



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 790 OF 2017

JOSEPHINE MUTIWA MUSUMBI.....PLAINTIFF

VERSUS

JOSEPH NDEGWA KAMAU T/A

LUCKY BASE SHELTERS & PROPERTIES.....1ST DEFENDANT

JOSEPH TUPET.....2ND DEFENDANT

RULING

What is before court is the Plaintiff's notice of motion application dated 27th June, 2017 brought pursuant to Section 3A of the Civil Procedure Act and Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, the inherent jurisdiction of this honourable court and enabling provisions of the Law. The application is premised on the grounds which in summary is that the Plaintiff is the registered owner of property title number LR No. KAJIADO/KAPUTIEI – NORTH/19420 (hereinafter referred to as the 'suit land') and the 2nd Defendant has encroached on it and put up a building/structure without her authority. The Plaintiff stands to suffer irreparable loss and injury which cannot be compensated by way of damages.

The application is supported by the affidavit of JOSEPHINE MUTIWA MUSUMBI the Plaintiff herein where she deposes that she purchased the suit land vide Sale Agreement dated 1st September, 2015 from the 1st Defendant for the price of Kshs. 66500. She claims that upon completion of the purchase price, she was shown the suit land and assured of vacant possession. She states that upon retirement, she considered developing the suit property in order to generate some income for upkeep and upon visiting the suit property on 22nd April, 2017 she found that the 1st Defendant had allocated it to the 2nd Defendant who had encroached/trespassed by constructing temporary structures thereon. She confirms that on the said date upon confronting the 2nd Defendant, he stated that he was ready to move on condition that the 1st Defendant showed him where to move to. Further, that on 27th April, 2017 during a meeting with the 1st and 2nd Defendants, the 1st Defendant declined to move the 2nd Defendant as he did not want to incur any costs and sought she moves instead to a property he would show her. She avers that despite seeking the intervention of the office of Kajiado County Commissioner, to arbitrate over the dispute, the Defendants failed to show up for the scheduled meetings and she was advised to seek legal intervention.

The application is opposed by the 1st Defendant JOSEPH NDEGWA KAMAU who filed a replying affidavit where he confirmed that he indeed sold the suit property to the Plaintiff and issued her with a title deed. He deposed that he does not understand why he has been sued and stated that he does not know how the orders in the instant application could affect him as he does not have any contractual relationship with the Plaintiff.

The 2nd Defendant despite being duly served did not enter appearance nor file a replying affidavit. Both the Plaintiff and the 1st Defendant filed their respective written submissions that I have duly considered.

Analysis and Determination

Upon perusing the application, the supporting/replying affidavits and the written submissions filed herein, the Court finds that the issues for determination are:

Whether the Plaintiff is entitled to the interlocutory injunction sought.

Whether the Plaintiff is entitled to the mandatory injunction sought.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well 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 is upon this honourable court to interrogate whether the Plaintiff/Applicant have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiff/Applicant has demonstrated a prima facie case with probability of success, the Court notes that the Plaintiff/Applicant bought the suit land from the 1st Defendant and even has a title deed to that effect. This position is confirmed by the 1st Defendant and not controverted by the 2nd Defendant who did not oppose the application. The Plaintiff avers that the 2nd Defendant has encroached on the suit land, constructed a temporary structure thereon and blocked a road. Further that the 1st Defendant moved the 2nd Defendant to the suit land and wants to move the Plaintiff from it. The 1st Defendant denied these allegations and categorically stated that he already gave the Plaintiff her title deed and he does not have any contractual obligations with her and should not have been sued. From the foregoing the Court finds that the Plaintiff has indeed demonstrated a prima facie case with a probability of success.

On the second limb as to whether the Plaintiffs/ Applicants' might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. In the instant case, both the Plaintiff/Applicant and the 1st Defendant/Respondent agree on one point that the Plaintiff is the owner of the suit land. The Plaintiff states that she intended to settle on the suit parcel upon retirement and unable to do so due the Defendants' acts. The Court finds that the Plaintiff who is the legal owner of the suit land might suffer irreparable loss which cannot be compensated by an award of damages as opposed to the Defendants who have not demonstrated any damages they would incur.

On a balance of convenience, the Court finds that the Plaintiff/Applicant is likely to suffer more inconvenience if the injunction is denied than which will be suffered by the Defendants if the injunction is allowed.

On the issue of balance of convenience, from the facts and materials presented by the Plaintiff and 1st Defendant, I am not in doubt that the balance tilts in favour of the Plaintiff and if the suit property is not preserved, the sub stratum of the suit can be lost.

On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, ' **a mandatory injunction can be**

granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.'

The mandatory injunction sought by the applicant for removal of the temporary structures on the suit land can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. I note none of the Defendants has controverted the Plaintiff's claim of ownership of the suit land nor the fact that the 2nd Defendant has put up temporary structures thereon. The 1st Defendant even confirmed he had sold the Plaintiff the suit land and effected the transfer. The Plaintiff even annexed a copy of the title deed to the suit land to prove ownership and before coming to court she sought intervention from the office of the County Commissioner Kajiado and the local Chief but the Defendants failed to attend the meeting despite being summoned. In the circumstances, I find that the prayer for a mandatory injunction to compel the 2nd Defendant to remove his temporary structure from the suit land is deserved and will allow it.

The upshot of the matter that that the Plaintiff's motion dated 27th June 2016 is merited and is allowed. The Costs will be in the cause.

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

CHRISTINE OCHIENG

JUDGE