



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 486 OF 2017

(formerly ELC No. 157 of 2016)

PARAMJIT SINGH SOKHIPLAINTIFF/APPLICANT

VERSUS

LORNA INGETINA CHARLESDEFENDANT/RESPONDENT

RULING

By a motion dated the 18th October, 2016, brought pursuant to Order 40 rule 1, 2, and 4 of the Civil Procedure Rules of 2010, Section 1A, 1B, and 3A of the Civil Procedure Act, Cap 21 and other enabling provisions of the law, the Plaintiff/ Applicant is seeking the following orders:

1. spent

2. That a temporary injunction order do issue against the defendant/respondent restraining her, her agents and/or servants from alienating, selling, leasing, encroaching and/or trespassing, interfering, wasting, constructing further/or further dealing in whatsoever manner with the Plaintiff/Applicant's land Title No. Kajiado/Kaputei - North/277 pending the final hearing and determination of this application.

3. That a mandatory injunction order do issue against the defendant/respondent directing her, her agents and/or servants to immediately stop and/or cease encroaching and/or trespassing, interfering, wasting, constructing further/or further dealing in whatsoever manner with the Plaintiff/Applicant's land Title No. Kajiado/Kaputei - North/277 and to remove any and all structures erected on the said land within such a period as the Honourable Court may deem reasonable and in default of such compliance, the plaintiff/applicant be at liberty to use reasonable force to remove and/or demolish such structures at the defendant/respondent's expense.

4. That this Honourable Court be pleased to issue a mandatory injunction to compel the defendant/respondent to give vacant possession to the plaintiff/applicant of all that parcel of land known as Title No. Kajiado/Kaputei - North/277.

5. That the OCS Kitengela Police station do ensure that the orders issued herein are complied with and peace maintained by the defendant/respondent.

6. That pending the hearing of the instant application *inter partes* there be interim orders in terms of prayer 2 herein above

7. That the costs of this application and the ensuing enforcement of the court order be borne by the

defendant.

The application is based on the following grounds, which in summary are that the Plaintiff is the registered owner of the suit property having purchased it in 1994. Further that the Defendant has trespassed and put up structures on the suit parcel without the Plaintiff's consent. The application is further supported by the affidavit of PARAMJIT SINGH SOKHI who is the Plaintiff herein. He states that he is the registered owner of the parcel of land known as Kajiado/Kaputiei North/277 having bought it from one JAMES NJENGA KAMAU in the year 1994. Further that despite his legal ownership of the suit land, the Defendant/Respondent has since 2014 or thereabout forcefully and arrogantly trespassed and occupied the suit property, fenced and put up temporary structures on it and might be planning to put up permanent structures thereon without his consent.

He avers that he needs to develop the land but the Defendant/Respondent's acts of trespass have greatly interfered with his plans and he stands to suffer irreparable loss and damage. Further that despite seeking assistance of the local administration and Assistant Commissioner, Kitengela to evict the Defendant/Respondent from the suit property, this proved futile. He avers that his efforts to have the matter settled amicably between himself and the Defendant has failed, because Defendant/Respondent is falsely claiming to be legal owner of the suit property through adverse possession in the first instance and also as the Plaintiff/Applicant's apparent dependant through marriage. He states that the Defendant/Respondent is not entitled to the suit property under adverse possession at all and cannot sustain such a claim. He avers that he has never been married to the Defendant/Respondent or are in any way related to her.

The Respondent filed a replying affidavit sworn by one LORNAH INGATIMA CHARLES the Defendant herein where she avers that the Plaintiff's application and supporting affidavit contain both false and misleading statements in a calculated move to get undeserved order from the Court. Further, that the suit property is registered in the name of her husband PARAMJIT SINGH SOKHI who shares a similar name with the Plaintiff/Applicant but is not the Plaintiff herein. Further, that in 1992, the Defendant and her husband jointly purchased the suit land and in 1994 a title deed to the suit land was issued in her husband's name; and they lived happily on the suit parcel until 1998 where the husband travelled abroad and never came back to date. She states that she has been staying on the suit parcel and constructed a school called Cornerstone Academy which has been operational from 1998 to date. She avers that in January 2004 a broker by the name Jonathan Milika offered to assist her transfer the suit land to her name and she gave him the original title deed, a copy of her husband's national identity card and a copy of her identity card, but the said broker disappeared with the documents which prompted her to report to the Kajiado Police Station vide OB No. 18/12/10/15. She avers that she lived on the suit parcel of land with her husband from 1994 until 2016 when the Plaintiff/Applicant in company of known connen and brokers visited the suit parcel to establish vulnerable persons who own property in the area with the intention to grab the property from them and she was singled out.

Both parties filed written submissions to canvass the instant motion.

The Plaintiff/Applicant in his written submissions dated 31st March, 2017 stated that he is the registered proprietor of the suit parcel of land after having purchased the same in 1994 from JAMES NJENGA KAMAU. He referred to annexures "PSS 1" and "PSS 2" which are copies of Title Deed, Certificate of Official Search and Survey Report respectively, to prove ownership. He submits that as a legal proprietor of the suit land, he is entitled to enjoy all the rights conferred by ownership. Further, that after purchase, he had left the plot vacant and to his dismay and without his consent, the Defendant/Respondent forcefully trespassed on to the suit land and put up temporary structures thereon. He stated that when he sought assistance from the administration to remove the Defendant/Respondent from the suit land, the Defendant/Respondent failed to tender any documents or witnesses in support of her claim of ownership over the suit parcel.

The Plaintiff/Applicant relied on the cases of **Giella Vs. Cassman Brown 1973 (EA) 358** and **Mrao Vs. First American Bank Limited & 2 others (2003) KLR 125**. He stated that he had established a prima facie case as against the Defendant to warrant the injunction sought. He submitted that he had produced

documents of title to prove his claim over the suit land. He further relied on Section 24 of the Land Registration Act that stipulates that registration of a person as proprietor of land shall vest in that person the absolute ownership of that land with all rights and privileges belonging or appurtenant thereto. The Plaintiff/Applicant further relied on the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that ' **the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Registration of Lands Act entitled to the protection of the law** '.

The Plaintiff/Applicant submitted that the Defendant/Respondent did not have a valid claim over the suit property as she had not established any fraud and or illegality to which the Plaintiff/Applicant was a party to. Further that the documentation tendered by the Plaintiff/Applicant shows that he procedurally carried out the transaction until he was registered as the owner of the suit parcel. The Plaintiff/Applicant further submitted that the Defendant/Respondent's claim of ownership is unsubstantiated and she has been living on the suit parcel as a trespasser and cannot claim ownership just because she has lived on the suit land for two years.

The Plaintiff/Applicant also submitted that he is likely to suffer irreparable loss and/or damage as the suit property is located at a place developing at a fast rate and the Defendant/Respondent has been occupation for two years to his detriment. He stated that he wished to develop the suit parcel and gain from the same but he continues to suffer because of non occupation and lack of access to the same. Further that no award of damages can adequately compensate him. He relied on the case of **Korari Agencies Limited Vs. Epc Builders Limited (2013) eKLR** where Justice M. Gitumbi stated as follows: ' **I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach.** '.

The Plaintiff/Applicant submitted that the balance of convenience tilts in his favour as he has been deprived of enjoying his property. On the question of the mandatory injunction, he relied on several cases including the case of **Jaj Super Power Cash and Carry Ltd Vs. Nairobi City Council & 20 others (civil appeal No. 111 of 2002)** where the court of appeal stated that ' **This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.** ' The Plaintiff/Applicant submitted that his case passes the tests outlined in the grant of mandatory injunction as his case is plain and clear and he has demonstrated ownership of the suit parcel and furnished copies of the Sale Agreement, Title documents and Certificate of Official Search.

The Defendant/Respondent in her written submission dated 19th April, 2017 has opposed the application and submitted that the suit property belongs to her husband PARAMJIT SINGH SOKHI who seems to share the same name with the Plaintiff. Further, that they jointly bought the suit parcel of land which was registered in her husband's name in 1994 and has been operating a school thereon since 1998 called Cornerstone Academy. She claims adverse possession as she has been on the suit parcel for over 13 years and submits the Plaintiff/Applicant does not have any sentimental value to the suit parcel and can be compensated by way of damages. She further submits that she stands to suffer irreparable loss as the suit parcel is her only home and she has nowhere to go if she is dispossessed and contends the Plaintiff/Applicant has not established a prima facie case with a probability of success, that damages would not be adequate compensation for the loss she will suffer if the prayers are granted and the balance of convenience tilts in favour of preserving the suit property until the suit is heard and determined. She relied on the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** where the court had occasion to discuss and consider the principles that govern the grant of mandatory injunction and stated that, ' **a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted.** ' She submits that the applicant has failed to prove that there are special circumstances to warrant grant of a mandatory injunction at the interlocutory stage.

Issues and determination

Upon perusal of the application together with the supporting affidavit, the replying affidavit and the parties written submissions, at this junction the only issue for determination is whether the interim and mandatory injunctions sought by the Plaintiff/Applicant ought to be granted pending the hearing and determination of the main suit.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I wish to interrogate the evidence presented. The Plaintiff/Applicant stated that he is the proprietor of the suit land Kajiado/Kaputei - North/277 and the Defendant/Respondent has trespassed on the same and is interfering with his ownership and access to it. Looking at the documents presented in the supporting affidavit which included a Sale Agreement, Title deed and Certificate of official search, the suit land belongs to one **PARAMJIT SINGH SOKHI** who is the Plaintiff/Applicant herein. The Defendant/Respondent on the other hand stated that the suit land belonged to her husband who shares the same name as the Plaintiff/Applicant. Further that they have owned the suit land since 1994. She however did not produce any documentation to confirm this position and stated that the same had been taken by an agent who turned out to be a conman. By virtue of this position, it is clear that the claim laid by the Plaintiff/Applicant over the suit land is not baseless and may indeed succeed at the full trial. Several issues are curious about the Defendant/Respondent's averments, she did not produce any form of identification to identify her husband, nor a sale agreement nor certificate of official search. She claims to have been running a school called Cornerstone Academy on the suit land from 1998 and does not provide proof of registration of the said school. One can only conclude that the applicant has a prima facie case with a probability of success.

On the second principle of the three **Giella vs Cassman Brown** conditions to the granting of an interlocutory injunction i.e. that an interlocutory injunction ought to be granted in cases where the Applicant suffers irreparable loss which cannot be compensated by way of damages. Both the Plaintiff/Applicant and Defendant/Respondent admit that the Defendant/Respondent has constructed structures in the suit land and is operating a school. The Plaintiff/Applicant submitted that he has not been able to access the suit land as a result of the Defendant/Respondent's acts of trespass. The Defendant/Respondent on the other hand insists she has been on the suit land for over 13 years and has a school constructed thereon. In the instant case, the Plaintiff/Applicant submitted that the suit property is located in a place that is fast developing, and he is desirous of developing the suit land. He stated that the non occupation and delay in accessing the suit land is making him suffer great substantial loss. The Court finds that if the temporary injunction sought is not granted, the person in control of the suit property may waste it away, and if the Plaintiff/Applicant were to win the case against the Defendant/Respondent no amount of damages can put him back to its rightful position.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the Plaintiff/Applicant is likely to suffer more inconvenience if the temporary injunction is denied as opposed to the Defendant/Respondent if the injunction is allowed. If the title to the property is not preserved, it may be wasted away.

The Court finds that the Plaintiff/Applicant has easily satisfied the three principles in granting injunction as established in the case of **Giella vs. Cassman Brown**.

On the question of granting mandatory injunction, the principle in granting the same is well settled in Kenya. The Applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, ' **a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

The mandatory injunction sought by the applicant for removal of structures on the suit land can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. Even though the Plaintiff/Applicant in the instant motion has put forth documentation to prove ownership of suit land, the Defendant/Respondent is also staking ownership claiming there was fraud. The Court has further taken judicial notice that there is a school operating thereon and in the circumstances the Court will not grant the mandatory injunction sought for the removal of structures, pending the determination of the suit.

I find merit in the Plaintiff's notice of motion application dated the 18th March 2016 and filed on 19th October, 2016 and allow the application in the following terms:

An order of temporary injunction do issue against the defendant/respondent restraining her, her agents and/or servants from alienating, selling, leasing, encroaching and/or trespassing, interfering, wasting, constructing further/or further dealing in whatsoever manner with the Plaintiff/Applicant's land Title No. Kajiado/Kaputiei - North/277 pending the final hearing and determination of this suit.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 27th day of June, 2017.

CHRISTINE OCHIENG

JUDGE