



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 201 OF 2014

TIMOTHY MUSAU MUTUAPLAINTIFF

VERSUS

KAMALA ISINGIDEFENDANT

RULING

1. In the Notice of Motion dated 14th May, 2014, the Plaintiff is seeking for the following orders:

a. The Honourable Court be pleased to grant an injunction restraining the Respondent from encroaching, trespassing, interfering with the peaceful enjoyment, damaging, wasting, constructing, developing, alienating, disposing or in any way interfering with Plot No. 95 in Makutano Market pending the hearing and determination of this Application.

b. The cost of this Application be provided for.

2. The Application is premised on the grounds that the Plaintiff is the owner of plot number 95 in Makutano Market having bought it from the Respondent's father in 1980; that the Plaintiff has been in quiet possession of the land until the year 2013 when the Defendant trespassed on the land and that the Defendant should be restrained by this court from trespassing on the suit land.

3. According to the Applicant's Affidavit, before the Respondent trespassed on the suit land, he had commenced moving construction materials on the land and that he can no longer continue with the construction due to the actions of the Defendant.

4. In response to the Application, the Defendant filed a Notice of Preliminary Objection in which he averred that the suit and the Application are incompetent and invalid for failing to comply with the mandatory provisions of the law.

5. The Plaintiff's advocate submitted that Order 40 of the Civil Procedure Rules presupposes the existence of a suit; that the court may grant a conditional injunction and that the Applicant has set out a prima facie case with chances of success.

6. On the other hand, the Defendant's counsel submitted that the court is authorized to issue a temporary injunction pending the hearing of a suit; that the Applicant is only seeking for orders of injunction pending the hearing and determination of the Application and that parties are bound by their pleadings.

7. The Defendant's advocate further submitted that plot no. 95 Makutano Market is part of parcel No. Mwala/Mango/1232 of which the Defendant has been in occupation for decades now; that the said land is in the name of a deceased person and that the suit land is subject to succession proceedings in the High

Court.

8. Counsel submitted that the Application is predicated on purported agreements which are in Kamba language and which do not specifically state the subject matter of the agreement.

9. The Plaintiff is seeking for an injunctive order in respect to the suit land “*pending the hearing and determination of this Application.*”

10. Indeed, the order as prayed in the Application cannot issue considering that the prayer is not for an injunction pending the hearing and determination of the suit.

11. However, considering that indeed there is a pending suit, and the Plaintiff has prayed in the suit for a permanent injunction, the court has the inherent power to issue an injunction pending the hearing and determination of the suit if it is satisfied that the Plaintiff has met the threshold for granting an injunction.

12. The mere fact that the Plaintiff has pleaded in his Affidavit to be granted the injunction pending the hearing and determination of an Application instead of the suit, it cannot in itself be a reason to strike out the Application. That, in my view, is an excusable mistake on the part of the advocate who drafted the Application which should be ignored by the court.

13. The Plaintiff’s Application and the suit is predicated on the fact that he purchased the suit property from the Defendant’s father in 1980.

14. To support that allegation, the Plaintiff has annexed on his Affidavit two copies of “sale agreements” dated 31st February, 1980 and 20th April, 1980.

15. The purported sale agreements are in Kamba language and have not been translated in English.

16. It is trite that under the provisions of Section 86 of the Civil Procedure Act, the language of this court is English.

17. Consequently, having failed to translate the said agreements as required by the law, I find and hold that the same cannot be used as evidence by the court.

18. In the absence of evidence to show that the Plaintiff purchased the suit land from the Defendant’s father in 1980, I find that the Plaintiff has not established a prima facie case with chances of success.

19. Although the Plaintiff has deponed that he is in occupation of the suit, he has not annexed photographs to prove that allegation.

20. In the absence of evidence of his occupation of the land, I find and hold that the Plaintiff will not suffer irreparable damage that cannot be compensated by damages if the injunctive order is not granted.

21. Having failed to establish the principles for the grant of a temporary injunction, I dismiss the Plaintiff’s Application dated 14th May, 2014 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE