



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C. NO 128 OF 2014

NYAGA RUANDERI1ST PLAINTIFF

CIAKUTHII NJOROGE.....2ND PLAINTIFF

VERSUS

MARIKO KANYAKIRI GAKUTHI.....1ST DEFENDANT

ONARAT VUKO MARIKO.....2ND DEFENDANT

GABRIEL NYAGA NJOGOGE3RD
DEFENDANT

JOHN NJOKA KANYAKIRI.....4th DEFENDANT

RULING

INTRODUCTION

The plaintiff/applicant has filed a notice of motion in this court seeking a temporary injunction against the defendants/respondents. In that motion, he has attached a supporting affidavit.

The defendants/respondents have opposed the motion.

The Case for the Plaintiff/Applicant

The applicant in his supporting affidavit has stated that she has been in exclusive continuous and un-interrupted possession of the suit land for more than 12 years. She therefore believes that she has acquired title to the suit land by adverse possession. She has also stated that her suit has good chances of success. It is her case that the defendants/respondents through their agents/servants invaded the suit land and destroyed many of her cash crops.

Furthermore, she says that the defendants/respondents have plucked her tea and harvested all her bananas which they sold without her consent. Finally, she has stated that they have dug around her residential house, which she believes is an act of intimidation that is meant to force them out of the suit land. It is for the foregoing reasons that she seeks a temporary injunction to stop wastage and destruction of her cash crops and the intimidation.

The Case for the Defendant/Respondents:

The respondents have filed a joint replying affidavit sworn to by John Njoka Kanyakiri (the 4th Respondent). According to his affidavit, the suit land which previously was land reference number Kyeni/Mufu/3060 was subdivided on 13th June, 2014 into the following 3 portions:

1. A portion of 2 acres occupied by Ciakuthi Njoroge.
2. 1 acre occupied by Videa Warue
3. 1 acre occupied by Onarat Vuko Mariko.

The subdivision was effected following an order issued by the Embu High Court in Succession Cause number 435 of 2011.

The 4th respondent on behalf of the other 3 respondents have denied invading the suit land. Instead, he says that the respective beneficiaries have occupied their respective portions in terms of the grant which has not been challenged.

In paragraph 7 of his affidavit, the 4th defendant has stated that all the beneficiaries have occupied their respective portions as decreed by the court.

Submissions of Counsel for the Parties:

The plaintiffs/applicants' counsel have submitted that they have made out a case for the grant of a temporary injunction. According to her, the respondents should be restrained from interfering with the suit property pending the hearing and determination of the suit. She has also submitted that the defendants/respondents are not in occupation of the suit land.

The defendants/respondents counsel has opposed the application. She says that the defendants/respondents are in occupation of the suit land. Because of this conflicting factual submissions, I directed the Deputy Registrar of this court to visit the suit land and prepare a report. The Deputy Registrar filed his report on 7th November, 2014. The relevant parts of the report indicates the following:

1. Onarat Vuko Mariko, the second respondent is in occupation of 1 acre of land which has a homestead, tea and bananas.
2. The 3rd and 4th defendants/respondents do not have any homesteads in the suit land and they are not in occupation of any part of suit land.
3. Videa Warue who is not a party to this proceedings is in occupation of one acre of the suit land. She has a homestead, tea and banana plants.
4. The plaintiff (Ciakuthi Njoroge) is in occupation of 2 acres of the suit land which has her homestead, tea and banana plants.

Counsel for both parties made submissions in respect of the report of the Deputy Registrar.

The Applicable Law:

The grant of a temporary injunction is governed by Order 40 of 2010 Civil Procedure Rules. The provisions of Order 40 were judicially considered and approved in the case of ***Giella v Cassman Brown & Co Ltd (1973) EA 358***. An applicant who is seeking a temporary injunction must satisfy the following requirements:

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

According to that case, the application for the grant of a temporary injunction must satisfy the following criteria:

1. That he has a prima facie case which has a probability of success.
2. That if the injunction sought is not granted the applicant might suffer irreparable damage which damage is unlikely to be compensated by way of damages.
3. If the two conditions raised above raise doubt in the mind of the court, the court is required to decide the application on a balance of convenience.

Issues for Determination:

In the light of the evidence adduced in this court, the submissions of both counsel and the law, the following are the issues for determination:

1. Whether or not the plea of res-judicata is available to the defendant/respondent by virtue of the order made in the succession proceedings in the High Court cause number 435 of 2012.
2. Whether or not the applicant has met the criteria evidence for the grant of the temporary order
3. Who should pay for the costs of this application.

Evaluation of the Evidence and the Law

I have carefully considered the affidavit evidence and the submissions of both counsel. Having done so, I have come to the conclusion that the grant of a temporary injunction does not extinguish the legal rights of the defendants/respondents which were acquired following the order of the High Court in the above succession cause. The grant of a temporary order merely preserves the status quo of the subject matter of the application pending the hearing and determination of the suit.

In view of the report of the Deputy Registrar of this court and the affidavit evidence produced, the applicant has met the criteria for the grant of a temporary injunction against the 1st, the 3rd and the 4th defendants/respondents. In respect of the 2nd defendant/respondent, a temporary injunction will not issue because she is in occupation of her portion of land by virtue of an order issued by the High Court, which is valid and has not been challenged. This is in recognition of the doctrine of res judicata

In this regard, she and the applicant must maintain status quo pending the hearing and determination of this suit.

Verdict and Disposal Order:

In the light of the above matters, the court makes the following orders:]

1. A temporary injunction is issued against the 1st, 3rd and 4th defendants/respondents in terms of the notice of motion, excluding prayers (a), (c) and (d) of the motion.
2. The plaintiff/applicant and the 2nd defendant/respondent must maintain the status quo by remaining in occupation of their respective parcels of land.
3. Costs of this application shall be costs in the cause.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this..... 22nd day of
....JANUARY...2015**

In the presence of

Mr Kamunyori for the applicants and in the absence of M/S Muthoni for the Respondents

Court clerk Mr Muriithi

Court clerk.

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

J.M. BWONWONGA

JUDGE