



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 408 OF 2017

(Formerly Nairobi ELC No. 122 of 2015)

CATHERINE WANGECI NJUGUNA.....PLAINTIFF

VERSUS

PURITY DAUTI.....1ST DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....2ND DEFENDANT

RULING

What is before court is the Plaintiff's notice of motion application dated 1st December, 2015 brought pursuant to Section 3 & 3A of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules and enabling provisions of the Law. The application is premised on the grounds which in summary is that the Plaintiff is the registered lessee, proprietor of land plot number 77/RESIDENTIAL – ISENYA.CENTRE (hereinafter referred to as the 'suit property') being a lease granted by the 2nd Defendant. The 1st Defendant has interfered with the suit property by trespassing thereupon and has started constructing a fence thereon. The Defendant has fenced off the service road reserve and some of the 2nd Defendant's officials have refused/failed to remedy the situation despite complaints to them by the Plaintiff.

The application is supported by the affidavit of CATHERINE WANGECI NJUGUNA the Plaintiff herein where she deposes that the suit property was allotted to one STEPHEN KAGAI KIMANI by the defunct Ol Kejuado County Council in 2006 and upon purchase the same was transferred to her after paying the requisite fees. She avers that upon purchase she took possession, constructed some rental units on part of it, has been in possession of the suit land since 2006 and been paying the property rates to the 2nd Defendant. She claims that sometime in August 2015 she went to visit the suit property and found the 1st Defendant had invaded it and commenced constructing a fence annexing part of it and the road reserve. She contends that she went to the 2nd Defendant's survey offices to report the 1st Defendant's acts of trespass and they confirmed that the 1st Defendant had indeed trespassed on the suit land and the road but have failed to take action to remedy the situation.

The 1st and 2nd Defendant were served on 20th July, 2017 respectively but failed to attend court nor file a replying affidavit. The Court notes from the affidavit of service that all the Defendants were duly served. On 27th September, 2017, the hearing of the Notice of Motion dated the 1st December, 2015 proceeded unopposed.

The Plaintiff's Counsel Mr. Leparmarai reiterated the facts of the case and stated that they were seeking

orders in the Notice of Motion dated the 1st December, 2015 pending the hearing and determination of the suit. He stated that the 2nd Defendant's officials had confirmed the 1st Defendant's acts of trespass to the suit land and the Plaintiff has written several letters to the 2nd Defendant to intervene but in vain. The Plaintiff was apprehensive that unless restrained by the Court, the 1st Defendant would continue constructing permanent structures on the suit land which would prejudice the Plaintiff. Further she wants the 1st Defendant to remove her permanent structures thereon

Issues and Determination

Upon consideration of the materials presented and arguments canvassed by the Plaintiff/Applicant in respect to the Notice of Motion dated 1st December, 2015 the Court has analyzed that the following are the issues for determination:

- Whether the Plaintiff is entitled to the injunctive orders sought pending the determination of the suit.
- Whether the 1st Defendant should be compelled to remove the structures she has constructed on the suit land.

The Court notes that the Plaintiff is the owner of the suit land as has been paying land rates to the 2nd Defendant. The Plaintiff claims that the 1st Defendant has interfered with the suit land and even commenced constructing a fence thereon and blocked a road. The Court further notes that the Plaintiff is apprehensive the 1st Defendant will persist in her acts of trespass unless legally restrained. The principles of granting temporary injunction are well settled in the case of **Giella versus Cassman Brown**. Since the Plaintiff's averments have not been controverted by any of the Defendants who failed to file defence nor a replying affidavit, I find that indeed the Plaintiff has established a prima facie case with a probability of success.

I note however that the Plaintiff seeks to evict the 1st Defendant from the suit land. This order sought is of a mandatory nature and I note the guiding principle of granting it is special circumstances or compelling reasons or only in the clearest of cases to warrant the order. In so far as this case is unopposed, I find that issue of eviction of the 1st Defendant cannot be determined at an interlocutory stage but only after the matter has been heard and determined.

Since the application proceeded unopposed and there is no evidence from the Defendants rebutting the Plaintiff's claim, I will not delve into the other merits of the application but proceed to allow prayers 2, 3, 5 and 6 of the Notice of Motion dated the 1st December, 2015.

Dated signed and delivered in open court at Kajiado this 20th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Court Assistant Mpoye

No appearance for defendant and plaintiff.