



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 660 OF 2017

VIRGINIA SEIN NKIYIAA.....PLAINTIFF

VERSUS

ERICK MACHARIA WANYOIKE.....DEFENDANT

RULING

What is before Court is the Plaintiff's Notice of Motion dated the 4th May, 2017 brought pursuant to Section 1A, 3, 3A and 63 of the Civil Procedure Act Order 40 Rule 1 & 2 and Order 51 of the Civil Procedure Rules.

The application is based on the following grounds which in summary are that the Plaintiff is the owner of plot No. KAJIADO/LR No. 9923/62 now B 747 Residential Kajiado Town hereinafter referred to as 'suit land'. The Defendant or his agents have encroached on the aforementioned plot deposited building materials and erected a fence thereon. The Plaintiff has been in possession of the plot since 1972 and stands to suffer irreparably.

The application is supported by the affidavit of VIRGINIA SEIN NKIYIAA, the Plaintiff herein where she deposes that she has brought the suit in her capacity as the legal administratrix and that the suit land belongs to JOSEPH TINENE NKIYIAA. She avers that her deceased husband has been in possession of the suit land from 1972 and been paying rates. Further that the Defendant has no genuine claim over the suit land and on 26th April, 2017 together with his agents, he encroached on it.

The application is opposed by the Defendant ERICK MACHARIA WANYOIKE who swore an affidavit and deposed that he does not own the suit land and denied depositing building materials nor erecting a fence thereon. He averred that if indeed the Plaintiff is a true owner of the suit land, she ought to have attached the Certificate of Official Search and Land Rate Clearance Certificate. He denies obtaining another title over the suit land and reiterates that the Plaintiff is making false allegations against him.

Both parties filed their respective written submissions which were highlighted on 27th June, 2017. I have considered the said submissions.

Analysis and Determination

Upon perusing the application herein including the supporting documents, I find that the only issue for determination at this juncture is whether the Plaintiff is entitled to the injunctive orders sought.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a 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."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

On the first principle as to whether the Plaintiff has established a prima facie case with a probability of success at the trial, one question we need to ask is whether the Plaintiff is owner of the suit land as claimed. The Plaintiff stated that she is suing as an administratrix of the estate of JOSEPH TINENE NKIYIAA who was allotted the suit land in 1972. The Plaintiff annexed letter of allotment confirming the suit land was allotted to her late husband in 1972. She annexed the Certificate of Official Search dated 10th April, 2012 indicating the suit land belonged to her late husband and a letter from the Kajiado Town Clerk dated 10th September, 2012 to the Commissioner of Lands asking him to process a lease/title to the suit land in the name of the Plaintiff's late husband JOSEPH TINENE NKIYIAA. The Defendant refuted the Plaintiff's claim that he owns the suit land. Since the Plaintiff has produced documents of title to the suit land, it is the Court's finding that the Plaintiff has established a prima facie case with a probability of success.

On the second principle that an interlocutory injunction ought to be granted in cases where the Applicant suffers irreparable loss which cannot be compensated by way of damages. The Plaintiff produced documents to prove ownership of suit land and submitted that the Defendant and his agents have encroached on the suit land, put up a fence and deposited building materials thereon. The Defendant on the other hand denies the said allegations and insists he does not own the suit land and neither has he fenced it nor deposited building materials thereon. The Court finds that if the temporary injunction sought is not granted, the suit property may be wasted away and the Plaintiff will suffer irreparable loss which would not be adequately compensated by an award of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the Plaintiff is likely to suffer more inconvenience if the temporary injunction is denied as opposed to the Defendant if the injunction is allowed.

I find merit in the Plaintiff's notice of motion application dated the 4th May, 2017 and allow prayer (c) the said application.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 3rd day of October, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Itaya for plaintiff

Obare for Onchiri for defendant

Court assistant Mpoye