



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 580 OF 2017

RHODA SYOKAU MUTUA.....PLAINTIFF

VERSUS

ELIZABETH TAAVU NDINDI.....1st DEFENDANT

MARGARET MBUVI.....2nd DEFENDANT

RULING

What is before Court is the Plaintiff's Notice of Motion dated 28th March 2017 brought pursuant to Order 40 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all the other enabling provisions of the law.

The application is based on the following grounds which in summary are that the Defendant has purportedly and forcefully entered and occupied the suit properties and commenced developing the same. The Plaintiff never acquiesced to the trespass by the Defendant and reported the same to the Provincial Administration including the Area Chief but the Defendant continues her illegal occupation of the suit properties and constructing therein. The Defendant has at all material times to this suit been occupying the suit premises as a trespasser and its' fair to stop them at an early stage. Unless restrained, the Plaintiff will suffer irreparable loss and harm.

The application is supported by the affidavit of RHODA SYOKAU MUTUA the Plaintiff herein where she deposes that she is the equitable and beneficial proprietor and allottee, entitled to exclusive possession of all those premises known as PLOT NUMBER 1809/BUSINESS and PLOT NUMBER 1975/BUSINESS - EMALI T. CENTRE hereinafter known as the suit lands. She avers that the Defendant has occupied the suit lands against her authority or permission since February, 2017 and she sought the intervention of the local administration including the Ward Administrators as well as the District Officer but the Defendant has been adamant and she was advised to seek court intervention. She claims the Defendant has failed to vacate the suit land or cease the unlawful developments being undertaken thereon. She seeks for damages from the Defendant for the illegal occupation as well as for her to uproot her developments.

The application is opposed by the 1st Defendant ELIZABETH TAABU NDINDI who filed a replying affidavit where she states that she is not the owner of plot no. 1809 business and plot no. 1975 business since the same is owned by other people other than the Plaintiff. She avers that plot no. 38 Residential Emali Trading Centre belongs to MARGARET MBUVI and that the Plaintiff has sued her wrongly as she is the caretaker. She claims that plot no. 38 Residential Emali Trading Centre has permanent structures

and it is a lie for the Plaintiff to allege she entered into the said plot in February, 2017. She reiterates that the Plaintiff has allotment letters that appear to be forged since the alleged plots are in the names of different people.

The 2nd Defendant MARGARET MBUVI opposed the application and filed a replying affidavit where she deposes that she is the owner of plot no. 38 Residential in Emali Town which she was given in 1986. She claims her plot is adjacent to the unregistered plot in dispute. She states that the dispute is over the unregistered plot which her parents inherited in 1930 and she thereafter inherited from her parents. She insists the plot initially belonged to her parents who built it and it has old trees thereon which were planted by her parents. She states that she did not enter the plot in 2017 as alleged but has been in occupation of the same through the 1st Defendant. She reiterates that the Plaintiff must have forged documents to lay claim on the plot since the Plaintiff was allotted the same in 2010. She contends that from the records at Kajiado Land Registry, plot no. 1809 and 1975 respectively belong to other people and not the Plaintiff. Further that the suit is time barred and prays the application be dismissed.

All parties filed their respective written submissions and their Counsels highlighted the same on 18th September, 2017. I have considered the respective submissions.

Analysis and Determination

On perusal of the Notice of Motion dated 28th March 2017 including the supporting/replying affidavits as well as the annexures thereon, I find that the only issue for determination at this stage is whether the Plaintiff is entitled to the orders of temporary injunction sought.

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."

In line with this principle, the Court will proceed to interrogate whether the Plaintiff has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiff has demonstrated a prima facie case with probability of success, it is the Plaintiff's contention that she is the proprietor of the suit lands and the Defendant without any colour of right and permission has trespassed on it from February, 2017 and put up permanent structures. The 2nd Defendant on the other hand claims she is owner of plot no. 38 Residential Emali Trading Centre while the 1st Defendant is her caretaker. She contends that the suit land in dispute is unregistered and belonged to her parents from 1930 and she inherited it from them. She insists that as per the records at the Kajiado County Land Registry, the Plaintiff is not registered as the owner of the suit land. The 1st Defendant claims plot no. 38 Residential Emali Trading Centre has permanent structures and trees thereon and it is a lie that she entered the plot in February, 2017. I note that both the Plaintiff and 2nd Defendant are staking ownership over the suit lands. I further note that the suit lands are registered in the names of third parties and not the Plaintiff, who claims she bought from them but the records have not been amended. I note that the documents produced by the Plaintiff are letters of allotments to the suit lands. First I must say know from a legal stand point that letters of allotment are not documents of title. This position is affirmed by Kimondo J. in **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR** when he had this to say on whether a Letter of Allotment amounts to title to land;

"... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property"

In the case at hand, the Plaintiff has failed to demonstrate if she is indeed the owner of the suit lands claimed as even the latest search conducted at the Kajiado County Land Registry still bears the name of a third party. On the claim that she bought land from the said third parties, these are issues that can only be proven at a full hearing.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 2nd Defendant claim ownership of the suit lands. It is not disputed that the 2nd Defendant has put up permanent structures on the suit lands. The Plaintiff on the other hand has not demonstrated whether she has put up any structures thereon. In the circumstances I find that the Plaintiff will not suffer irreparable loss which cannot be compensated by way of damages, if the injunctive orders sought are not granted.

From the documents presented, the plot numbers for both the Plaintiff and 2nd Defendant are different. The Plaintiff claims she purchased suit land while the 2nd Defendant claims she inherited it from her parents who had owned it from 1930. The question of determining the real owner of the suit parcels cannot be handled by way of affidavit evidence but must proceed to full trial.

The upshot is that the Plaintiff has failed to establish a prima facie case that would warrant granting of the orders of injunction. If there was a wrong, the Plaintiff can be compensated by way of damages. The notice of motion dated 28th March, 2017 is not merited and is consequently dismissed entirely with costs.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 13th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Faith holding brief for Itaya for defendant

No appearance for plaintiff.

Court Assistant Mpoye