



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC CASE NO. 296 OF 2017

VIC PRESTON MURITHI RUCHABI.....PLAINTIFF/APPLICANT

-V E R S U S-

MARY WANGARI.....1ST DEFENDANT/RESPONDENT

JACINTA WANGARI.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR, LAIKIPIA DISTRICT...3RD DEFENDANT/RESPONDENT

DISTRICT SURVEY, LAIKIPIA.....4TH DEFENDANT/RESPONDENT

RULING

1. **Spent**
2. **Spent**

3. Coming up before me for determination is the Notice of Motion dated and filed on the 8th December 2016 in which the Plaintiff/Applicant seeks orders of temporary injunction restraining the Defendant/Respondents, their agents, servants and/or anybody claiming under them from alienating, disposing, selling, wasting or in any way dealing with LR No. Daiga/Umande Block 2/4822 and 4823 respectively pending the hearing and determination of this suit.

4. Cost of this Application be provided for.

5. The application was premised on the grounds on the face of the application as well as the annexed affidavit sworn by the Plaintiff/Applicant Mr. Vic Preston Murithi Ruchabi dated the 8th December 2016.

6. By consent the said application was disposed of by way of written submissions wherein parties were to highlight on their submissions. The Applicant filed their written submissions on the 11th July 2017 while the 1st and 2nd Defendants filed their submissions on the 18th August 2017.

7. While the Applicant was present in court on the 14th February 2018 to highlight on their submissions, there was no appearance for the Respondents. The applicant went ahead to highlight on their submissions.

Applicant/Plaintiff's case.

8. Briefly it was the Applicant's case that he was the registered proprietor of the suit property No. LR No. Daiga/Umande Block 2/1622 measuring 3 acres, which land subsequently became a subject of a land dispute proceedings wherein upon its deliberation, the tribunal found not in his favor which prompted him to lodge an appeal in the Land Disputes Appeal Committee who then found in his favour and the award was adopted vide Senior Principal Magistrates Court sitting in Nanyuki in SPMC and Dispute case No. 17 of 2001.

9. The orders were to the effect that the District Land Registrar do enter into the Plaintiff's parcel of land, and carve out three acres of land being the plaintiff's rightful share and if any piece of land remained, then the same be awarded to the 1st and 2nd Respondents.

10. What happened instead was that the 1st and 2nd Respondents herein visited the suit land in his absence and sub-divided it into 3 portions resulting into Numbers 822, 4822 and 4824.

11. That on the 23rd March 2010, the 3rd Respondent illegally closed the Register in respect of the Applicant's parcel of land being LR No. Daiga/Umande Block 2/1622 and registered the 1st and 2nd Respondents as the proprietors of parcel of land No. LR No. Daiga/Umande Block 2/4822 and 4824 respectively wherein they took possession of the same.

12. The applicant submitted that they had met the three conditions set out in the **Giella vs Cassman Brown & Company Ltd [1973] E.A 358** to deserve the grant for interlocutory injunction to the effect that the applicant had proved that he had a prima facie case against the Defendants that he was the registered proprietor of the suit land Daiga/Umande Block 2/1622 wherein the 1st and 2nd Defendants had illegally sub divided it into 3 and had obtained the title deeds thereby disposing the Plaintiff/Applicant, which was a total misapprehension of the Appeal Committee's ruling. Further that the said subdivision were not legal as the mutation were not registered and neither was the RIM amended.

13. The Plaintiff/Applicant while relying on the case of **Waithaka vs Industrial and Commercial Development Corporation [2001] eKLR** submitted that now that he had proved that the Respondents herein had illegally sub divided his property and displaced him, damages would not adequately serve the injury inflicted upon him and that he would suffer irreparably should the injunctive relief so sought not issue.

14. That the property herein was at risk of being disposed of by the Respondents to his detriment and further that if the property was sold, the Plaintiff would not be able to get it back.

15. The Plaintiff/Applicant further submitted that the balance of convenience lie in his favour adding that if injunctive orders so sought were not granted, he would be deprived of his legal rights and privileges while the Respondents on the other side would suffer no prejudice, if the orders were not issued.

16. That the Appeal Committee's ruling was to the effect that if the land was less than 3 acres, then the Plaintiff/Applicant was entitled to all the land, a decision that the Respondents misunderstood and went ahead to subdivide it into three portions.

17. That the Plaintiff/Applicant had demonstrated sufficient grounds for the grant of the injunction sought.

Defendant/Respondent's case.

18. The Application was opposed by the 1st and 2nd Respondent who submitted that the Plaintiff had not established a prima facie case with a probability of success as was stipulated in the case of **Mr Rao vs Bank of Kenya Ltd and 2 others [2003] eKLR**.

19. The Respondents' submission was that the claim pleaded in this application/suit was a resultant of a court decree wherein in essence the Applicant/Plaintiff was pleading an unlawful execution. That the suit was an abuse of the court process because it went against the provisions of Section 34(1) of the Civil Procedure Act.

20. That the Plaintiff's application herein ought to have been filed in the Nanyuki Senior Magistrate's Land Dispute Case No. 17 of 2001 as it related to the execution of the decree therein. That the suit herein was there for a non-starter prima facie.

21. The Defendant/Respondent also submitted that they were in possession of the suit land and therefore to grant the Plaintiff/Applicant the prayers sought would amount to eviction orders against the Respondent at an interlocutory stage which was inappropriate and undesirable. They relied on the case of **Panari Enterprise Ltd vs Lijoodi ans 2 others [2014]eKLR** to buttress their case.

22. The issue for determination by this court is whether the plaintiff established a prima facie case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants 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. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

23. Having looked at the principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought, I find that at a glance of the proceedings before me, it is an undisputed fact that the Plaintiff/Applicant herein had filed an Appeal at the Land Dispute Appeals Committee (RVP) wherein it made its determination to the effect that District Land Registrar do enter into the Plaintiff's parcel of land, and carve out three acres of land being the plaintiff's rightful share and if any piece of land remained, then the same be awarded to the 1st and 2nd Respondents. That subsequently this award was adopted in the Senior Principal Magistrates Court sitting in Nanyuki in SPMC CC 17 of 2001.

24. That it is undisputed fact that while executing the said decree the 1st and 2nd Defendants herein had illegally sub divided the Plaintiff's parcel of land into 3, obtained the title deeds thereby displacing the Plaintiff/Applicant. The Plaintiff/Applicant's suit herein arises out of the said decree.

25. Section 34(1) of the Civil Procedure Act stipulates as follows.

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

26. I find that by virtue of the provisions of section 34 (1) of the Civil Procedure Act, the plaintiff/Applicant herein is barred from filing a separate suit seeking to resolve any question arising from the suit that was filed in the Nanyuki Senior Magistrate's Court as all questions arising between the parties herein ought and must be tried and determined in Senior Principal Magistrates Court sitting in Nanyuki in SPMC Land Dispute No.17 of 2001. The Plaintiff/Applicant has therefore not established a prima facie case.

27. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

28. Having found that The Plaintiff/Applicant has therefore not established a prima facie case, by virtue of the provisions Section 34(1) of the Civil Procedure Act, I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- Cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

29. Consequently, I dismiss the application dated and filed on the 8th December 2016 with costs to the Respondents.

Dated and delivered at Nyahururu this 26th day of April 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE