



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC` SUIT NO. 1538 OF 2016

MARY NJERI KAMANU.....PLAINTIFF

VERSUS

MARTIN NG'ANG'A KAMANU.....DEFENDANT

RULING

What I have before me is the plaintiff's application by way of Notice of Motion dated 7th December, 2016 seeking a temporary injunction restraining the defendant from trespassing onto, making use of, staying in or in any manner whatsoever or howsoever interfering or dealing with all that parcel of land known as Muguga/Gitaru/T.55 (hereinafter referred to as "the suit property") pending the hearing and determination of the suit. The plaintiff has also sought an order restraining the defendant from interfering with the plaintiff's use and enjoyment of the suit property pending the hearing of the suit and that the defendant do forthwith vacate or be evicted from the suit property. The application has been brought on the grounds that the plaintiff who is the registered owner of the suit property has been living on the suit property peacefully with the defendant who is her biological son and his siblings until 2014 which the defendant started becoming a nuisance in the premises by being disrespectful and threatening to harm her. The plaintiff has averred that the defendant has also threatened and attempted to kill his sister Ann Wangare Kamanu who also stays on the suit property. The plaintiff has averred that the defendant's illegal actions aforesaid have deprived her of the use and enjoyment of the suit property and that her other children and she are facing imminent danger of harm by the defendant. The plaintiff has averred that the defendant has been asked to vacate the suit property but has refused to do so and as such he is a trespasser on the property.

The application is opposed by the defendant through a replying affidavit sworn on 24th January, 2017. The defendant has denied all the allegations made against him by the plaintiff and has contended that the plaintiff wants to evict him from the suit property so that she can sell the same. The defendant has contended that the suit property was owned by his deceased father and that the plaintiff was only registered as owner thereof as a trustee on behalf of all the members of the family of his deceased father. The defendant has contended that the plaintiff has not given him a share of the suit property which he is entitled as a beneficiary of the estate of his father.

The application was heard by way of written submissions. The plaintiff filed her submissions on 5th December, 2017 while the defendant filed his submissions on 16th January, 2018. I have considered the application together with the affidavits which were filed by the plaintiff in support thereof. I have also considered the affidavit that was filed by the defendant in opposition to the application. Finally I have considered the submissions by the respective advocates for the parties. The plaintiff has sought both prohibitory and mandatory injunction against the defendant. The principles upon which the court exercises its discretion in application of this nature are now settled. For a temporary prohibitory injunction to issue, the applicant must satisfy the court that he has a prima facie case with a probability of success and that he stands to suffer irreparable harm if the order is not granted. If the court is in doubt as to the foregoing, the application is to be determined on a balance of convenience. See the cases of Giella v Cassman Brown & Co. Ltd. (1973) E.A 358, Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR and Mrao Ltd v First American Bank of Kenya Ltd. & 2 Others (2003) KLR 125 which were cited by the plaintiff.

For an interlocutory mandatory injunction, the threshold is higher. In addition to satisfying the conditions for granting a temporary prohibitory injunction, the applicant has to demonstrate that special circumstances exist that warrant the grant of such order and that the case is a clear one which can be determined at once and that the injunction sought is directed at a simple and summary act which can be easily remedied. See the decision in the case of Localbail International Finance Ltd. v Agro Export and Another (1986) 1 ALL ER 901 that was also cited by the plaintiff.

Apart from the injunctive reliefs, the plaintiff has also sought possession of the suit property. This prayer has been brought under Order 36 Rule 1(1) (b) and (2) of the Civil Procedure Rules which gives the court power to enter summary judgment for recovery of land from a trespasser. The law on summary judgment is settled. The court will only grant summary judgment if it is shown that the defendant has no defence to the plaintiff's claim and that a single triable issue entitles a defendant to leave to defend the suit. Order 36 Rule 1(1) (b) of the Civil Procedure Rules provides as follows:-

“In all suits where a plaintiff seeks judgment for the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits (emphasis mine).”

In the case of Taylor v Bolus (1981) KLR 536, it was held that:

“It is an established principle of law that where the plaintiff’s claim is undoubted and clear and the defence is only a sham or a spurious one, the court would grant summary judgment as prayed and where the defendant demonstrates a fairly arguable case or shows triable issue, summary judgment would not issue and he must be given leave to defend.”

In the case of Zola v Ralli Bros. Ltd. (1969) E. A. 691, the court stated as follows at page 694:

“Order 35 (now order 36) is intended to enable the plaintiff with a liquidated claim, to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgement. ”

As stated above, Order 36 rule 1 (1) (b) provides that the application for summary judgment should be brought where the defendant has appeared but has not filed a defence. In this case, the application was filed together with the plaint before the defendant even entered appearance. The defendant has since filed a defence.

With regard to the injunctive reliefs sought by the plaintiff, I am satisfied that the plaintiff has established a prima facie case against the defendant. The plaintiff has established that she is the registered owner of the suit property having acquired the same by adverse possession pursuant to a decree that was given on 30th June, 2000 in Nairobi HCCC No. 1902 of 1993. The plaintiff has also established on a prima facie basis that the defendant was a licensee on the suit property and that she has revoked the licence and demanded that the defendant vacates the suit property which demand the defendant had not heeded.

I am however not satisfied that the plaintiff stands to suffer irreparable harm unless the orders sought are granted. The plaintiff and the defendant have resided on the suit property for several years and it was until 2014 that a dispute arose between them. The defendant is residing on the suit property. The complaints which have been raised by the plaintiff against the defendant are of a criminal nature and I have noted that each time the same has been reported to the police, appropriate action has been taken against the defendant. I am not satisfied that the order sought if granted would stop the defendant from committing the criminal acts he has been accused of. Those acts have to be redressed through the criminal justice system. I am therefore not persuaded that the plaintiff would suffer irreparable injury if the injunctive reliefs sought by the plaintiff are not granted. Her concerns in my view can be taken care of by the criminal process. That being my finding, the plaintiff is not entitled to both prohibitory and mandatory injunction sought against the defendant.

As concerns the prayer for summary judgment, again, I am not satisfied that a case has been made out to warrant the grant of the order. The defendant has contended that he is in occupation of the suit property as of right and that he is entitled to a share of the same by virtue of being a beneficiary of his deceased father, Kamanu. Although the plaintiff has established that she is the registered proprietor of the suit property, evidence before the court shows that she acquired the property by adverse possession. The court is not seized of information on how this adverse possession came to be more particularly whether the plaintiff’s husband played any role in the acquisition of the property. I am of the view that it is a triable issue whether or not the defendant has any interest in the suit property apart from that of a licensee which I have mentioned above. The defendant having established that he has a defence which raises a triable issue, summary judgment sought by the plaintiff cannot be granted.

The upshot of the foregoing is that the plaintiff’s Notice of Motion dated 7th December, 2016 is not for granting. The same is dismissed with no order as to costs. However, for the purposes of maintaining law and order on the suit property, I order that the defendant shall henceforth keep to his house or home on the suit property and shall not interfere with the plaintiff and her other children’s activities on the suit property pending the hearing and determination of this suit. It is so ordered.

Delivered and Dated at Nairobi this 11th day of October 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Ms. Nyandwaro for the Plaintiff

The Defendant in person

Catherine Court Assistant