



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 126 OF 2017

CATHERINE MUTHONI GATHEE.....PLAINTIFF

VERSUS

FRIDAH KARIMI.....DEFENDANT

RULING

1. By a plaint dated and filed on 20th July 2017, the Plaintiff sought the following reliefs against the Defendant;

- a. A permanent injunction restraining the Defendant herself (sic), her agents, servants and/or anyone claiming under her from entering, leasing, and/or interfering in any manner with the Plaintiff occupation and ownership of the land parcel No. Mbeti/Kiamuringa/3899.*
- b. General damages for trespass.*
- c. Costs of the suit together with interest at court rates.*
- d. Any other relief that this hounourable court may deem fit to grant.*

2. The Plaintiff also filed a notice of motion application of even date seeking the following orders against the Defendant;

- a. That this application be certified as the most urgent and be heard ex-parte in the 1st instance.*
- b. That this honourable court be pleased to issue a temporary injunction restraining the defendant/respondent herself (sic), her agents, servants and/or anyone claiming under them from entering, leasing, and/or interfering with the land parcel No. Mbeti/Kiamuringa/3899 until the hearing and final determination of this suit.*
- c. That the OCS Siakago Police Station be ordered to enforce compliance with the order.*
- d. That costs of the application be provided for.*

3. The basis of the said application was that the Plaintiff had bought *Title No. Mbeti/Kiamuringa/3899* (hereinafter known as the 'suit property') and obtained title thereto but it was impossible for her to occupy, cultivate or utilize the suit property because the Defendant was occupying it. The said application was supported by the affidavit of the Plaintiff sworn on 20th July 2017 to which she annexed copies of the relevant sale agreement, consent of the Land Control Board, title deed and a demand letter

to the Defendant.

4. In opposition to the said application, the Defendant filed a replying affidavit sworn on 12th September 2017 in which she stated that she bought the suit property from Githumbi Njeru in 2013 when it was still part of *Title No. Mbeti/Kiamuringa/124* and that the Plaintiff had purchased a portion adjacent thereto from the same vendor.

5. The Defendant further stated that she took possession of the suit property upon purchase and cultivated miraa stems and erected a semi-permanent house thereon. She further stated that she did not process her title deed immediately upon purchase due to financial constraints. She therefore asked the court to dismiss the Plaintiff's said application.

6. When the said application was listed for *inter-partes* hearing on 20th September 2017 both parties attended court in person. The Plaintiff prosecuted her application through oral submissions while the Defendant opposed the same in a similar manner on the basis of the affidavits and exhibits on record.

7. It is evident from the material on record that both parties bought some land from one Githumbu Njeru who was selling several portions from his *Title No. Mbeti/Kiamuringa/124*. One of such portions appears to be *Title No. Mbeti/Kiamuringa/3899* which is the property in dispute herein. The Defendant appears to have bought it in 2013 whereas the Plaintiff bought the property in 2014. However, the Plaintiff moved expeditiously to obtain a title deed which she obtained in 2015 whereas the Defendant did not obtain any title document. It would also appear that the Defendant took possession of the disputed property and planted some crops thereon and erected a structure before the Plaintiff came into the picture.

8. The main question for determination is whether the Plaintiff has satisfied the requirements for the grant of an order of interlocutory injunction as set out in the case of **Giella vs Cassman Brown & Co Ltd [1973] EA 358**. There is no doubt that the Plaintiff is the current registered owner of the suit property. There is no doubt that as registered proprietor, she is entitled to enjoy all the legal rights of a proprietor. The court is satisfied that she has made out a *prima facie* case with a probability of success.

9. The second principle for consideration relates to adequacy of damages. An injunction will not normally be issued unless the applicant might otherwise suffer irreparable damage which cannot be adequately compensated by an award of monetary damages. None of the parties before me addressed the court on this aspect. The court recognizes that the subject matter of the suit is land but that is not in itself, sufficient to establish irreparable harm or damage. The court therefore finds that there is no evidence on record to demonstrate that the Plaintiff might otherwise suffer irreparable harm or damage if the injunction sought is not granted.

10. The court is of the view that in any event, the orders of injunction sought ought not be granted for the following reason. It is conceded by the Plaintiff that the Defendant is already in possession of the suit property and that is why it has become impossible for her (the Plaintiff) to occupy, cultivate or utilize the suit property. In those circumstances, it would be futile for the court to issue an injunction to restrain the Defendant from entering, or interfering with the suit property. The defendant is already in possession and she appears to have cultivated miraa stems. The most appropriate order for the Plaintiff to seek in the circumstances would be an eviction order and not a prohibitory injunction.

11. In the circumstances of this case, the court finds that the Plaintiff's notice of motion dated 20th July 2017 must fail and the same is hereby dismissed with costs in the cause.

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **2nd** day of **NOVEMBER, 2017**

In the presence of the Plaintiff and the Defendant.

Court clerk Njue/Leadys

Y. M. ANGIMA

JUDGE

02.11.17