



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 264 OF 2013

ROBERT KIOKO KIVUVA.....1ST PLAINTIFF/APPLICANT

FRANCIS MUTUA AARON.....2ND PLAINTIFF/APPLICANT

(Suing as Administrators of the estate of Aaron Kivuva Kitusa (Deceased))

VERSUS

HENRY NZIOKA MULLI..... DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 15th February 2013 in which the Plaintiffs/Applicants are seeking for orders of temporary injunction restraining the Defendant from interfering with, wasting, damaging, selling or dealing in any manner with the parcel of land situated at Kalimani Market, Kangundo measuring 40ft x 100ft (hereinafter referred to as the “suit property”) as well as the parcel of land known as L.R. No. 2358/1 Koma Rock Ranch, Machakos (hereinafter referred to as the “other property”) pending the hearing and determination of this Application and suit. The Plaintiffs/Applicants also seek a permanent injunction restraining the Defendant from interfering with, wasting, damaging, selling or dealing in any manner with the suit property as well as the other property pending the hearing and determination of this Application and suit. The Plaintiffs/Applicants also seek for a court order directing the Defendant to deliver vacant possession of the suit property within 14 days and that this court do grant the Plaintiffs/Applicants leave to enter upon and repossess the suit property. The Plaintiffs/Applicants also sought for orders directing the OCS Kangundo Police station to provide escort, security and assistance to ensure compliance with the above orders and that costs of the Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff, Robert Kioko Kivuva, sworn on 15th February 2013 in which he averred that he was one of the administrators of the estate of his late father Aaron Kivuva Kitusa (hereinafter referred to as “the Deceased”) along with the 2nd Plaintiff. He further averred that by an Agreement for Exchange of plots dated 1984 entered into between the Deceased and the Defendant, the Deceased at the time being the owner of the suit property agreed to transfer the same to the Defendant in exchange for 20 acres to be excised or hived off from the other property. He further averred that under the said Agreement, the Deceased was required to obtain and execute all the relevant and necessary completion documents in order to transfer the suit property to the Defendant and in return the Defendant was required to execute all

the relevant completion documents and transfer to the Deceased 20 acres to be hived off from the other property. He further averred that the Deceased duly performed his obligation under the said Agreement while the Defendant, despite repeated requests and demands, completely failed, refused and/or neglected to hive off the agreed 20 acres from the other property and to transfer the same to the Deceased. He added that the Defendant has since 1984 been in occupation of the suit property and intends to dispose it off as well as the other property the result of which will be immense and substantial loss and damage to the estate of the Deceased. He further averred that the Defendant's continued occupation of the suit property is illegal and the same should be surrendered to the estate of the Deceased immediately for the benefit and enjoyment of the beneficiaries thereof.

The Application is contested. The Defendant/Respondent filed his Replying Affidavit sworn on 18th March 2013 in which he admitted the existence of the said Agreement between him and the Deceased but further averred that this Application and suit are fatally defective as the subject matter thereof namely the other property is non-existent in the Machakos Land Registry records and does not belong to him. He further averred that he transferred 20 acres of land hived from the parcel of land known as Donyo Sabuk/Koma Rock/Block 1/100 to the Deceased ostensibly in exchange for the suit property. He asserted his ownership of the suit property on that basis. He further averred that the Plaintiffs' claim is caught up by the doctrine of laches.

Both the Plaintiffs and the Defendant filed their written submission which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiffs have laid claim over 20 acres hived out of the other property which they contend rightfully belong to the estate of the Deceased. They also claim the suit property which they contend was transferred to the Defendant in exchange for those 20 acres. The document that they have produced to this court as evidence of those rights is an Agreement ostensibly entered into between the Deceased and the Defendant and which is undated save for the indication of the year as 1984. The Defendant on his part has admitted that there was indeed an Agreement between him and the Deceased but asserts that in exchange for the suit property, he transferred to the Deceased the parcel of land known as Donyo Sabuk/Koma Rock/Block 1/100. Apart from the said Agreement, none of the parties have produced any title documents to any of the parcels of land alluded to by them. As this is the Plaintiffs' case, it is the onus of the Plaintiffs to demonstrate to the court in a convincing way that they have proprietary rights over the suit property or the 20 acres hived from other property which are in danger of being infringed if a temporary injunction is not granted. The Defendant has stated that the parcel of land which was to be transferred to the Deceased was not 20 acres hived out of the other property but was 20 acres hived out of the parcel of land known as Donyo Sabuk/Koma Rock/Block 1/100. I must say that the Plaintiffs have not established a prima facie case as it is not clear which parcel of land was to be transferred to the Deceased in exchange

for the suit property.

Further to this, it has been conceded by the parties that the suit property is currently occupied by a school going by the name Mulli Academy being run by the Defendant. The Defendant submitted that the said school currently has in excess of 500 students. Granting the sought after temporary injunction will no doubt interfere with the running of the said school on the suit property. The said school has not been enjoined in these proceedings but would no doubt bear the brunt of any order issued by this court in respect to the suit property where it stands. For all these reasons, I find that the Plaintiffs have not established a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

The other issues that fall for determination in this Application are whether or not to grant the prayers for a permanent injunction and an eviction order in respect of the suit property as well as the other property. All these orders are orders of a final nature which cannot be granted at this interlocutory stage. For that reason and for the other reasons given earlier, I decline to grant those orders.

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 26TH DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE