



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C. NO 126 OF 2014

SIMON MWANIKI MIRU.....PLAINTIFF

(Suing as the legal representative of the estate of MIRU KAMWENDE - DECEASED)

VERSUS

ESTHER NJOKI MURIUKI.....DEFENDANT

RULING

INTRODUCTION

Mr Simon Mwani Miiro the plaintiff/applicant has by his notice of motion dated 27th October, 2014 sought the following orders from this court:

1. That he be granted a temporary injunction stopping the defendant/respondent from remaining on the suit land pending the hearing and determination of this application.
2. That the OCS Runyenjes Police Station be directed to ensure compliance with the court orders.
3. That the costs of this application be borne by the defendant/respondent.

In support of that application, they have relied on the grounds set out in that motion and his supporting affidavit. The defendant/respondent has opposed his application. In support of her opposition, she has filed a replying affidavit dated 11th November, 2014. In that affidavit, she has stated that she is the wife of the deceased who was the father of the plaintiff/applicant. She also says that the deceased lawfully transferred the suit land to her upon which she became a joint owner.

The Case for the Plaintiff/Applicant:

The plaintiff has applied to the court to issue an order to stop the defendant/respondent from working on the suit land and harvesting over 3,000 three plants. According to the applicant, the registration of the defendant/respondent as the owner of the suit land was obtained fraudulently. He therefore seeks a temporary injunction to stop the defendant/respondent from working on the suit land which he says would lead to the estate of the deceased suffering irreparable damage which cannot be compensated by way of damages. Finally, he says that the defendant/respondent is a stranger to the applicant and his brothers who are the only beneficiaries of the estate of the deceased.

The Case for the Defendant/Respondent:

As I have already mentioned, the respondent has opposed the application. According to her, she got married to the deceased in the year 2011 who then transferred the suit land parcel number Kagaari/Kanja/4669 upon which they became joint owners. She further states that all the formalities of transferring the land into her name and that of the deceased including the obtainment of the consent of the Land Control Board were followed.

It is her evidence that she took care of the deceased when he was sick because the plaintiff and other members of the family were never concerned with the health of the deceased. She went further to state that her husband died, the plaintiff and his brothers were not interested in burying his remains.

Finally, she says that the plaintiff and his brothers never attended the burial of the deceased and that they only appeared in the area after the burial ceremony.

The Applicable Law:

The law that governs the grant of temporary orders is found in Order 40 of the 2010 Civil Procedure Rules. The provisions of that order have been interpreted and judicially approved in the case of *Giella v Cassman Brown & Co Ltd (1973) EA 358*

“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, an applicant for a temporary order 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 view of the affidavit evidence, the submissions of counsel for the parties and the applicable law, I find the following as the issues for determination:

1. Whether or not the plaintiff/applicant has met the criteria for the grant of a temporary injunction.
2. Who should bear the costs of this application.

Evaluation of the Evidence, Findings and the Law:

I have considered the affidavit evidence, the submissions of the parties and the law. I find that the applicant has not met the criteria for the grant of a temporary order. The reason is that the defendant/respondent is in occupation of the suit land. The order that is being sought by the applicant is not capable of being implemented. If it were implemented it may amount to ordering the respondent out of the suit land, which may determine the whole suit as there will be nothing to be litigated upon. For these reasons, I find that his application for a temporary order is not warranted.

Verdict and Disposal Order:

In the light of the foregoing, I hereby make the following orders:

1. Application for a temporary injunction is hereby refused.
2. Costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **2nd** day of **JANUARY, 2015**.

In the presence of

M/S Muriuki holding brief for Mr Mugambi and M/S Gitari for Mr Andande.

Court clerk Mr Muriithi.

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

J.M. BWONWONGA

JUDGE