



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC CASE NO.127 OF 2016

TERESA NJOKI NJOROGE.....PLAINTIFF/APPLICANT

=VERSUS=

JOEL MWANGI.....DEFENDANT/RESPONDENT

RULING

1. The applicant is the administratrix of the estate of the late **Daniel Njoroge Kibugi (deceased)** who was a shareholder at Embakasi Ranching Company Limited (the company). By virtue of being a shareholder of the company, the deceased was allocated **Plot No. P 5113 (suit land)**. Following the demise of the deceased on 11th August 1995, the applicant moved to Limuru Senior Principal Magistrate's Court where she obtained grant of letters of administration in respect of the estate of the deceased.
2. The applicant proceeded to the company where she had the deceased's share transferred to her and her daughter to hold it in trust for the estate of the deceased. In the year 2014, the applicant's daughter visited the suit land and discovered that the respondent had put up a perimeter fence around the suit land and had erected a gate and planted some trees on it. The applicant reported the incident to Ruai Police Station and the local Chief who could not assist insisting that they wanted a court order in order to evict the respondent from the suit land.
3. In the meantime the respondent was charged in court with a criminal offence of forcible detainer which case is still pending. It is after this that the applicant brought an application seeking injunction orders against the respondent.
4. The applicant contends that she has all documents to show that the suit land belonged to the deceased and that the respondent has encroached on to the suit land without any colour of right. The applicant now wants the respondent restrained from interfering with the suit land.
5. The respondent has opposed the applicant's application based on a replying affidavit sworn on 7th February 2017. The respondent contends that the applicant is misleading the court and that according to the applicant's documents, the deceased may still be alive because there is a receipt dated 14th November 2013 for Kshs.20,000/- paid by the deceased and signed by the deceased. The respondent denies trespassing on to the suit land and that therefore the applicant has no cause of action against him.
6. I have carefully considered the applicant's application as well as the opposition thereto by the respondent. I have also considered the submissions filed by the applicant and the respondent. This being an application for injunction, I have to decide whether the applicant has met the threshold set out in the

celebrated case of **Giella Vs. Cassman Brown Co. Ltd. [1973] .E.A. 358.**

7. The first consideration is whether the applicant has established that she has a *prima facie* case with probability of success. A *prima facie* case was described in the case of **Mrao –Vs- First American Bank of Kenya Limited and 2 others (2003) KLR 125** 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”

8. In the instant case, the applicant has produced documents to show that the deceased was a shareholder of the company. The deceased had been allocated the suit land. Upon the demise of the deceased the shareholding of the deceased was changed to applicant’s name and that of her daughter. The company has confirmed that the deceased was a shareholder and was entitled to the suit land.

9. There is evidence that the respondent has fenced the suit land. The respondent has not denied the fact that he is facing a charge of forcible detainer in respect of the suit land. The respondent does not say why he is on the suit land. He has not even filed a defence to the applicant’s claim. This therefore clearly shows that the applicant’s right has been infringed and that she has a *prima facie* case with probability of success based on the materials put before the court.

10. On whether the applicant will be compensated by way of damages, I do not think that a trespasser can trespass onto one’s land and stay put saying that the aggrieved party can be compensated in damages. If courts were to hold this view, then there will be chaos where trespassers who are able to pay can take other people’s land and say that they can pay for it in monetary terms. No one parcel of land is the same to another even if the two are adjacent. One is entitled to the land which rightfully belongs to him and the issue of compensation cannot be called in to aid a trespasser.

11. It is a trespasser who should give way and it cannot be argued that since the trespasser is in possession, he should be let to remain on the land. The respondent has not even said why he is laying claim to the land. Mere denial that he has not trespassed is not enough. He is facing a charge of forcible detainer which he has failed to respond to in his replying affidavit. I find that this is a clear case where an injunction should be granted to preserve the property. This is because if no injunction orders are given, the respondent may proceed to commence construction or even sell the suit land to unsuspecting third parties. I therefore allow the applicant’s notice of motion in terms of **prayer (2) (3) and (5)** of the Notice of Motion dated 18th January 2017.

12. It is so ordered.

Dated, signed and delivered at Nairobi on this 21st day of **June**, 2017.

E.O .OBAGA

JUDGE

In the Presence of:

Mr Shah for Mr. Mwanzia for defendant

Court Assistant; Hilda.