



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC.NO.49 OF 2017

ESPERE KENYA LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

SAM MUREITHI.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion** dated **6th February 2017**, brought by the Plaintiff/Applicant herein **Esper Kenya Limited** against the Defendant/Respondent **Sam Mureithi**. The application is anchored under Article 40 of the Constitution, Order 40 Rules 1, 2, and 4 and Order 41 Rule 1 of the Civil Procedure Rules Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Cap 21 and all enabling provisions of law.

The Applicant has sought for the following orders:

- a) THAT a temporary injunction restraining the Defendant, his agents, servants, employees, assigns or any other person, body or authority from entering, fencing, building or any other way trespassing upon the Plaintiff's property comprised in the title No.KAMITI/ANMER BLOCK 2/7333 (formerly known as Plot No.1328/KAMITI/ANMER) pending the hearing and determination of this suit.***
- b) THAT a mandatory injunction directing the Defendant, his agents, servants, employees or any other concerned person to demolish and remove all structures and materials erected or placed by himself or upon his instructions on the suit property comprised in Title No.KAMITI/ANMER BLOCK 2/733 (formerly known as Plot No.1328/KAMITI/ANMER) forthwith and in default the Plaintiff to be at liberty to demolish the same at the Defendant's cost.***
- c) THAT the Officer-in-Charge, Kiambu Police Station ensure compliance with the court orders.***
- d) THAT costs of the application be borne by the Respondent.***

The said application is premised on the grounds stated on the face of the application and on the Supporting Affidavit of **Ruth Gathoni Ngotho Kariuki**. The grounds in support of the application are:

- 1) THAT the Applicant is the registered proprietor as lessee for the unexpired term of 99 years from 1/05/1996 of all that land known as title No.KAMITI/ANMER BLOCK 2/733 (formerly Plot No.1328/KAMITI/ANMER).***
- 2) THAT the Respondent has, without any colour of right come onto the Applicant's land and***

put up a semi-permanent structure thereon.

3) THAT the Respondent, being neither a Member nor a Director of Espere Kenya Limited, has fraudulently acquired a copy of Letter of Allotment in respect of the Applicant's property being Title Number KAMITI/ANMER BLOCK 2/733 (formerly plot no.1328/KAMITI/ANMER), creating the impression that he owns the property.

4) THAT the Respondent's actions are callous, arbitrary, unlawful and intended to defeat the Applicant's proprietary rights over its land.

5) THAT the Applicant stands to suffer irreparable harm, loss and damage, if this Honourable Court does not grant the orders sought in this application.

In her Supporting Affidavit, **Ruth Gathoni Ngotho Kariuki** averred that she is a **Director** of the Applicant Company and is well versed with the facts of this case. Further that the Applicant is the registered proprietor of all that parcel of land known as **Kamiti/Anmer Block 2/733 (formerly plot No.1328/Kamiti/Anmer)**, measuring approximately **0.0800 Hectares** thereafter known as the suit property. Further that the Applicant has enjoyed possession of the suit premises since **29th October 1997**, when the property was transferred to it but the Respondent without any colour of right has invaded the same and erected a semi-permanent structure on the suit property sometime in January **2017**. That the Respondent's action amount to a manifest act of trespass on the Applicant's property and therefore a violation of the applicant's quiet possession of its property. She urged the court to allow the instant application.

The application is contested and Sam Mureithi, the Respondent, swore a **Replying Affidavit** on **14th March 2017**, and denied all the allegations deponent by the Applicant herein. He denied that he is the registered owner of the two quoted suit premises and that he has never laid any claim on the alleged suit property. That if the Plaintiff had carried an official search, it would have confirmed the legal ownership of the suit premises. He also denied that he is in possession of the suit property and that he has no legal right over the said property as it belongs to another party but not him. It was his allegation that he has no ownership claim to the suit land and that the Plaintiff is being untruthful. Further that the Plaintiff's actions are an abuse of the courts process and he urged the court not to entertain the illegal actions of the Plaintiff. Therefore the suit is vexatious, illegal, an abuse of the court process and it is a fishing expedition.

