



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT CASE NO. E001 OF 2022(OS)**

**JENIPHER ONOKA WERE.....PLAINTIFF**

**VERSUS**

**PAMELA ANYANGO.....DEFENDANT**

**RULING**

**The applicant's case**

1. The motion dated 4/01/2022 is brought within the provisions of **Sections 1A and 1B** of the **Civil Procedure Act, Order 40 Rule 1, 2 and 4** and **Order 51 Rule 1** of the **Civil Procedure Rules**. Prayers 1 and 2 are spent and the main prayer pending determination is as follows;

*a) An order of temporary injunction restraining the respondent, her agents, employees or servants or any person acting on her behalf from trespassing, selling, charging, occupying, accumulating materials whether for personal use or for business, evicting the plaintiff or otherwise in any manner interfering with Land parcel Number South Gem/Wagai/1902 ("the suit property") pending hearing and determination of the present suit.*

2. The motion is supported by grounds on the face of the motion and on the supporting affidavit of the plaintiff dated 4/01/2022.

3. She contended that she was an adverse possessor of the suit property having lived on it for a period of over 30 years and that the defendant had vide a letter dated 23/12/2021 threatened to evict her, her family and tenants from the suit property and that the motion is intended to safeguard the substratum of the suit.

**The defendant's case**

4. In opposition to the motion, the defendant filed a replying affidavit dated 9/02/2022. She contended that she is the registered proprietor of the suit property having purchased it together with her husband in the year 1994. She stated that the plaintiff encroached on the suit property in the year 2018 when her brother in law stopped cultivating on the suit property. She stated that she had never seen the plaintiff or given her permission to use the suit property. She contended that the plaintiff had not met the threshold for the grant of a temporary injunction.

**The plaintiff's submissions**

4. The applicant filed written submissions dated 24/01/2022. Placing reliance on the cases **Giella v Cassman Brown [1973] EA 358** and **Mrao Limited v First American Bank of Kenya Limited [2003] eKLR** which settled the principles of injunctions, her counsel submitted that the plaintiff had established a prima facie case by demonstrating that she had lived on the suit property for a period of over 30 years. On the principle of damage that she may suffer, she submitted that the respondent would interfere with her legal occupation and quiet possession of the suit property. On the last principle: in the event of doubt the court shall determine the suit on a balance of convenience; she submitted that the balance of convenience tilted in her favour. On this last principle, she also placed reliance on the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**. She prayed for costs.

**The defendant's submissions**

5. Through counsel, the respondent filed written submissions dated 9/02/2022. The defendant submitted that for one to be issued with injunctive orders, the ingredients of **Giella v Cassman Brown & Company Limited (Supra)** must be fulfilled and that the principles were reiterated in the case of **American Cyanamid Company v Ethicon Limited [1975] AAER 504**. She submitted that the plaintiff had to make full and frank disclosure of all relevant facts to the just determination of the motion and show she had a legal or equitable right which required protection. On this, she placed reliance on the case of **Kenleb Cons Limited v New Gatitu Service Station Limited & another [1990] eKLR**.

6. She submitted that the plaintiff is not in actual occupation of the suit property and will not suffer loss and she relied on the case of **Francis Muthui Mathangani v Alice Gathiga Menja [2020] eKLR**. She also relied on the case of **Gladwell Muthoni Njoroge vs Wangaruro Mbugua & 16 others [2018] eKLR** which held that once a respondent (in this case the defendant) demonstrates that she is the registered owner of the suit property, the onus shifts to the applicant (in this case plaintiff) to demonstrate that the title is challengeable within the provisions of law.

7. It was her submission that the balance of convenience tilted in her favour since she is the registered proprietor of the suit property.

#### **Analysis and determination**

8. I have carefully considered the motion, grounds in support, supporting affidavit and the respondent's replying affidavit and parties' rival submissions and the two issues falling for determination are: (i) Whether the plaintiff has met the threshold for the grant of a temporary injunction and, (ii) Who shall bear costs of this motion.

I will proceed to analyze the legal and jurisprudential framework on the issues.

9. The provision of law that clothes this court with jurisdiction to grant a temporary injunction pending the hearing and determination of the suit lies with **Section 63(c)** and **(e)** of the **Civil Procedure Act** which provides:

***“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed...grant a temporary injunction... make such other interlocutory orders as may appear to the court to be just and convenient”.***

10. The case of **Giella vs Cassman (Supra)** has long settled the principles that guide courts in determining whether or not an applicant has met the threshold to warrant the grant of a temporary injunction pending the hearing and determination of the suit. Has the plaintiff met the threshold? In answering this question, the court has to look at the overriding objective of the law and the circumstances of the case generally and this court shall sequentially juxtapose the principles of **Giella vs Cassman (Supra)** against the facts of this case.

11. Has the plaintiff established a prima facie case with probability of success at the intended trial? In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, the Court of Appeal defined a prima facie case to mean a genuine and arguable case based on the material presented before the court. From the grounds in support of the motion and the supporting affidavit, the plaintiff contends that her tenants and children are in occupation of the suit property. The tenancy agreements and the period of time her children have been in occupation have not been disclosed. Further, the plaintiff has not proffered copies of title documents of the suit property to ascertain the history of the suit property. The letter dated 23/12/2021 that she has relied upon, is a notice of termination of tenancy and is not even addressed her. In view of this, I do find that the plaintiff has not established a prima facie.

12. It is trite law that where an award of compensation would be adequate, an order for temporary injunction should not be granted. It is the plaintiff's contention that she has put up rental structures on the suit property. Will the plaintiff suffer irreparable harm that will not be compensated by way of damages? In my view, the rental units, if at all they exist in the suit property are commercial in nature and the rental income and value are ascertainable and can be compensated by damages in the event the plaintiff is eventually successful in her claim. The plaintiff fails on this limb.

13. Does the balance of convenience tilt in favour of the plaintiff or the defendant? The plaintiff has contended that she has always had possession and occupation of the suit property to the exclusion of the defendant for the past 30 years. The defendant contends that the plaintiff encroached on the suit property in the year 2018. The parties disagree on the period of time the plaintiff has been in occupation and possession of the suit property and in my view, the balance of convenience tilts in favour of the defendant who is the registered proprietor of the suit property.

14. It is my finding that the plaintiff's motion dated 4/01/2022 is not merited and because it is trite law that costs follow the event, I award costs to the defendant. Ultimately, I make the following disposal orders: -

***a) The Notice of Motion dated 4/01/2022 is hereby dismissed with costs to the defendant.***

***b) The plaintiff shall fully comply with the provisions of order 11, of the Civil Procedure Rules, within 21 days of delivery of this ruling and the defendant shall comply with order 11, of the Civil Procedure Rules within 21 days after the period stipulated for compliance to the plaintiff.***

***c) Parties shall appear before the Deputy Registrar for pretrial directions on 27/04/2022.***

15. It is so ordered.

**RULING DELIVERED VIRTUALLY,**

**DATED, SIGNED AND DELIVERED THIS 10TH DAY OF MARCH 2022.**

**IN THE PRESENCE OF:**

**MR. OORO FOR THE RESPONDENT.**

**N/A FOR THE APPLICANT**

**COURT ASSISTANT: SARAH OORO**

**HON. A. Y. KOROSS**

**JUDGE**

**10/3/2022**