



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 870 OF 2014

JOHN CHUCHU MUCHAI.....PLAINTIFF

VERSUS

ANDREW NJENGA.....1ST DEFENDANT

IAN KAMAU MUNGAI.....2ND DEFENDANT

MARGARET NYAMBURA MUNGAI.....3RD DEFENDANT

RULING

The Application

The application before the court is a Notice of Motion dated 2nd July 2014 filed by the Plaintiff, who is seeking the following orders:

1. An order of injunction restraining the Defendants from trespassing, interfering with and/or dealing in any manner with the suit property herein namely title Number Kiambaa/Kihara/2334, pending the hearing and final determination of the suit herein.
2. A mandatory injunction against the Defendants to vacate and demolish the illegal structures in the suit property.

The grounds for the application are that the Plaintiff is the *bona fide* proprietor of the suit property, and has a title deed to the same duly issued to him. Further that the Defendants have been and are still trespassing and/or interfering with the suit property by *inter alia* erecting permanent structures on the suit property.

The Plaintiff filed a supporting affidavit sworn on 2nd July 2014, and attached a copy of the title to the suit property and of an official search of the same showing him to be the registered owner. He further explained that the 1st and 2nd Defendants approached him in May 2013 and offered to purchase the suit property, and that he informed them that he would accept a purchase price of Kshs 18 million on condition that the same be paid in cash and in one installment.

He stated that he subsequently received a letter of offer from the Advocates for the 1st and 2nd Defendants, and a sale agreement stipulating that the consideration for the suit property was Kshs.10 million and not Kshs.18 million, and that he declined to execute the said agreement for sale. Further, that he received a licence agreement from the 3rd Defendant which he also declined to execute. The Plaintiff annexed copies of the said letter of offer, agreement for sale and licence agreement.

The Plaintiff averred that the Defendants have since then moved into the suit property, have continuously trespassed on the same and have erected permanent structures thereon and continue to waste the said property. He annexed photographs of the said permanent structure on the suit property. Further, that on 20th April 2014, he instructed his advocates on record to send the Defendants a notice to vacate and a demand for the demolition of the structures on the suit property, and that he has not received any feedback on the same.

The Response

The Defendants opposed the Plaintiff's application in a replying affidavit sworn by the 2nd Defendant on 3rd October 2014. The deponent stated that the suit property has been subject of a family dispute as to who is the true owner of the land for years, and that the 3rd Defendant who is their grandmother has been in occupation of the said property since 1964 which was within the Plaintiff's knowledge. Further, that he and the 1st Defendant built the house that is currently on the suit property for the 3rd Defendant in 2008 wherein she still lives to date, and the averment by the Plaintiff that the Defendants moved into the land in 2013 is false and misleading.

The Defendants admitted approaching the Plaintiff to purchase the suit property in 2013, and that they agreed on a purchase price of Kshs.10 million to be paid in instalments of Kshs.2,000,000/= per year for 5 years, and not Kshs.18 million as averred by the Plaintiff. Further, that part of the agreement was that they were to pay the Plaintiff 10% of the purchase price as deposit which amounted to Kshs.100,000/=, which they did through their advocates and also deposited legal fees amounting to Kshs.15,000/=.

However, that the Plaintiff failed to execute the sale agreement, and the Defendants were surprised when the 3rd Defendant was served with a notice to vacate dated 30th April, 2014. The deponent averred that if the orders sought by the Plaintiff are granted, the 3rd Defendant shall be adversely prejudiced and left destitute since the house on the suit property is her only home.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 23rd November 2013 while the Defendants' counsel filed submissions dated 6th January 2015. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary and mandatory orders of injunction sought.

The principles for the grant of temporary and mandatory injunctions are settled. The requirements for the grant of temporary injunctions are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and that these are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** wherein it was held that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the 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 latter.”

The Plaintiff has in this respect submitted that it is undisputed that he is the registered owner of the suit property having acquired a title to the same registered under the repealed Registered Land Act, and is therefore entitled to the protection provided by sections 108 and 28 of the Land Registration Act. Further, that the Defendants have acknowledged his ownership by admitting that they offered to purchase the suit property from him, and that he has thereby met the conditions stated hereinabove for a temporary and mandatory injunction as held in **Giella vs Cassman Brown (supra)** and **Kamau Mucuha vs The Ripples Ltd (1990-1994) E.A 388.**

The Defendants on the other hand submitted that the orders sought by the Plaintiff are in essence both mandatory injunctions, and that there are no exceptional or special circumstances to warrant issue of the same, neither is this a plain and clear case in light of the facts disputed by the Defendants. They also reiterated that the eviction of the 3rd Defendant would render her destitute. The Defendants in this regard relied on the decisions in various judicial authorities including **Virginia Njoka vs Joel Nathan Ouma & Another, (2013) e KLR** and **Kamau Mucuha vs The Ripples Ltd (1990-1994) E.A 388.**

I note that the Plaintiff in his Plaint dated and filed on 2nd July 2014 is seeking declarations as to his ownership and entitlement to the suit property, and orders of eviction, a permanent injunction and damages as against the Defendants. He has provided evidence of his title to the suit property issued to him on 27th March 2003. The effect of such title is provided under section 26 of the Land Registration Act as follows:

“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 encumbrances, 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 the ground 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.”

I also note that the Defendants have claimed that there is a family dispute as regards ownership of the suit property. They have however not filed any Defence or shed any other light as to the nature of the said family dispute or of the Plaintiff's involvement. In addition the evidence of the deposit of Kshs 100,000/= paid for the suit property shows that it was paid to the Defendants' Advocates, and there is no evidence that the Plaintiff received the same. Lastly it is also not disputed by the parties that the sale agreement over the suit property was not executed by the Plaintiff.

I find from the circumstances explained hereinabove that the Plaintiff has shown a *prima facie* case. The Defendants have not pleaded that they will be able to compensate the Plaintiff in damages if he succeeds in his claim, and I am therefore not able to find that damages would be an adequate remedy in lieu of the injunctions sought. However, in light of the allegations made by the Defendants as to a family dispute and the fact that there are permanent structures on the suit property, it may be premature at this stage to grant the orders of demolition sought, and the Defendants should first be given the opportunity to explain their position.

This finding notwithstanding, I am of the view that the orders sought of eviction are warranted, for the reason that the Plaintiff as registered owner is entitled to possession of the suit property, and the said orders will not be final in nature as the Defendants can still take possession of the suit property if the Plaintiff's claim is found to have no merit. The Court has in this regard considered the Defendants' plea that the suit property is the only home for the 3rd Defendant, and will in this regard grant the Defendants adequate time to secure alternative accommodation.

I accordingly allow the Plaintiff's Notice of Motion dated 2nd July 2014 on the terms of the following orders:

1. That the Defendants, their servants, agents, and/or or anyone acting through them shall, within sixty (60) days of service by the Plaintiff of the orders granted herein, vacate the property known as Title Number KIAMBAA/KIHARA/2334.
2. That after the expiry of the said sixty (60) days, the Defendants their servants, agents and/or anyone acting through them shall be restrained from trespassing on, interfering with and/or dealing with in any other manner with the property known as Title Number KIAMBAA/KIHARA/2334 pending the hearing and determination of the suit herein or until further orders.
3. That pending the hearing and determination of this suit or until further orders the Plaintiff shall not demolish or in any other manner interfere with the permanent structures constructed by the Defendants as at the date of this ruling on Title Number KIAMBAA/KIHARA/2334.
4. The costs of the Plaintiff's Notice of Motion dated 2nd July 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____24th____ day of

____February____, 2015.

P. NYAMWEYA

JUDGE