The court directed that the said application be canvassed by way of Written Submissions. In response to that direction, the Law Firm of **Kariuki Muigua & Co. Advocates** for the Plaintiff/Applicant filed the Written Submissions on **3rd April 2017**, and relied on various authorities to support their respective position. The Applicant relied on the case of **Evelyn College of Design Ltd..vs.. Director of Children Department & Another (2013) eKLR** where the court held that;

“...the thrust of Article 40 is to protect proprietary rights under the law. Such rights are governed by statutes, for example in this case, the title issued is governed by the provisions of the Registration of Titles Act (repealed). The Petitioners case is grounded on the fact that it has an absolute and indefeasible title under the Registration of Titles Act that is capable of being protected under Article 40 and that once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with the Constitution and the law”.

Further, Applicant also relied on the case of **Kenya Breweries Ltd & Ano. ..vs..Washington O. Okeyo (2002)/EA 109**; where it was held that:

“Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial. The Defendant has accelerated the development that the Plaintiff seeks to restrain, with the intention of defeating the Plaintiff's

claim on where the Defendant is otherwise bent on stealing a march on the Plaintiff

The Applicant submitted that it is the registered owner of the suit property and the Defendant is a trespasser and should therefore be restrained from further trespass.

The Defendant through the **Law Firm of Omungo Wanga & Co. Advocates** filed his written submission on **4th May 2017**, and urged the court to dismiss the Plaintiff's application. He submitted that the Plaintiff failed to establish the principles set out in the case of **Giella..vs..Cassman Brown & Co. Ltd(1973) EA 358** for grant of temporary Injunction. Further he submitted that there are no special circumstances established by the Plaintiff to warrant issuance of mandatory injunction at an interlocutory stage. He relied on the case of **Locaball International Finance Ltd ..vs.. Agro Export & ano.(1986)/ALL ER 901** where the court held that;

“A mandatory injunction ought not to be granted or an interlocutory application in the absence of special circumstances and then only in clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, the court had to feel a high degree of assurance that at the trial, it would appear that the injunction has rightly been granted, that being a different and higher standard than was required for a prohibiting injunction”

The Defendant/Respondent urged the court to dismiss the instant application.

This court has now carefully considered the instant Notice of Motion and the annexures thereto. The court has also considered the Pleadings in general, the relevant provisions of law and the written submissions. The court has also considered the cited authorities and the court renders itself as follows;

The Applicant has sought for injunctive orders which are equitable remedies which are granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others ..vs.. Gathoni & Others (1990) KLR 554** where the court held that;

“whether or not to grant an injunction is the discretion of the court and the discretion is a free one but must be judicially exercised”

The Applicant has sought for both temporary and mandatory injunctions which prayers are vehemently contested by the Respondent. For the court to arrive at the decision whether to grant the sought orders or not, it will be guided by the well settled principles for grant of such order. In the case of **Kheira Omar Maalim..vs.. New Look Estate Ltd & ano. Nairobi HCCC No.156 of 2008**, the court held that;

“The condition for the grant of an interlocutory injunction are now settled in East Africa. First an Applicant must show 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. (see Giella..vs.. Cassman Brown (973 EA 358; E.A Industries..vs.. Trufoods (1972) EA 420

Further in the case of **Triton Service Station Ltd ..vs.. PSP Holdings Ltd Nairobi HCCC NO.338 of 2009**, the court held that:

“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thinks that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which can easily be remedied or where the Defendant has attempted to steal a march on the Plaintiff. Moreover before granting a mandatory injunction the court has to feel a high degree of assurance that at the trial, it would appear that the injunction has rightly been granted that

being on a different and higher standard than was required for a prohibitory injunctionSee Kenya Breweries Ltd..vs..Okeyo (2002)/EA 110: Locaball International Finances Ltd..vs.. Agro Export & Others (1986)/All ER 901.

Taking into account the above principle, the court will embark on analysis of available evidence to arrive at a conclusion on whether the Applicant is deserving of the orders sought.

In opposing the application, the Defendant/Respondent submitted that the Plaintiff/Applicant failed and/or ignored to file a Plaintiff. However, a perusal of the court file has revealed that a ***Fast Track Plaintiff*** was filed in court on ***6th February, 2017***, simultaneously with the instant application. If the Applicant has not served the said Plaintiff to the Defendant/Respondent, then that is another issue altogether but the application herein is anchored on the Plaintiff filed in court on ***6th February, 2017***.

Firstly, the Applicant had to establish that it has a *prima-facie* case with probability of success at the trial. *Prima facie* case was described in the case of ***Mrao Ltd..vs.. First American Bank of Kenya Ltd & Others (2003) KLR*** to mean;

“A case in 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”.

