



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 164 OF 2017

MATUI NAIBEL..... PLAINTIFF

VERSUS

GLADYS MASAI.....DEFENDANT

RULING

1. The plaintiff's application dated 11/10/2017 seeks an order of temporary injunction to restrain the defendant from or her agents from interfering in any way with the plaintiff's quiet possession of LR No. "**Chepkuy Farm measuring 2.5 acres**" pending the hearing and determination of this suit.
2. The plaintiff's case is that he bought **2 ½ acres** from one **Festus Omuse** and took possession thereof. Soon thereafter the defendant, who had never interfered with the land before Festus Omuse sold it to the plaintiff, forcefully gained entry into the parcel bought by the plaintiff and started developing it.
3. The plaintiff avers that before he took possession, the matter had been considered by a Committee of the Co-operative Society in which Festus Omuse had bought shares and the Committee had resolved that the said Omuse had been in occupation of the suit property for **39 years** and that pending a survey, the parties should confine themselves to their respective portions.
4. The plaintiff avers that despite the determination of the Committee the defendant did not cease encroachment of the plaintiff's land. The plaintiff avers that upon invitations by the area chief to whom the dispute was reported, the county surveyor's office visited the ground on various occasions in attempts to clarify the extent of the encroachment by the defendant, but the defendant together with her sons turned hostile and chased the county surveyor's officers out of the disputed land each time. It is said that the defendant has uprooted growing maize planted by the plaintiff and then planted hers, a matter that has been reported to the police.
5. The defendant filed her sworn affidavit dated 23/10/2017 in reply to the application by the plaintiff. Her response is that no particulars relating to the date of her alleged trespass are given; that the current status quo has remained for 10 years; that she had lived alongside Festus Omuse for over 20 years peacefully; that she never exceeded her boundaries; that the dispute herein commenced in the year 2016 when some farm officials tried to excise some portion from her land; that, she has not obstructed any survey exercise but she has only raised a protest; that she believes that the intended survey should be independent and that the annexures to the plaintiff's supporting affidavit are not genuine.
6. However the plaintiff has filed a further affidavit dated 2/10/2017, in which he points out that the defendant does not deny trespassing onto the plaintiff's land and that she has conceded that the suit land belonged to the said Omuse before purchase by the plaintiff. He also denies allegations of forgery.

7. This court is of the view that the main issue in this case is whether the order of temporary injunction already issued should be confirmed pending the hearing and determination of this suit. In determining that issue the court must consider the conditions for the grant of a temporary injunction set out in the case of ***Giella -vs- Cassman Brown 1973 EA 358***. First that the applicant must prove that he has a *prima facie* case with probability of success and secondly, that the applicant may suffer some irreparable injury of the order of temporary injunction does not issue. If the court is not satisfied that the two conditions above have been met it may rule on a balance of convenience.

8. I have considered the instant application and its supporting affidavit and the response thereto. It appears that the plaintiff and the defendant are neighbours and that the dispute over the portion claimed by the plaintiff pre-existed the sale transaction between the plaintiff and Festus Omuse. This is why the matter had to be taken to the Dispute Resolution Committee of the Co-operative Society. However, no survey has been done regarding the suit land. There is therefore no proper expert evidence on which the court can rely to establish that the plaintiff has a *prima facie* case with probability of success. This court also finds nothing else in the correspondence attached to the plaintiff's supporting affidavits to suggest that a *prima facie* case exists. All the documents thereto attached are under challenge from the plaintiff who terms many as forgeries.

9. I have also considered the specific averments of the replying affidavit and the further affidavit and in my view there is a lot that is not accounted for by the plaintiff in this matter that involves land which is not yet registered in the parties names. From the documents available there is a hint that the titling process for the land owned by the Co-operative Society, which will ensure that the parties have titles is underway.

10. I also do not find any evidence to suggest that the plaintiff would sustain irreparable injury that he would not be capable of being compensated for by way of damages. For those reasons, I find that the application dated 11/10/2017 has no merit. Consequently I vacate the earlier orders of temporary injunction issued herein, and application dated 11/10/2017 is hereby dismissed. However, there shall be no orders as to costs.

Dated, signed and delivered at Kitale on this 20th day of **December, 2017.**

MWANGI NJOROGE

JUDGE

20/12/2017

Before – Mwangi Njoroge Judge

Court Assistant - Isabellah

Ms. Mwemeke holding brief for Mengich for Applicant

N/A for Respondent

Ruling read in open court

MWANGI NJOROGE

JUDGE

20/12/2017