

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 263 OF 2013

MARY NASAMBU MAKANDA PLAINTIFF

VERSUS

DENNIS WANYAMA..... DEFENDANT

RULING

1. The plaintiff/applicant has moved this court under section 3, 3A and 63 E of the Civil Procedure Act and order 40 rules 1 & 2, 51 rule 1 and enabling statutes, seeking temporary orders of injunction restraining the defendant/respondent whether by himself, agents, servants, nominees or anybody acting through him from constructing on land parcel no. E. Bukusu/N.Kanduyi/5886 pending hearing and determination of this suit. The notice of motion is premised on the grounds listed on the face of it inter alia that the applicant is the sole registered owner of this land. The motion is also supported by the affidavit sworn by applicant.

2. The application is opposed by a replying affidavit sworn by the respondent. The respondent deposes that this motion is overtaken by events as the plaintiff has conceded in paragraph 4 of the plaint that the respondent has built on this land. He deposed further that he finished construction and is currently in occupation of the said house. He also denied the plaintiff as the absolute owner of the land in dispute. He urged the court to find the application as without merit and dismiss it with costs.

3. Counsels for the parties filed their respective submissions. Mr. Situma advocate for the applicant submits that the applicant has laid out a prima facie case with chances of success hence the application should be allowed. He questions the validity of the sale agreement between the respondent and one Ramadhan Wekesa Kassim. He also submits that section 26 of the Land Registration Act gives the applicant absolute and indefeasible ownership of the suitland. There is no entry that the applicant holds the land in trust for his son Ramadhan Wekesa Kassim. He concluded that the applicant cannot fully utilize the land and monetary compensation cannot be sufficient.

4. Mr. Kassim advocate for the respondent submits the applicant is not entitled to the orders sought as the defendant/respondent has finished construction of his house and taken occupation of the same. Secondly he submits the applicant has not satisfied the conditions set out in the case of ***Giella vs. Cassman Brown***. It's the respondents submission that the applicant will suffer no loss because the disputed portion is that allocated to her son. He urged the court to dismiss the application.

5. The celebrated case of ***Giella vs. Cassman Brown*** laid the principles for granting injunction and which is contained under order 40 of our Civil Procedure Rules. In comparing the present scenario with the set principles, I am in agreement with part of the submissions of the applicant that they have laid out a prima facie case as the applicant is the registered owner of the land in dispute. The issue is on whose favour the balance of convenience tilts. The defendant avers the house is already built and is in use. The applicant thus in ground (b) on the face of the application, photographs annexed as **MNM -11 (a) and (b)** and paragraph 4 of the plaint where it is pleaded thus, "That the defendant has already gone ahead and built on the said land." If the respondent is already in occupation then the balance of convenience tilts in his favour.

6. In the application, the only orders sought is to stop construction on L.R. E. Bukusu/W. Kanduyi/5886. From the pleadings, construction was already done when the application was made. The court cannot stop an action which has already taken place. Injunctions are issued in instances where “any property in dispute in a suit is in danger of being wasted, damaged or alienated.....” the court will grant temporary injunction in such instances to restrain such an act or make such other order for the purpose of staying and preventing the wasting, alienation etc.” In light of the facts presented, this court can only issue orders to stop future construction, which has not been prayed for. However, to avoid unnecessary application, this court issues an order of status quo prevailing as at the date of this ruling be maintained pending the determination of this suit.

7. In conclusion, I find the application as not proved and dismiss it. Each party to bear their costs of the application.

DATED, SIGNED and DELIVERED in Bungoma this 30th Sept. 2014.

A. OMOLLO

JUDGE.