



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1127 OF 2013

TERESIA NJERI MWANGI PLAINTIFF/APPLICANT

(SUING AS LEGAL REPRESENTATIVES OF

THE ESTATE OF STEPHEN MWANGI MAINA (DECEASED)

VERSUS

PAUL MWANGIDEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 20th September 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant from constructing or in any manner dealing with the property known as Ruiru Kiu Block 2/4726 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit, that he Defendant be compelled forthwith to move out of the suit property and that the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Teresia Njeri Mwangi, sworn on 20th September 2013 in which she averred that the suit property was at the time of death of her husband, Stephen Mwangi Maina, registered in his name. She annexed a copy of the title deed of the suit property dated 14th May 2004 and a Certificate of Official Search dated 14th March 2012 in support of that assertion. She further averred that she is a court appointed administrator of the estate of the late Stephen Mwangi Maina. She annexed a copy of the Grant of Letters of Administration Intestate dated 17th December 2009. She further averred that the court confirmed the grant on 9th September 2011 verifying that the suit property transmitted to her. She attached a copy of the Confirmation of Grant. She then averred that on 13th September 2013, the Defendant invaded the suit property, started fencing it and constructing upon it. She annexed various photos to show the ongoing work by the Defendant on the suit property. She further stated that upon informing the Defendant that the land belonged to her late husband, the Defendant refused to listen and instead continued with construction. She further stated that she was now seeking an injunction against the Defendant to stop construction and move out of the suit property.

The Application is contested. The Defendant, Paul Mwangi, filed his Replying Affidavit sworn on 6th December 2013 in which he averred that prayer No. 3 of the Application is final in nature and if granted

will bring the suit herein to an end. He also stated that the Certificate of Confirmation of Grant does not disclose other beneficiaries apart from the Plaintiff which raises serious suspicion.

Both the Plaintiff and the Defendant filed their written submissions which have been read and taken into account in this ruling.

The issue that I must determine is whether to grant the Plaintiff/Applicant the temporary injunction that she seeks as well as the eviction order. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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 question whether the Plaintiff/Applicant has demonstrated a genuine and arguable case no doubt leads us to an assessment of the documents of ownership produced by her in this Application. The Plaintiff/Applicant relies on a copy of a title deed and certificate of official search, both of which refer to the suit property and are in the names of one Stephen Mwangi Maina. The Plaintiff claims that the said Stephen Mwangi Maina was her husband but is now deceased. To assert her legal capacity to administer the estate of her late husband, the Plaintiff produced Letters of Administration issued by this Honourable Court. She went further to produce the Confirmation of Grant which clearly shows that she inherited the suit property from her late husband as a sole proprietor. On his part, the Defendant did not claim that he owns the suit property. He never produced any documents of ownership of the suit property and did not dispute the Plaintiff’s claim of ownership of the suit property. He never denied carrying on construction on the suit property and did not disclose how he came to enter the suit property. In the circumstances, I consider that the Plaintiff has shown that she has a genuine and arguable case and that she has a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

I further wish to rely on the case of **Jaj Super Power Cash and Carry Ltd versus Nairobi City Council and 2 Others Civil Appeal Number 111 of 2002** (unreported) where the Court of Appeal stated as follows:

“This court has recognized and held that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay

for it.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights. Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

The Plaintiff has also sought for an order compelling the Defendant to move out from the suit property. This is no doubt in the nature of a mandatory injunction. The principles governing the issuance of mandatory injunctions were well encapsulated in the English case of **LOCABAIL INTERNATIONAL FINANCE LTD- VS- AGRO EXPORT AND ANOTHER (1986) ALL ER 901** as follows:

“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 trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory order.”

Going by this precedent, I am directed to consider whether there are special circumstances warranting the grant of the mandatory injunction and to ensure that it is a clear case where the court thinks that the matter ought to be decided at once. I have given great thought to the Plaintiff's assertion of ownership rights over the suit property and the affidavit and documentary evidence she has produced before this court in support thereof. I have also considered the response given by the Defendant which in my view gives absolutely no answer to the Plaintiff's assertions. In these circumstances, I have a high assurance that the Plaintiff's case has high chances of success at the main trial. It is not right that a party can simply enter and occupy another's land on absolutely no basis whatsoever and then seek to remain thereon while the dispute goes through the court process awaiting determination. I will not allow that. I am sufficiently convinced that this is a case suitable for the issuance of a mandatory injunction as sought by the Plaintiff compelling the Defendant to immediately vacate the suit property and I do so order.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 31ST DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE