



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 51 OF 2014

JACOB MWANTO WANGORA..... PLAINTIFF/APPLICANT

VERSUS

MARY WARUGA WOKABI.....1ST DEFENDANT/RESPONDENT

GEORGE LWANGA KORONTO.....2ND DEFENDANT/RESPONDENT

(SUING AS BENEFICIARIES AND PERSONAL REPRESENTATIVES OF THE

ESTATE OF SOROMEETI KAPORE, DECEASED)

BERNARD WOKABI WARUGA.....3RD DEFENDANT/RESPONDENT

JOSEPH NJUGUNA WARUGA.....4TH DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 22nd January 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from wasting, damaging, alienating or trespassing upon the parcels of land known as Ngong/Ngong/62257, 62258, 62259 and 62260 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for an order inhibiting the registration of any dealings with the suit properties pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Jacob Mwanto Wangora, sworn on 22nd January 2014 in which he avers that in the year 1977, Soromeeti Kapore, now deceased, was his immediate neighbor at Kandisi in Ongata Rongai. He further averred that the Deceased was an old man with no wife, children or other dependants that he knew of. He further averred that in the year 1977, the Deceased approached him seeking his financial assistance to maintain him as he had no livelihood or income. He further averred that it was agreed between them that the Deceased would transfer to him one acre from his three acre parcel of land known as Ngong/Ngong/3080 at a consideration of Kshs. 3,000/- for the acre. He further averred that in return he assisted the Deceased financially and built him a semi-permanent house on his said parcel of land. He further averred that in mid-1978, the Deceased went missing and he never heard from or saw him again. He further averred that seeing that the Deceased was nowhere to be found, he proceeded to

safeguard his proprietary interest in that parcel of land by fencing the same with a barbed wire fence and a kay apple and euphoria hedge in the year 1978. He further stated that he commenced to cultivate crops, fodder, grass and trees and develop the said parcel of land. He then stated that in January 2014, he found the Defendants on the said parcel of land and when he enquired as to what they were up to, they claimed to be related to the Deceased and to have inherited the land from him. He further stated that he then conducted a search at the Land Registry and found that the parcel of land known as Ngong/Ngong/3080 had been closed on 17th December 2013 upon subdivision into the suit properties and that title deeds had been issued to the Defendants the following day. He further stated that the 1st and 2nd Defendants had petitioned the Honourable High Court at Machakos in Succession Cause No. 108 of 2011 claiming to be the wife and son of the Deceased while the 3rd and 4th Defendants claimed to be his children. He further averred that he knew the Deceased for over 30 years but had never met or knew him to have a wife or children and that none of the Defendants bear his name. He doubted that they are related to the Deceased. He further stated that by the time the Defendants petitioned the Court and sought distribution of parcel of land known as Ngong/Ngong/3080, the Deceased title to it had been extinguished and it was held in trust for him. He further stated that the suit properties did not form part of the Deceased's estate for this reason.

The Application is contested. The Defendants filed the Replying Affidavit of Mary Waruga Wokabi, the 1st Defendant, sworn on 5th March 2014 in which she averred that it is true that she is a beneficiary and personal representative of the estate of the Deceased and that the 2nd, 3rd and 4th Defendants are beneficiaries of his estate. She further confirmed that the parcel of land known as Ngong/Ngong/3080 was divided among the Defendants through a Confirmation of Grant dated 17th October 2013. She further averred that the Plaintiff/Applicant did not object at any stage of the Succession Cause No. 108 of 2012 despite the same having been gazetted on 11th February 2011 and on 20th July 2012. She further averred that the Plaintiff/Applicant did not secure any purported interest in the said land and that his name does not appear in the land registry in relation to that land. She further stated that these proceedings are vexatious and an abuse of the process of court and should be dismissed with costs. The Defendants also filed their Grounds of Opposition dated 5th March 2014.

Both the Plaintiff and the Defendants have filed their written submissions which have been read and taken into account in this ruling.

The issue I must determine is whether or not to grant the Plaintiff/Applicant the temporary injunction and inhibition order which he seeks. In deciding whether or not to grant the temporary injunction, 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.”

Has the Plaintiff 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.”

I must now embark on the task of determining whether the Plaintiff has shown that he has a genuine and arguable case and therefore has established that he has a prima facie case. Has the Plaintiff established, on a prima facie basis, that he has any proprietary rights over the suit properties which lie in danger of being infringed by the Defendants if a temporary injunction were not to be granted? To begin with, the Plaintiff

claims that the Deceased sold to him one acre out of the larger parcel known as Ngong/Ngong/3080 for a consideration of Kshs. 3,000/-. To respond to that claim, I can do no better than to set out the provisions of the law. The **Law of Contract Act at section 3(3)** clearly indicates as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- a. **The contract upon which the suit is founded**
 - a. **Is in writing**
 - b. **Is signed by all the parties thereto: and**
- b. **The signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”**

Further, the **Land Act at section 38** provides as follows:

“No suit shall be brought upon a contract for disposition of an interest in land unless-

- a. **The contract upon which the suit is founded**
 - a. **Is in writing**
 - b. **Is signed by all the parties thereto; and**
- b. **The signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.**

In this particular case, the Plaintiff has not produced any document in writing duly signed by both him and the Deceased transferring the one acre to the Plaintiff for the said consideration of Kshs. 3,000/-. To that extent therefore, I find that the Plaintiff has not proved on a prima facie basis that he has any proprietary rights over the one acre which this court should protect by way of a temporary injunction.

However, the Plaintiff has on the other hand laid claim on the suit properties on the ground that he acquired prescriptive rights over the same through the doctrine of adverse possession. Arising from that, I must therefore determine whether the Plaintiff has established a claim under adverse possession. The Plaintiff claims to have moved into possession of the suit properties in the year 1978 when he claims the Deceased disappeared. He claims to have proceeded to safeguard his proprietary interest in that parcel of land by fencing the same with a barbed wire fence and a kay apple and euphobia hedge and commenced to cultivate crops, fodder, grass and trees. To that assertion, I agree with the Plaintiff's submission that none of the Defendants have filed any affidavit contesting or rebutting any of these facts. The question that keeps ringing in my mind that remains to be answered by the Defendants is where they were for the period since 1978 to the time they commenced succession proceedings in respect of the Deceased's estate? It appears to me that neither the Deceased nor the beneficiaries of his estate (the Defendants) asserted their ownership rights over the suit properties during that period of time. At this juncture therefore, I find that the Plaintiff's claim for adverse possession has not been rebutted by the Defendants. I am convinced that the Plaintiff has shown this court that he has a genuine and arguable case and therefore a prima facie case with high chances of success at the main trial. For the avoidance of doubt, I must mention categorically that this is a preliminary finding based on the affidavit evidence before this court at this stage of the proceedings. A conclusive finding on this issue shall no doubt have to await the full trial of this suit.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“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 a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights.

In whose favour does the balance of convenience tilt? On that factor, I agree with the Plaintiff that it is necessary to maintain the status prevailing as at now whereby the Plaintiff is in possession of the suit properties while the Defendants have the titles to the same. In order to avert any adverse dealings with the suit properties, I find that the balance of convenience tilts in favour of the Plaintiff.

I also consider this an appropriate case to grant the order of inhibition to bar any adverse dealings with the suit properties pending the hearing and determination of this suit.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 31ST

DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE