



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 389 OF 2013

HITESHKUMAR HEMRAT GOSRANI 1ST PLAINTIFF

NILESHBAHAI RAV JIBHAI PATEL 2ND PLAINTIFF

VERSUS

DISMAS NYAKUNDI MAGEKA 1ST DEFENDANT

SALOME GESARE ONCHARI 2ND DEFENDANT

RULING

1. The plaintiffs in the present suit state they are the registered proprietors of all that parcel of land known as **LR No. Central Kitutu/Daraja Mbili/2231** (hereinafter referred to as “the suit property”). The plaintiffs suit against the defendants is for a mandatory injunction for eviction of the defendants and a permanent injunction restraining the defendants from trespassing into the suit property. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 18th September, 2013 seeking an interlocutory injunction to restrain the defendants from (further) trespassing the suit property and a mandatory injunction for the eviction of defendants from the portion of the suit property presently in the defendant's occupation. In a ruling delivered on 16th May 2014 Okong’o, J. ruled thus:-

“The plaintiffs’ application dated 18th September 2013 is therefore allowed in terms of prayer (c) thereof. The injunction granted herein shall however no extend to that portion of the suit property which has been under actual occupation and use by the defendants or any of them.”

2. The defendants have now filed a Notice of Motion dated 12th May 2015 under Order 40 Rule 1, 2 and 3 of the Civil Procedure rules and Section 3 (a) and 63 (a) of the Civil Procedure Act seeking:-

(a) Spent

(b) That pending the hearing and determination of this application, the plaintiffs either by themselves, their servants, agents and otherwise be and are hereby restrained by an injunction from blocking the applicants from accessing the suit property and further be restrained from demolishing the buildings, trees, nappier grass and other valuables.

(c) That pending the hearing and determination of this suit the plaintiffs either by themselves, their servants, agents and or otherwise be and are hereby restrained by an injunction from blocking the applicant from accessing the suit property and further be restrained from demolishing the building, cutting down trees, nappier grass and other valuables.

(d) That the OCS Kisii Police station to assist in the enforcement of the court orders.

(e) That the costs of this application to be provide for

3. The application is supported by a supporting affidavit of Dismas Nyakundi Mayeka, the 1st defendant herein where he depones that the 2nd defendant who is his mother is deceased. He further depones that he was able to obtain the agreement dated 2nd January 1986 between Dismas Mokaya and the 2nd defendant on the one part and Elikanah Mgaga Nyanducha on the other part which is annexed and marked as “Ex.1”. The 1st defendant further avers that he and his deceased mother have been in occupation of the suit property whose title was unlawfully taken and registered in favour of the plaintiffs.

4. The 1st defendant avers that he has been totally evicted from the suit property which action is in contravention of the orders restraining the plaintiff from evicting them from the suit property and that the deceased house has been demolished and the iron sheets have been thrown out onto the road. The photographs of the demolished house have been attached and are marked as “Ex.2”. The 1st defendant by the instant application seeks orders to restrain the respondents from blocking the 1st defendant’s access to the property and from further demolition of the house, cutting of trees, nappier grass and other valuables.

5. The plaintiffs have opposed the above application by the 1st defendant vide a replying affidavit dated 20th October 2015 sworn by the 2nd plaintiff with authority from the 1st plaintiff. The plaintiffs aver that the application by the defendant is incurably defective and further deny that they have blocked the defendant from accessing his home and state that the 1st defendant left the suit property after the demise of his mother and that he was the one who demolished her house. The plaintiffs further aver that the 1st defendant has not specified when the house was allegedly demolished and/or where he is now residing. The plaintiffs’ further state the 1st defendant has not shown there is a nexus between the suit premises and the original property known as LR No. **Central Kitutu/Daraja Mbili/431** in regard to which the 1st defendant has annexed a copy of agreement marked as “Exh.1”.

6. The plaintiffs further contend that they purchased the whole of the suit premises and are the registered owners and therefore are vested with absolute ownership rights which are constitutionally and statutorily protected and the 1st defendant has no valid claim against them. It is the plaintiffs averment that the present application by the defendant is actuated by mischief as no nappier grass has ever been grown on the suit premises by the defendants and that in fact when the 1st defendant became aware of the plaintiffs purchase of the suit property, the 1st defendant cut down the six trees which were growing thereon and took timber away after the plaintiffs declined his offer to purchase the same at kshs. 10,000 per tree. The plaintiff thus contend that the applicant will not suffer any prejudice as he vacated the suit premises of his own free will after the demise of his mother (2nd defendant) over one year ago and allowed the plaintiffs to use the whole of the suit premises.

