubt that the Defendant knew more than he disclosed to the court. My take in all these is that the Defendant having been accused of trespass on the suit property and having denied the trespass and blamed others for the same; he had a duty to disclose to the court the particulars of those persons he claimed to have trespassed on the suit property. In the absence of such disclosure, the court will take it at this stage that the Plaintiff's identification of the Defendant as the person carrying out construction on the suit property is correct. I wish to add that if at all the Defendant had no interest in the suit property; I can see no reason why he decided to oppose the Plaintiff's application for injunction which would not affect him after all. I have found no merit in the Defendant's preliminary objection.

The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 24th February, 2016 succeeds. The same is allowed in terms of prayer 3 thereof. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 27th day of June, 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

N/A for the Plaintiffs

N/A for the Defendant

N/A Court Assistant