Has the Applicant herein established that it has a *prima-facie* case with probability of success? As the court embark to answer the above question, it will take into account that this being an interlocutory application, the court has to be cautious not to make any conclusive findings of facts on disputed issues that form the subject of the main trial.

In the instance suit and application, the Plaintiff/Applicant through one of its ***Directors, Ruth Gathoni***, has alleged that the Plaintiff is the registered owner of the suit property herein ***Kamiti/Anmer Block 2/733***. The Plaintiff produced a ***Certificate of Lease*** issued on ***29th October 1997***, and a ***letter of Allotment*** allegedly issued on ***17th May 1996***. The Respondent has challenged these documents and averred that the Plaintiff/Applicant has not carried a recent official search from the Lands Office to confirm who indeed is the current registered owner of the suit property. It is indeed correct that the Plaintiff has duly produced documents which are not certified. There is no recent official search from the Ministry of Lands to confirm that indeed the Plaintiff is the current registered owner of the suit property.

The Respondent has denied being in possession of the suit property and even having laid any claim on the suit property. The Plaintiff is the one who has come to court and alleged in paragraph 12 of the Supporting Affidavit that in ***January 2017***, the Defendant/Respondent while armed with an alleged Letter of Allotment for ***Plot no.1328*** went to the suit property and interfered with the beacons and the boundaries of the said properties. However, the Plaintiff/Applicant did not attach a copy of the said Letter of Allotment that the Defendant was allegedly armed with. Further that the Defendant has put a semi-permanent structure on the said property. However, no evidence of such semi-permanent structure was attached to the application. The Defendant/Respondent also submitted that the Plaintiff's Company did not annex any company resolution appointing the firm of Advocates representing them in this matter. The court has perused the annexures to the Notice of Motion and it is indeed correct that there are no company resolution appointing the firm of Advocates to represent them in court. Therefore the Plaintiff's advocates are not properly on record.

The Defendant/Respondent has denied any wrong doing or any connection to the suit property. Apart from the annexures attached to the application and the allegedly statement of the Assistant Chief of Kamiti, there is no any other evidence to connect the Defendant to the suit property or confirm that he entered into the suit land and erected the semi-permanent structures thereon.

For the above reasons, the court finds that the Applicant has failed to establish that the Defendant/Respondent herein has infringed on any of its rights herein. The Plaintiff has failed to establish that it has a *prima-facie* case with probability of success at that.

Having found that the Plaintiff/applicant has not established any prima-facie case, the court finds no reason to delve into the other limbs that are to be considered in grant of temporary orders; see the case of The Attorney General..vs.. ***Kenya Commercial Bank Ltd, Afraha Education Development Co. Ltd & Others Nakuru High court, Civil Case No.260 of 2004***, where the court held that:

“that judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has *no registered interest in the land comprised in the title’s dispute and therefore has not demonstrated that it has a prima-facie case with probability of success, no interlocutory injunction would be available”*

The Applicant has also sought for mandatory injunction to be directed on the Defendant, his agents, servants or employees, that they should demolish and remove all structures and or materials erected or placed on the suit property. However, the Respondent/Respondent has denied any connection to the suit property. The court has noted that though the Plaintiff/Applicant has alleged that the Defendant has erected a semi-permanent structure on the suit property, there was no evidence of this semi-permanent structure on the suit property and also any evidence that the same was constructed by the Defendant/Respondent herein. The Plaintiff/Applicant has therefore failed to demonstrate the existence of special circumstances for grant of mandatory injunction. Plaintiff has also failed to demonstrate that the case herein is a simple one that needs to be decided at once and that the Defendant/Respondent is attempting to steal a march on the Applicant herein.

Having now carefully considered the available evidence, the court finds that the Plaintiff/Applicant herein has not been able to establish the principle for grant of both the temporary and mandatory injunctions. For the above reason, the court finds that the instant Notice of Motion ***dated 6th February 2017***, is not merited. The said Notice of Motion dated ***6th February 2017***, is accordingly dismissed entirely with costs to the Defendant/Respondent.

It is so ordered.

Dated, signed and delivered at THIKA this 14TH JUNE, 2017.

L. GACHERU

JUDGE

In the presence of

Hon. Gacheru, Judge

Court Clerk – Wycliffe

Mr. Tumu holding brief Mr. Kariuki Muigua for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent though date was taken in court.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of Mr. Tumu holding brief for Mr. Kariuki for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

L. GACHERU

JUDGE

14/6/2017