



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC SUIT NO. E016 OF 2020**

**MARY MUMBUA KIMINZA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KIILU MUSYIMI.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect to the Notice of Motion application dated 7<sup>th</sup> December, 2020 wherein the Plaintiff/Applicant seeks orders that:

*a. Spent.*

*b. Spent*

*c. Spent*

*d. THAT an order of injunction be and is hereby issued against the defendant/respondent, his employees, agents, servants or whomsoever restraining him from trespassing on, cultivating on, felling trees, damaging, wasting or depriving the petitioner /applicant of, or dealing with the property Kibwezi/Kibwezi/85 also known as Kibwezi settlement no. 85 Usalama howsoever pending the hearing and determination of this suit.*

*e. THAT costs of this application be in the cause.*

2. The application is supported by the applicant's affidavit and is premised on the grounds that: -

*a. THAT land parcel Kibwezi/Kibwezi/85 also known as Kibwezi settlement scheme no. 85 Usalama (herein after referred to as the suit property) was originally allocated to Kiminza Musyimi (deceased) who was the father to the plaintiff/applicant herein.*

*b. THAT the deceased lawfully transferred the suit property to the plaintiff/applicant herein during his life time and the registration process of the title in her name is still ongoing.*

*c. THAT the defendant/respondent wrongfully entered and illegally took possession of the suit property and has remained illegally on the said parcel cultivating thereon, felling trees and thereby damaging and degrading the property.*

*d. THAT as a consequence of the defendant's wrongful occupation of the suit property, the plaintiff has been deprived of the use and enjoyment of the suit property.*

*e. THAT it is in the interest of justice that this application is allowed.*

3. The defendant/respondent opposed the application through the replying affidavit sworn on 25<sup>th</sup> March, 2021.

4. The defendant/ respondent deposed that the orders sought in the application are not available to the plaintiff as they are final in nature whose effect would be to first evict the defendant / respondent from the suit property at an interlocutory stage without a hearing.

5. The defendant/ respondent deposed that the name Kiminza Musyimi (deceased) was only entered in the allocation register for the suit property after the same was given to the officers registering people by Mary Muia Musyimi (deceased) who was their mother.

6. The defendant/ respondent deposed that their mother gave the name of Kiminza Musyimi as her identification documents had been burnt

in a fire and she accidentally found the identity card of his brother which she used.

7. The defendant/ respondent deposed that up until 1998, his brother Kiminza Musyimi was never aware that the plot was in his name.
8. The defendant/ respondent deposed that the reason Mary Muia Musyimi (deceased) sought the allotment of the suit property was purely for the joint use and benefit for herself and the defendant/respondent as her youngest son.
9. The defendant/ respondent deposed that upon the demise of Mary Muia Musyimi (deceased), he remained the sole beneficial owner of the suit property and the allotment and/ or any subsequent title processed in the name of anybody including Kiminza Muysimi (deceased) and the plaintiff without his consent are mere paper transactions not capable of conferring any title to the paper title holders.
10. The defendant/ respondent deposed that it is even clear from the documents attached by the plaintiff/applicant that the said Kiminza Musyimi was never issued with the letter of confirmation mentioned in the purported letter of allotment dated 16<sup>th</sup> October, 1992 annexed as 'MWK1' and neither did he pay the unspecified deposit mentioned therein.
11. The defendant/ respondent went on to depose that his entry into the suit property, taking of possession of the same and remaining in possession thereon since 1992 has never been wrongful and/or illegal and he is the ultimate beneficial owner of the same.
12. The defendant/ respondent deposed that he has no intention of depriving the plaintiff anything as falsely deposed to by the plaintiff in the supporting affidavit as he is the lawful owner of the suit property.
13. Parties canvassed the application by way of written submissions. The main issue for determination is whether the applicant has made out a case for the granting of orders of temporary injunction.
14. The Plaintiff/Applicant submitted that the application before this court being one for temporary injunction against the defendants/respondents, the conditions for grant of the same are well settled in the case of **Giella Versus Cassman Brown [1973] EA 358.**
15. The Plaintiff/Applicant submitted that there is no evidence on record to substantiate the claim that the property was co-owned by the defendant/respondent as no proprietary rights ever passed to the defendant/respondent. That it is not in dispute that the suit property was previously allocated to and owned by the plaintiff/applicant's father, Kiminza Musyimi (deceased). The allocation was in 1992. In 2017 the allottee transferred the suit land to the plaintiff/applicant, a fact which has been acknowledged by the defendant/respondent. She cited the case of **Mrao Versus First American Bank Of Kenya Limited & 2 Others (2003) KLR 125.**
16. The Plaintiff/Applicant submitted that encroachment and trespass is a clear manifestation of infringement of the plaintiff/applicant's rights. The plaintiff/applicant shall suffer irreparable damage which would not adequately be compensated by an award of damages. She cited the cases of **John Kirori Wamurangi V John Mwaniki Kiarie & Another [2013] eKLR and Margaret Njeri Muiruri Vs Bank of Baroda, Civil Appeal No. 9 Of 2001.**
17. The Plaintiff/Applicant submitted that the balance of convenience tilts in her favour. She is apprehensive that the defendant/respondent will waste and damage the property. That unless this court acts and halts such a step, this suit will be rendered nugatory and merely academic.
18. The Plaintiff/Applicant submitted that she has satisfied the conditions for grant of a temporary injunction as established in **Giella Vs Cassman Brown Case (Supra)** and added that the application dated 7<sup>th</sup> December 2020 is merited. She prayed that the orders sought in the application particularly; 2,3 and 4 be granted.
19. The defendant/respondent submitted that the prayer no. 4 in the plaintiff/applicant is actually a prayer for mandatory injunction at an interlocutory stage despite the fact that it may have been pleaded as a prayer for a temporary injunction. That logically it follows that the submissions by the plaintiff/applicant to the extent that they talk about the principles for grant of a temporary injunction are misplaced and should be disregarded by the court.
20. The defendant/respondent submitted that the plaintiff/applicant has not shown existence of any special circumstances that would warrant the issuance of mandatory injunction at this interlocutory stage. That neither the plaintiff/applicant nor the alleged father have ever taken any steps to disturb the defendant's/respondent's occupation of the suit property since March 1992. He cited the case of **Qualitorn Limited V Shaban Swedi Mombasa High Court Civil Suit No. 83 Of 2003, Kamau Mucuha Vs The Ripples Civil Application No. Nai 186 Of 1992 (Unreported) And Belle Maison Ltd Vs Yaya Towers Limited HCCC No. 2225 Of 1992.**
21. The defendant/respondent further submitted that the plaintiff/applicant's application dated 7<sup>th</sup> December, 2020 cannot succeed and should therefore be dismissed with costs to the defendant.
22. Parties canvassed the application by way of written submissions. The main issue for determination is whether the applicant has made out a case for the granting of orders of temporary injunction.
23. It is not in doubt that there have been contradictory and contentious issues that have been raised by both parties that require proper interrogation during the hearing of the substantive suit. However, the suit is still at an interlocutory stage and the Court cannot deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003,** where the Court held that: -

**“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law.”**

24. The law governing the granting of interlocutory injunction is set out under order **40(1) (a) and (b)** of the **Civil Procedure Rules 2010** which provides that: -

*"Where in any suit it is proved by affidavit or otherwise—*

*(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21*

*(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."*

25. The conditions for consideration in granting an injunction were settled in the celebrated case of ***Giella v Cassman Brown & Company Limited (1973) E A 358***, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

*"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant 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."*

26. The test for granting of an interlocutory injunction was considered in the ***American Cyanamid Co. v Ethicom Limited (1975) A AER 504*** where three elements were noted to be of great importance namely: -

*i. There must be a serious/fair issue to be tried,*

*ii. Damages are not an adequate remedy,*

*iii. The balance of convenience lies in favour of granting or refusing the application.*

27. The important consideration before granting a temporary injunction under **Order 40 Rule 1** of the **Civil Procedure Rules** is the proof that any property in dispute is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit property; ***Kibwezi/Kibwezi/85 also known as Kibwezi Settlement no. 85 Usalama*** is in danger of being alienated as the defendant /respondent has not denied damaging and wasting the property by felling trees and perimeter fencing.

28. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In ***Mrao Ltd v First American Bank of Kenya and 2 others, (2003) KLR 125*** which was cited with approval in ***Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR***, the Court of Appeal defined a prima facie case as: -

*"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later"*

29. Has the plaintiff/ applicant herein established a prima facie case? It is not in doubt that the defendant/respondent is in occupation of the suit property. The defendant/ respondent has not refuted this and confirmed that he has been in occupation since March 1992. He contends that any transfer to the plaintiff/applicant was done fraudulently. The said contention cannot be settled at this juncture. As already stated above, these are contentious and contradictory statements of facts that cannot be determined at this stage. This Court will have to determine the same at the main hearing.

30. The instant application relates to land parcel no. ***Kibwezi/Kibwezi/85 also known as Kibwezi Settlement no. 85 Usalama***. It is not in doubt that the said parcel was allotted to Kiminza Musyimi (deceased).

31. Prima facie, being the daughter of the allottee of the suit property, the plaintiff/applicant has therefore established that she has an interest over the suit property. Given that plaintiff/ applicant has further alleged that the defendant/ respondent has been in occupation and is damaging and wasting the property by felling trees and perimeter fencing without a lawful cause, it is, therefore, not in doubt that its rights over the suit property (being the right of being in quiet possession) have been infringed upon by the defendant/ respondent by occupying the same. Consequently, the court finds and holds that the plaintiff/ applicant has established a prima facie case with probability of success as her rights can only be curtailed in accordance with the law.

32. On whether the Plaintiff/ Applicant will suffer irreparable loss which cannot be compensated by an award of damages; - 'Irreparable loss' was described in the case of ***Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015***, as simply injury or harm that cannot be compensated by damages and would be continuous.

33. It is not in doubt that the plaintiff/ applicant is in possession of the suit property. If for any reason the plaintiff/ applicant is put out of possession and taking into account that there are many attempts by the defendant/respondent to waste or damage the suit property, if after the hearing of the substantive suit, the plaintiff/ applicant becomes the successful litigant, this court finds and holds that the plaintiff/applicant will have suffered irreparable harm that cannot be compensated by way of damages. It is trite that a crystalized right which is violated cannot be equated to compensation by damages. See the Case of *Niaz Mohammed Janmohammed...Vs...Commissioner for Lands & 4 Others (1996) eKLR*, where the Court held that:-

***“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”***

34. On the third limb wherein if the Court is in doubt, then it ought to determine the matter on the balance of convenience, the Court finds that the balance of convenience tilts in favour of the plaintiff/applicant.

35. Arising from the above my finding is that the **Notice of Motion Application** dated 7<sup>th</sup> December 2020, is **merited** and the same is allowed in terms of prayer 4 with costs.

**DATED, SIGNED AND DELIVERED AT NAROK VIA EMAIL ON THIS 22ND MARCH, 2022.**

**MBOGO C.G**

**JUDGE**

In the presence of:-

CA:T.Chuma