



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND SUIT NO. 68 OF 2017

EUNICE NGETA MUTIGAPLAINTIFF/APPLICANT

VERSUS

KENNETH MWITI MUTUNGADEFNDANT/RESPONDENT

RULING

1. The Notice of Motion dated 21st February, 2017 seeks the following orders:-

1. Spent.

2. That a temporary injunction order do issue against the defendant/respondent restraining him, his agents and/or servants from trespassing, entering, leasing, cultivating, building, damaging, wasting, alienating, dealing and/ or interfering in whatsoever manner with the plaintiffs' quiet control, management and /or control over the plot measuring about 0.74 acres comprised in Title No. Abogeta/L.Kiungone/380 pending the final hearing and determination of this application.

3. That the O.C.S Nkubu Police Station do ensure that the orders issued herein are complied with and peace maintained by the defendant/respondent.

4. That pending the hearing of the instant application inter-parties there be interim orders in terms of prayer 2 herinabove.

5. That the cost of this application and the ensuring enforcement of the Court order be borne by the defendant.

2. The application is based on the grounds:-

a. The Plaintiff /Applicant is the owner of a plot of land measuring about 0.74 acres comprised in Title No. ABOGETA/L.KIUNGONE/380(hereinafter referred to as "the suit property") having acquired the same in the year 2015 from the defendant.

d. The defendant has forcefully and arrogantly invaded the suit property causing wanton destruction of banana plants and vegetation and is now in the process of undertaking some cultivation on the same without the plaintiffs consent and/or authority.

c. The encroachment constitutes trespass and is an outright interference of the plaintiff/applicant's right of enjoyment and use of his land.

d. The defendant /respondent has no valid basis whatsoever to trespass and cultivate on the suit

property and the said actions greatly prejudice the plaintiff/ applicant's interests over the suit property.

e. The plaintiff /applicant has a *prima facie* case with a high probability of success as against the defendant/respondent and the orders sought to be granted.

f. The Plaintiff/Applicant has a *prima facie* case with a high probability of success as against the defendant/respondent and the orders sought ought to be granted.

g. The interest of justice dictates that the orders sought be granted.

3. The application is supported by the affidavit of Eunice Ngeta Mutiga sworn on 21st February, 2017 and has the following grounds:-

1. That she is the plaintiff /applicant herein fully conversant with the facts herein and therefore competent to swear this affidavit.

2. That she is the owner of a plot of land measuring about 0.74 acres comprised in Title No. Abogeta/L-Kiungone/380 having bought the same in the year 2015 from the defendant herein.

3. That Title No. Abogeta/L-Kiungone/380 is part of the Estate of M' Mutunga M'Mukaba and is currently undergoing subdivision in accordance with the agreed distribution agreement under the Succession process. (Annexed and marked "ENM 1" is a copy of the mutation form for the property).

4. That the defendant is a beneficiary of the said estate and stands to inherit the plot measuring about 0.74 acres on Title No. Abogeta/L.Kiungone/380 which he agreed to sell to the plaintiff for the sum of Kshs. 600,000/= and she subsequently paid a deposit of Kshs. 450,000/= and took possession of the plot as agreed. (Annexed and marked "ENM 2" is a copy of the Sale agreement).

5. That sometime in 2015, she called the defendant several times and informed him that she would like to clear the purchase price balance of Kshs. 150,000 in order to acquire full ownership of the land and start developing it and we agreed to meet at our lawyer's office but each time he failed to show up and get the money.

6. That after consulting with the local administration, she was advised to go ahead with her plans of developing the suit property since she had followed due process and was the legitimate owner of the suit property.

7. That on or about August, 2016, she contracted some workers to clear the land and dig up holes for planting bananas, then manured the land to get it ready as we waited for the rains but to my surprise, some people later trespassed on the land, covered up the holes that were intended for planting the bananas, and planted maize.

8. That she did not worry about the maize because her plan was to still go ahead and plant the bananas once the rains came, which she did, but on the same day, some armed young men stormed in to the plot and started pulling and destroying the bananas.

9. That she was informed of what had happened by one of the employees who she advised to go and report the matter to the area chief who advised that the same be reported to the police station.

10. That the police officers also advised them to report the matter to the agriculture office which would be able to assess the damage caused and take photographs of the destruction. (Annexed and marked "ENM3" is a copy of the report).

That the Plaintiff planted the rest of the bananas but the defendant and/or his servants came and

uprooted them again and the matter was again reported to the police station and a statement recorded.

12. That despite my lawful ownership of the suit property the defendant/respondent has since 2016 or thereabout forcefully and arrogantly trespassed and cultivated on the suit property, and is planning to resell the same to third parties without my consent and/or authority.

13. That she has been informed/advised by her advocate on record, which advice she believe to be true, that the defendant/respondent's actions not only amount to infringement of my interest over the suit property but are also criminal in nature.

14. That she need to develop and cultivate the said land but the defendant's acts of trespass have greatly interfered with her plans and she stands to suffer irreparable loss unless the orders sought are granted.

15. That she sought the assistance of the local administration and the Deputy County Commissioner, Imenti south, in ensuring that the defendant does not trespass to her property but her efforts has been futile. (Annexed and Marked "ENM 4 "a" and "b" are copies of the letters from the Chief and to the Deputy Commissioner on the issue).

16. THAT my attempts to have the matter settled amicably between myself and the defendant/respondent have completely failed hence filing of the instant suit. (Annexed and marked" ENM 5 " is a copy of demand letter and an affidavit of service of the same.

17. That the defendant has completely refused to accept the balance of the purchase price and frustrated the completion of the sale of the suit property.

That in the circumstances it is imperative that conservatory orders are issued by way of an injunction because if this situation goes unchecked the defendant is bound to continue causing wanton destruction of vegetation on the suit property; or even transferring the same to unsuspecting 3 rd parties; thereby causing me to suffer irreparable loss.

19. That the defendant's actions which are very provocative are bound to create tension acrimony unless his intention is halted by issuance of the interim conservatory orders sought.

20. That I swear this affidavit in support of the application herein.

4. Defendant was served but has not filed any response to the present application.

5. I have perused the documents on record. Applicant's stake to the suit land is on the basis of a Sale Agreement dated 11:03:15. In Paragraph 3 of her affidavit , Plaintiff states that:-

"title No. Abogeta/L. Kiungone/ 380 is part of the estate of M'Mutungu M'Makaba and is currently undergoing subdivision in accordance with the agreed distribution agreement under the Succession process...."

6. In paragraph 4 of the said affidavit she further state that:-

"defendant is a beneficiary of the said estate and stands to inherit the pot measuring 0.74 acres on Title Abogeta/L- Kiungone/380 which he agreed to sell to me....."

7. There are two issues for determination.

1. Right of proprietorship.

2. Validity of the transaction where the land was sold.

8. Proprietorship

In light of the averments made by the applicant in paragraph 3 and 4 of the affidavit, it is clear that her right of proprietorship did not and has not crystallized. Her claim to ownership as set out in paragraph 3 of the Plaintiff has therefore not been proved at this stage. She cannot succeed on the basis of being a beneficial owner.

2. Validity of the transaction.

It appears that the transaction (Sale of the land) was conducted when the estate of deceased was not yet ripe for distribution. No confirmation of grant has been awaited to show that the parties had the mandate to deal with the propriety of deceased. If the Court was to allow the application on it may be sanctioning the intermeddling, with the estate of a deceased person;

See section 45 (1) of the law of Succession Act

"Except so far as expressly authorized by this Act, or by any other written law, on by a grant of representation under this Act, No person shall for any purpose, take possession or dispose of an otherwise intermeddle with, any free property of a deceased person..."

9. That being the case, I find that the application is unmerited. The same is hereby dismissed with no orders as to costs.

DELIVERED, DATED AND SIGNED AT MERU THIS 26th DAY OF JULY, 2017 IN THE PRESENCE OF:

C:A Janet

No appearance for applicant

No appearance for respondent

HON. L. N. MBUGUA

ELC JUDGE