



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1125 OF 2013

FRANCIS KARUMWA GATHEKIA.....PLAINTIFF

VERSUS

KAHINDO KATALIKO KAMUNGELE.....1ST DEFENDANT

JASON PALUKU KATALIKO KAMUNGELE.....2ND DEFENDANT

RULING

The Application

The application before the court is an Amended Notice of Motion dated 14th October 2013 filed by the Plaintiff, seeking the following orders:

- a. A mandatory interlocutory injunction directed against the Defendants, requiring the Defendants to reconstruct or restore to its original stable, or strong position, the boundary wall between the Defendant's land namely L.R No. 209/11296/192 (house No. 85) and the Plaintiff's land parcel namely L.R No. 209/11296/193, at Airport View Estate, Nairobi pending the hearing and determination of this suit.
- b. That in default of the Defendants reconstructing or restoring to its original stable or strong position on the said boundary wall at all or within such a time as the Court will give, pending the hearing and determination of this suit, then the Plaintiff to reconstruct, or restore to its original stable or strong position the said boundary wall, and upon valuation of the said reconstruction or restoration works and demand the sums expended thereon from the DefendantS.
- c. That the O.C.P.D Langata Police Division be empowered to provide security during the said reconstruction or restoration works.

The grounds for the application are that the Plaintiff's and the Defendants' respective parcels of land share a boundary wall, and that the Defendants have erected an illegal and authorized structure on the said boundary wall which has damaged it. Further, that the said wall hangs dangerously towards the Plaintiff's land and house, which has scared away tenants from the said Plaintiff's house, and that he is losing rental income as a result.

The Plaintiff in his supporting affidavit and further affidavit sworn on 20th September 2013 and 14th October 2013 respectively attached a copy of his title deed to L.R No. 209/11296/193 Nairobi, and reiterated that the Defendants has extended the boundary wall upwards and built thereon and extending to his side of the land, a structure which has made the boundary wall crack and tilt towards his land, and which hangs dangerously above his parking lot and compound.

The Plaintiff further stated that due to this dangerous state of the wall, his tenant vacated in September 2012, and since then no tenant has taken up the house on his land as every tenant who views the house fears the wall collapsing onto the parking lot. Further, that other than the wall being unsightly, the same is dangerous and may damage property or hurt someone. He annexed letters he wrote to the Nairobi City Council in May 2013, and to the owner of the neighboring house in July 2013 to which he stated there has been no response, other than a letter from the advocate on record for the Defendants who gave the name of the owner of the land as Kataliko Mulemba.

The Defendants' Response

The 2nd Defendant opposed the Plaintiff's application in two replying affidavits sworn on 4th November 2013 and 19th November 2013 respectively. The 2nd Defendant stated that he resides in the house neighboring that of the Plaintiff's, and is the son of Kahindo Kataliko Kamulenge, who is the registered owner of the said house and who has since relocated to Congo. Therefore, that he is a stranger to the suit as he is not the owner of the house, and he is not seized with power and authority to act on his father's behalf.

The 2nd Defendant further averred that without prejudice to the foregoing, the beautification on the house on his father's property was done under his father's authority and supervision as registered owner of the property. Further, that contrary to the Plaintiff's averments, the said beautification works were done entirely on his father's property and none of it touches the said boundary wall. The 2nd Defendant attached a copy of his father's title to the suit property.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 6th August 2014. The Defendants' counsel did not file any written submissions despite being availed ample opportunity by the Court to do so. 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.

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 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.

Lastly, as to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated 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's counsel in this respect submitted that they have shown that there is damage to the perimeter wall, which damage has affected the tenantable condition of the Plaintiff's house. Further, that the Nairobi City Council issued the Defendants with an enforcement notice and would have demolished the structure built by the Defendant were it not for an appeal filed against the same. It was also submitted

that damages may not be an adequate remedy as the Defendant has relocated to Congo and may not be able to meet the same. Lastly, that the balance of convenience tilts in the Plaintiff's favour as the said boundary wall is affecting the Plaintiff's premises and not those of the Defendants' which still remain habitable

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff in this regard did not produce any photographic evidence or other evidence of the alleged structure built by the Defendants, or the damage that it is alleged it has caused to their shared boundary wall. In the circumstances this Court has no basis on which to determine if a *prima facie* case has been established, and cannot therefore grant the mandatory injunctions sought.

In addition the 1st Defendant who is the registered owner of the property on which the said structures are built is said to be out of the country. The Plaintiff submitted that he served the 1st Defendant by way of advertisement in the **Daily Nation** newspaper of the 30th July 2014. The law however is clear on service of process on a person out of the jurisdiction of this Court is by leave of the Court and the procedures under Order 5 Rules 21 to 28 of the Civil Procedure Rules have to be followed in this regard.

Lastly, the Court also notes that there appears to have been proceedings as regards the demolition of the said structure by the Nairobi City Council, and no evidence was brought of the outcome of the said proceedings. It may therefore in the circumstances be premature to decide on the Plaintiff's application at this stage.

The prayers in the Plaintiff's Notice of Motion dated 14th October 2013 are accordingly declined for the foregoing reasons, and the costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____20th ____ day of ____March____, 2015.

P. NYAMWEYA

JUDGE