



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 361 OF 2016

HELLEN MUKAMI.....APPLICANT/PLAINTIFF

VERSUS

1. DORINA ATIENO AMOLLO

2. HAMISI BUHIRI.....DEFENDANTS/RESPONDENTS

RULING

1. The Application under consideration is the Notice of Motion dated 25th November 2016 in which the Plaintiff/Applicant is seeking the following orders: -

1. THAT the Application be certified as urgent and be heard ex-parte and service of the same be dispensed with at the first instance.

2. THAT the Court be pleased to issue a Temporary Injunction order restraining the 1st and 2nd Respondents by themselves, their agents and/or servants from further interfering, meddling, erecting, developing, and/or trespassing into the Applicant's plots No.MN/11/3243 CR33607 and CR 40005 until determination of this Application.

3. The Applicant (sic) be ordered to demolish any illegal structures of any nature which might have been erected by the Respondents on the Applicant's plot.

4. THAT the OCS Kiembeni or Bamburi Police Station be ordered to enforce Order 3 above.

5. THAT costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Hellen Mukami, the Plaintiff sworn on 25th November 2016. Briefly, the Applicant avers that she is the lawful owner of plot No.MN/11/3243 having purchased it for Kshs.1,350,000 from one Tobias Ogola Awiti who executed a transfer in the Applicant's favour and the transfer was duly registered. She has exhibited a copy of the transfer and a copy of Certificate of title. The Applicant avers that she charged the said parcel of land to Housing Finance Company Limited to secure a loan of KShs.945,000 and that she is still servicing the loan. The Applicant further avers that upon the transfer of the plot in her favour, she started paying property rates to the County Government of Mombasa. It is the Applicant's contention that the 2nd Respondent has illegally erected structures in the said plot and had denied the Applicant access to it and has threatened her of dire consequences. The Applicant states that she made a report at

Kiembeni Police Station and the County Assistant Commissioner but was advised to institute these proceedings. The Applicant also states that she is the owner of Plot No.MN/11/9210 within Mombasa County which she purchased from one Hussein Juma Hussein for KShs.920,000 which she paid and a transfer was executed in her favour and that she is also paying rates to the County Government of Mombasa for the plot. She has exhibited copies of the transfer and property rates statement. The Applicant contends that the 1st Respondent has without any plausible reason denied her the right to carry out developments on the said parcel of land. It is the Applicant's contention that the Respondent's actions amount to a nuisance, annoyance and trespass. The Applicant has also exhibited the Certificates of postal search of the properties which show that the same are in her name. The Applicant therefore prays for the issuance of the orders sought herein.

3. The Respondents were duly served with the Application but did not file any response, hence the Application is unopposed.

4. I have considered the Application and the Affidavit in support together with the annexures thereto. The principles to be applied when considering an application for Temporary Injunctions are well settled. In the famous case of **Giella –vs- Cassman Brown & Co Ltd (1973) EA 358**, the Plaintiff must show that she has a prima facie case with probability of success; that she stands to suffer irreparable damage; and in the event of doubt, the court will decide on the balance of convenience.

5. The Plaintiff has demonstrated by producing copies of title documents that she is the registered owner of the Suit Property. She has also attached other documents showing how she acquired the property. The Defendants, despite being served with the Application, did not file any response and therefore their claim if any, over the Suit Property is not known.

6. The Plaintiff, under the provision of Section 24 of the Land Registration Act became vested with the absolute ownership of the Suit Property. Sections 25(1) and 26(1) of the Land Registration Act provides as follows:

“25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrance, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a. On grounds of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ”

7. The Plaintiff having been registered as proprietor and having been issued with certificates of title over the Suit Property is in terms of section 26(1) of the Land Registration Act entitled to the protection of the

law.

8. It is my considered view that the Plaintiff has established a prima facie case with a probability of success. As regards irreparable damage, the effect of the refusal of the order of injunction in this case is that the Defendants will continue with their impugned activities and alter the state of the Plaintiff's plots and the plaintiff may suffer irreparable loss as a result. The balance of convenience, if I had doubt in the matter, lies in favour of the Plaintiff who is the registered owner rather than with the Defendants who have no claim over it.

