



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC NO. 108 OF 2017

OLLIN SAVINGS AND CREDIT CO-OPERATIVE SOC. LTD.....PLAINTIFF

VERSUS

PATRICK NJIRU KURIA.....DEFENDANT

RULING

1. By a Notice of Motion dated 3 June 2017 and filed on 5 June 2017 under certificate of urgency, the Plaintiff sought an interlocutory injunction to restrain the Defendant from trespassing upon, entering, placing any objects, constructing upon or from howsoever interfering with **Title No. WANGURU/TOWNSHIP/160** (hereinafter the suit property) pending the hearing and determination of the suit.
2. The said application was based upon the grounds that the plaintiff was the registered proprietor of the suit property and that the Defendant had trespassed thereon, demolished all buildings thereon and fenced off the suit property with a view to commencing construction thereon.
3. The said application was supported by the supporting affidavit of the CEO of the Plaintiff one John Mwangi Gathige sworn on 3.6.17 and the further affidavit of John Baptist Kanga a director of Mark and Bill Holdings Ltd which had sold the suit property to the Plaintiff. The Plaintiff contended that the plot which the Defendant claimed to be his was actually **Title No. WANGURU/TOWNSHIP/159** which was different from the suit property. It was claimed in the supporting affidavit that 3 different surveyors had on 24 May 2017 established that the plot the Plaintiff was claiming (i.e 159) was adjacent to the suit property and only shared a boundary with the suit property on one side.
4. The Defendant filed a replying affidavit sworn on or about 28 June 2017 in opposition to the said application. The Defendant conceded that the property he had bought was parcel No. 159 between 2013 and 2015. He, however, stated that pursuant to an internal investigation by the County Assembly of Kirinyaga County Government, it was found, inter alia, that the suit property (parcel No. 160) had been irregularly alienated and a certificate of lease issued to Sath Construction Co. Ltd which later on transferred it to Mark and Bill Holdings Ltd. He further stated that the said County Assembly had recommended to the National Land Commission to revoke the said certificate of lease on account of alleged fraud and irregularities. The Defendant also indicated that there was some confusion on the location of the two plots as they appear to have been interchanged. According to him. His plot No. 159 should be the one fronting the tarmac road whereas plot No. 160 should lie behind it.
5. The main issue in this application is whether or not the Plaintiff has satisfied the requirements for the grant of an order of interlocutory injunction as set out in the case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358**. The court has considered the material on record and noted that the Plaintiff is the current registered proprietor of parcel NO. 160. He exhibited a copy of a certificate of lease to that effect. I am

aware that the County Assembly of Kirinyaga County had recommended that the said title be revoked or cancelled. However, that remains a mere recommendation. There is no evidence before me that it was acted upon. The Defendant has in his replying affidavit and copies of the exhibited sale agreements confirmed that the property he purchased was parcel No. 159. In the premises, the court is satisfied that the plaintiff has demonstrated a *prima facie* case with a probability of success notwithstanding the dispute as to the exact location of the two plots.

6. The second principle relates to adequacy of monetary damages since an injunction would not normally be granted unless the applicant might otherwise suffer irreparable loss or damage which cannot be adequately compensated by an award of damages. The Defendant has contended that since the Plaintiff has sought damages for trespass and special damages for demolition of buildings, then damages should be an adequate remedy. At this stage, we do not really know into what use the Plaintiff or the Defendant intends to put the properties into. The Defendant may erect buildings which may run completely counter to the Plaintiff's purposes.

7. The court does not take the view that where damages for trespass or special damages are sought, then that constitutes conclusive proof that damages would be an adequate remedy. What if the Defendant will not be able to afford the hefty damages sought or ultimately awarded? I think every case should be looked at on its own circumstances. I do not think that monetary damages would be an adequate remedy in the circumstances of this case. It is therefore my view that the Plaintiff has established the second principle for the grant of an order of interlocutory injunction.

8. In view of my holding on the first and second principles it is not necessary to consider the third principle on balance of convenience. The upshot of the foregoing is that the court finds merit in the Plaintiff's Notice of Motion dated 3 June 2017 and the same is allowed.

9. The court therefore makes the following orders:-

a) The Plaintiff's Notice of Motion dated 3 June 2017 is allowed in terms of prayer No. 3 thereof.

b) The Plaintiff shall file a written undertaking as to damages within 14 days from the date hereof failing which the injunction shall lapse.

c) The costs of the application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 3RD DAY OF OCTOBER 2017.

In the presence of Mr. Muchiri for the plaintiff and Mr. Okwaro holding brief for Mr. Magee for the Defendant. The plaintiff's Notice of Motion dated 3 June was allowed.

Court Clerk – Njue/Leadys.

Y.M. ANGIMA

JUDGE. – 3.10.17