



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 89 OF 2017

FATMA SHAMLAL.....PLAINTIFF

VERSUS

BERNARD MAINA.....1ST DEFENDANT

MESHACK OWUYA.....2ND DEFENDANT

(Being sued as officials of Embakasi Njiru United Scheme)

RULING

The Plaintiff seeks a temporary injunction to restrain the Defendants from encroaching onto plot No. 208A (256) (“the Suit Property”) pending hearing and determination of this suit. The application was filed as an urgent matter and the court granted interim orders on 20th February 2017. The orders were extended by the court.

The Defendants are sued in their capacity as the officials of Embakasi Njiru United Scheme from whom the Plaintiff acquired the Suit Property in 2005. The Plaintiff claims that the Defendants have resold the Suit Property to another person who has commenced development on the Suit Property.

The Defendants admit in their defence and Replying Affidavit that the Plaintiff is the owner of the Suit Property. However, they contend that the dispute is about the boundary and that the Plaintiff has encroached on another person’s plot being Plot No. 209 (C255). The Defendants claim that the Plaintiff encroached on Plot No. 209 (C255) when she constructed the temporary structure. They maintain that the report made by the Plaintiff to the police related to the boundary dispute.

The Defendants have urged the court to strike out the suit and application claiming that these together with the plaint were not signed by the Plaintiff’s advocates. The plaint, list of witnesses, list of documents and the application filed in court are all duly signed. The Defendants also raise the issue of conflict of interest on the part of the Plaintiff’s advocate. This is not an issue the court can resolve at this stage without a formal application setting out the nature of the conflict of interest.

The defendants have annexed an unclear map of the plots from which it is difficult to tell where the Suit Property is situated in relation to Plot No. 209 (C255).

An applicant has to demonstrate that she has a prima facie case with a probability of success and that she will suffer irreparable damage unless the injunctive orders are granted.

The Plaintiff annexed copies of the transfer, receipt issued by Embakasi Njiru United Self Help Group on

account of survey and planning fees as well as the beacon certificate in respect of the Suit Property. She bought the land in 2005. The court is persuaded that she has a prima facie case against the Defendants who in any event do not deny that she is the owner of the Suit Property.

The Plaintiff claims that another person who was allocated the plot by the Defendants has commenced construction on her property and that unless that person is stopped, she will suffer irreparable damage which cannot be compensated by an award of damages. The ongoing development should be stopped to preserve the Suit Property until this dispute which the Defendants believe is on the boundary between plots numbers 208 A and 209, is resolved. If the construction is not stopped and it is later found that the construction is on the Plaintiff's plot, then damages would not adequately compensate her for the encroachment and construction on her plot. It is at the trial that evidence can be led as to the exact location and size of the two plots.

The application dated 7th February 2017 is allowed with costs to the Plaintiff.

Dated and delivered at Nairobi this 24th day of July 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Kahura for the Plaintiff

No appearance for the Defendant

Mr. V. Owuor- Court Assistant