9. Prayer 3 of the Application is in the nature of a Mandatory Injunction. It seeks to demolish any illegal structures of any nature which might have been erected by the Respondents on the Applicant's plot. The issue for determination is whether in the circumstances of this case the Plaintiff would be entitled to the said relief which indeed is in the nature of a mandatory Injunction which, if granted, would virtually dispose of the suit wholly or substantively at the interlocutory stage. The principles governing grant of a Temporary Mandatory injunction are well settled.

10. In the case of Kenya breweries ltd & Another –vs- Washington Okeyo (2002) eKLR the Court of Appeal had occasion to discuss and consider those principles and held that the test for grant of a Mandatory Injunction was as correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which reads:

“A mandatory injunction can be granted on an interlocutory Application as well as at the hearing, but, in the absence of special of special circumstance, 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 a 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 Injunction.”

Also in the case of Locabail International Finance Ltd –V- Agro Export & Others (1986) I ALL ER 901 At Page 901, it was stated:

“ A mandatory Injunction ought not to be granted on an interlocutory Application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the Injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover, before granting a Mandatory Injunction the Court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a Prohibitory Injunction.”

11. In the case of East African Five Spinners Ltd (In Receivership) & 3 Others – Vs- Bedi Investments Ltd Civil Appln. Nai 72 Of 1994 (UR) Gicheru, JA (as he then was) cited the case of Shepherd Homes Ltd –Vs- Sandalim (1971) I CH 34 which stated:

“It is plain that in most circumstances a Mandatory Injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory Injunction. At the trial of the action, the Court will of course grant such injunction as the justice of the case requires, but at that interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. ”

Referring to the application of those principles, the court of Appeal in Kenya Airport Authority –Vs- Paul Njogu Muigai & 2 Other, Civil Application NAI 29/97 (UR) stated that an order which results in granting a major relief claimed in the suit, which may not be granted at the final hearing, ought not to be granted at an interlocutory stage. Again referring to the principles in Shepherd Homes case Supra as adopted in the case of Locabail International Finance Ltd,

Mustil LJ said at page 906.

“The matter before the Court is not only an Application for a mandatory injunction, but it is an Application for a mandatory injunction which if granted, would amount to the grant of a major part of the relief claimed in the action. Such an Application should be approached with caution and the relief granted only in a clear case.....”

12. In this case, the Plaintiff contends that it is the registered owner of the Suit Property. In the Plaintiff dated 25th November 2016, the Plaintiff prays for a permanent Injunction restraining the Defendants from interfering with the Suit Property. The Plaintiff also seeks an order to demolish any illegal structures erected on the Suit Property by the Defendants as well as damages. Granting the order for demolition will constitute granting a final relief at interlocutory stage. The Defendants claim over the Suit Property is still unknown as they are yet to file their defence. From the pleadings on record, it is apparent that the Defendants are the ones in possession. At this moment, the court cannot predict with accuracy what the final orders of this court would be. In my considered view, and having taken into consideration the principles outlined for the grant of a Mandatory Injunction, and having applied them to this case, the Plaintiff's case herein does not pass the tests outlined. From the facts that have emerged, it is apparent that this is not a case that one can regard as plain and clear and which the court can decide at once. It is not known under what circumstances the Defendants entered and erected the structures on the Suit Property. Ordering the demolition at this stage will be tantamount to making a final decision in the case before the main issues are heard and determined in the main suit or the suit is otherwise determined in a summary manner. In the circumstances, I decline to grant the order for demolition sought in prayer 3 of the Motion.

13. Accordingly, only allow prayer 2 of the Notice of Motion dated 25th November 2016 pending hearing and determination of this suit. Prayers 3 and 4 are however not granted.

14. The costs of the Application are granted to the plaintiff

It is so ordered.

Ruling dated, signed and delivered at Mombasa this 6th day of December 2017

C. YANO

JUDGE