7. The counsel for the parties argued the 1st defendant’s application by way of written submissions. The 1st defendant’s counsel filed his submissions on 4th may 2016 while the plaintiffs counsel’s submissions were filed on 2nd June 2016. Having reviewed the 1st defendant’s application together with the affidavit sworn in support and in opposition and having considered the submissions by the parties the issue for determination is whether the 1st defendant’s application satisfies the threshold for grant of a temporary injunction as established in the case of **Giella –vs- Cassman Brown & Co, Ltd [1973] E. A 358** where the court set out the conditions to be met as hereunder:-

1. The applicant must demonstrate that he has a prima facie case against the respondent with a probability of success.

2. Unless the injunction is granted he will suffer irreparable harm which cannot be compensated by way of damages.

3. If in doubt, the court will determine the application on a balance of convenience.

Has the defendant made out a prima facie case with a probability of success? In the case of **Mrao –vs- First American Bank of Kenya and two others [2003] KLR 125**, a prima facie case was defined thus:

“A prima facie case in civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter.”

8. In the present case the court needs to ask itself whether the 1st defendant has satisfied the threshold for a grant of a temporary injunction. Arising from the facts as set out in this case and the evidence adduced by way of affidavit the court makes observations as hereunder:-

i. In as much as the defendant exhibited an agreement of sale, the defendant failed to show any nexus between the suit premises being Central Kitutu/Daraja Mbili/2231 and land parcel No. Central Kitutu/Mwamosioma/431 which is the subject matter of the agreement of sale exhibited by the defendant.

ii. As the plaintiff correctly submits, there is no suit in place lodged by the applicant on the basis of which it can be enquired whether the applicant has a prima facie case that has a chance of succeeding. It is to be noted the defendants have not pleaded a counter claim in the instant suit.

iii. In as much as the defendant contends that the plaintiffs were responsible for demolishing the 2nd defendant's house and that his piece of land has now been occupied by the plaintiffs, the plaintiffs in their replying affidavit have rebutted the defendant's claim and have stated that the 1st defendant voluntarily left the suit premises after the demise of the 2nd defendant and that the 1st defendant was in fact the one who demolished the 2nd defendant's house. The plaintiffs' have further stated that the 1st defendant will not suffer any prejudice as he has already vacated the suit premises of his own free will after the demise of the 2nd defendant over one year ago leading the plaintiffs to assume the use of the whole suit property. It is also the plaintiffs' contention that no nappier grass has ever grown on the suit premises. The defendants did not file a further affidavit to rebut the allegations by the plaintiffs' and as matters stand the plaintiffs averments remain unchallenged.

9. The defendant's application is primarily grounded on the orders given by Okong'o J. on 16th May 2014 which stated:-

“The plaintiffs' application dated 18th September 2013 is therefore allowed in terms of prayer (c) thereof. The injunction granted herein shall however not extend to that portion of the suit property which has been under actual occupation and use by the defendants or any of them.”

The 1st defendant's application literally sought to demonstrate/establish that the plaintiffs disobeyed the above orders. Section 63 of the Civil Procedure Act provides as follows:-

“In order to prevent the ends of justice from being defeated the court may, if so prescribed:-

a.

b.

c. Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”

Under Order 40 Rule 3 of the Civil Procedure Rules, in case of disobedience, or of breach of any terms of an injunction order, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

10. Once a court order is issued it can only be enforced by way of contempt proceedings. The 1st defendant's application does not seek to enforce the order issued by Hon. Justice Okong'o but is rather a fresh application seeking a counter injunction to the one granted by the judge. There can be no basis to grant an injunction when already there is an injunction already granted in the suit though on terms. If the terms of the injunction have been breached the appropriate route for the 1st defendant would have been to seek the enforcement of the terms of the injunction.

11. In the final result, I find the 1st defendant's application to lack any basis and the same is hereby ordered dismissed with costs to the plaintiff.

Ruling dated, signed and delivered at Kisii this 22nd day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

M/s Nyandika for Sagwe for the plaintiff

M/s Shilwatso for Nyamurongi for the defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE