



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 196 OF 2013

BENSON GICHOHI MUTAHI PLAINTIFF/APPLICANT

VERSUS

ALEX NJUE KITHANGARI 1ST DEFENDANT/RESPONDENT

MURIITHI KITHANGARI 2ND DEFENDANT/RESPONDENT

BONIFACE MUTHEE NJERU 3RD DEFENDANT/RESPONDENT

PETERSON MUGO KITHANGARI 4TH DEFENDANT/RESPONDENT

MWANIKI KITHANGARI 5TH DEFENDANT/RESPONDENT

NJERU RUTETU 6TH DEFENDANT/RESPONDENT

MURIITHI MUCHARO 7TH DEFENDANT/RESPONDENT

KITHANGARI KANGANGI 8TH DEFENDANT/RESPONDENT

RULING

By an amended plaint filed herein on 22nd June 2012, the plaintiff suing as the registered owner of the land MBEERE/KIRIMA/3066 sought the eviction of the defendant, their family, servants employees and agents from the said land and an order of permanent injunction prohibiting them from occupying, entering, encroaching, cultivating or in any other way interfering with the said land.

However, in their defence, the 1st, 2nd, 4th, 5th, 6th and 8th defendants stated that they are in occupation of the said land as of right for the last 50 years and made a counter-claim that the plaintiff holds 10 acres out of the said land in trust for the 1st, 2nd, 4th and 8th defendants and 5 acres in trust for the 6th defendant and an order that the said trust be determined and the title rectified accordingly.

Both parties also simultaneously put in applications seeking injunctive reliefs restraining the other parties from interfering with the other's right of enjoyment to the said land. The plaintiff further sought orders that the 1st, 2nd, 4th and 8th defendants do exhume the body of the 5th defendant which was interred on the said land on 24th November 2012 and that the Officer in charge Kiririti Police Station and the District Public Health Officer Mbeere South do supervise the said exhumation.

The two applications are dated 8th October 2012 and 3rd December 2012 and they are the subject of this ruling.

Written submissions on the two applications have been filed by Mr. Njiru for the plaintiff and Ms Njeru for the defendant and I have considered them together with the relevant affidavits and other annexures.

It is not in dispute that the plaintiff is the registered proprietor of the parcel of land known as MBEERE/KIRIMA/3066 and he has annexed to his application a title deed to the said property issued on 4th September 2008. The issuance of a title deed is prima facie evidence that the plaintiff is therefore the absolute and indefeasible owner of the said land. The defendants' case, however, is that they and their family have lived and developed the said land on which they have buried their mother and grandmother in 1992 and 1986 respectively and if they are evicted, they will be rendered homeless. The defendants have also laid claim to the said land alleging that the plaintiff holds it in trust for them. Of course whether or not a trust exists is a matter to be determined by the evidence during trial. The law, however, is that notwithstanding the registration of the land in the plaintiff's names, there is nothing in the **Registered land Act** (under which the title was issued) which precludes the declaration of a trust in respect of registered land even if it is a first registration – **MUMO VS MAKAU 2004 1 K.L.R 13.** Therefore, while the law recognizes that a title deed is prima facie evidence of ownership of a property, such registration does not relieve the registered proprietor of his obligation as a trustee should that evidence be available at trial.

Each of the parties are seeking injunctive reliefs while the plaintiff also seeks orders to exhume the 5th defendant from the land in dispute. An order for exhumation cannot be granted at this stage. Injunctive reliefs are governed by the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and these are:-

1. ***The applicant must make out a prima facie case with a probability of success at the trial***
2. ***An injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages, and***
3. ***If in doubt, the Court will decide the application on a balance of convenience.***

Even as the Courts apply the above principles while considering whether or not to grant an injunction, a further fundamental principle was identified by Justice Hoffman in the English Case of **FILMS ROVER INTERNATIONAL 1986 3 ALL E 772** at page **780 – 781** when he said as follows:-

“A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ----”

Therefore, even as the Courts adopt the basic test set out in the **GIELLA** case (supra) while making a decision on whether or not to grant an interlocutory injunctive relief, the Court, should always opt for the lower rather than the higher risk of injustice.

Bearing the above principles in mind, both the plaintiff and defendants would appear, prima facie, to have an arguable case. The plaintiff on the basis of his being the registered proprietor and the defendants on the basis of having lived thereon over the years including burying their relatives on the land. Whether the plaintiff or defendants will establish their respective claims to the land is a matter for trial. If the plaintiff sells the land, the defendants loss would, in my view, be irreparable taking into account that their relatives are buried there. It is also clear at this stage that the defendants are in occupation of the land. The plaintiff has the title to the land and therefore it is un-likely that the defendants are in a position to sell it. Having considered all the above, the order that commends itself to me in the circumstances of this case are as follows:-

1. ***The status quo now prevailing on the land is to remain until this suit is heard and determined. That status is that the defendants continue in occupation of the land***
2. ***Both the plaintiff and the defendants are hereby restrained from selling, wasting or in any way***

damaging the land pending the determination of this suit.
3. *Each party shall meet their own costs.*

B.N. OLAO

JUDGE

18TH MARCH, 2014

18/3/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Mr. Njiru for Plaintiff – absent

Mr. Njoroge for Njeru for 1st, 2nd, 4th, 6th and 8th defendant present

COURT: Ruling delivered this 18th day of March 2014 in open Court

Mr. Njoroge for MS Njeru for 1st, 2nd, 4th, 6th and 8th defendant present

No appearance for plaintiff.

B.N. OLAO

JUDGE

18TH MARCH, 2014