



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO 33 OF 2017

DICKSON NGONDE KWINGA..... PLAINTIFF

VERSUS

JULIUS NYAMAI MULI.....1ST DEFENDANT

ELIAS NGUNJIRI.....2ND DEFENDANT

RULING

1. The Application under consideration is the Notice of Motion dated 8th February 2017 in which the Plaintiff/Applicant is seeking for orders that pending hearing and determination of this Application and pending hearing and determination of this suit, the Court grants temporary orders of injunction against the Defendants, their servants, and/or employees from trespassing, encroaching, pouring building materials and erecting building in **Plot No.1457 Lessessia Taveta** and or having already trespassed, to stop henceforth the trespass and construction of the said building and in any way cease from interfering with the said **Plot No.1457 Lessessia Taveta**.

2. The Application is based on the grounds on the face of the Motion and supported by the Plaintiff's Affidavit sworn on 8th February 2017. Briefly, the Plaintiff states that he is the proprietor and/or registered owner of land parcel **Numbers 1582 and 1457 Lessessia Taveta** which are adjacent to each other. That sometime in 2013 or thereabout, the 1st defendant encroached and/or trespassed onto **Plot No.1582** and commenced cultivation thereon without the Plaintiff's knowledge and consent. The Plaintiff states that he reported the matter to the local administration officials who failed to resolve the matter and the Plaintiff filed **case No.27 of 2015** at Taveta Law Courts, but which before its conclusion was caught up by a decision of the High Court at Malindi which decided that the Magistrate's Court did not have jurisdiction over land matters. The Plaintiff avers that on 22nd January 2017, the 1st Defendant poured building blocks and sand in the Plaintiff's other plot being **No.1457** and upon inquiry discovered that the trespass and construction was by the 2nd Defendant. The Plaintiff has attached photographs showing the building allegedly constructed on his plot. It is the Plaintiff's contention that the 1st Defendant presented himself as the owner of **Plot No.1457** and sold it to the 2nd Defendant. The Plaintiff therefore seeks conservatory orders of the Suit Property directed against the Defendants pending hearing and determination of the Suit.

3. The Application is opposed by the Defendants and the 1st Defendant filed a Replying Affidavit dated 6th March 2017 made on his behalf and on behalf of the 2nd Defendant. The 1st Defendant avers that there are several matters pending before the High Court concerning the distribution of land in Taveta **including Petition NOs.1019 of 2004, 434 of 2015, and 5 of 2013** relating to **L.R. Nos.6731 and 6732; Petition No.576 of 2012** relating to **L.R. No.827 and Petition No.325 of 2011** relating to **L.R No.5865 (formerly**

Taveta 2097). He further avers that **Taveta/Taveta Scheme Phase I/1582** and **Plot No.1457 Lessessia Taveta** are part of **LR No.5865/2** which is the subject matter of **Petition No.325 of 2011** and that on 17th February 2012, the Court made an order prohibiting any distribution of **L.R. No.5865/2**. The 1st Defendant states that he has been in occupation of **Taveta/Taveta Scheme Phase I/1582** and **Plot No.1457 Lessessia Taveta** for more than 30 years and believes that he is the rightful owner. The 1st Defendant questions the Plaintiff's alleged Title Deed and Letter of offer as the same were granted after the issuance of the order by the High Court in the petitions referred to.

4. In his submissions, Mr. Tunje Counsel for the Plaintiff fully relied on the Plaintiff's Affidavit in support of the motion and urged the Court to allow the Application. Likewise the 1st Defendant relied on his Replying Affidavit and prayed that the Application be dismissed. On his part, the 2nd Defendant informed the Court that he is a pastor and his name was Geoffrey Ngunjiri and not Elias as stated in the pleadings. He further stated that he had no interest in the Suit Property and had no relations with either the Plaintiff or the 1st Defendant and said that he did not understand why he has been sued.

5. I have considered the Application, the affidavits on record and the submissions made. The principles to be applied when considering an Application for temporary injunctions are well settled. In the case of **Giella –V- Cassman Brown and Co. Ltd (1973)EA 358**, the Plaintiff must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage; and in the event of doubt, the Court will decide on the balance of convenience.

6. The Plaintiff has demonstrated by producing a copy of a Title Deed that he is the registered owner of the Suit Property. He has also attached other documents showing how he acquired the property. From the defence and the Replying Affidavit filed, the 1st Defendant alleges that he is the owner of the Suit Properties and that he has been in occupation of the same for more than 30 years. He also alleges that the Suit Properties are subject of various petitions pending in the High Court. The 1st Defendant questions the Plaintiff's Title Deed and letter of offer which, according to him were granted while there existed a Court order prohibiting any distribution.

7. The Plaintiff, under the provisions of Section 24 of the Land Registration Act became vested with the absolute ownership of the Suit Property and further, under Section 25 of the said Act, the right of ownership acquired by the Plaintiff is indefeasible except as provided under the Act. Section 25 (1) of the Land Registration Act provides as follows:

“25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.”

Section 26 (1) of the same Act provides as follows:

“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a) on grounds of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ”

8. The Plaintiff having been registered as proprietor and having been issued with a Title Deed over the suit property is in terms of section 26 (1) of the Land Registration Act entitled to the protection of the law.

9. It is my considered view that the Plaintiff has established a *prima facie* case with a probability of success. As regards irreparable damage, the effect of the refusal of the order for injunction in this case is that the Defendants will continue with their impugned activities and alter the state of the Plaintiff's land and the Plaintiff may suffer irreparable loss as result. The balance of convenience, if I had doubt in the matter, lies in favour of the Plaintiff who is the registered owner rather than with the Defendants who have no claim over it.

10. Accordingly, I find merit in the Application and grant the order for a Temporary Injunction in terms of prayer 3 of the Notice of Motion dated 8th February 2017.

11. The costs of the Application are granted to the Plaintiff.

It is so ordered.

Ruling delivered, dated and signed at Mombasa this 10th day of October 2017

C. YANO

JUDGE