



REPUBLIC OF KENYA
IN THE HIGH COURT
AT MERU
CIVIL CASE 172 OF 2011

JOYCE NKATHA MUSA PLAINTIFF

VERSUS

SAMWEL KAUMBUTHU M'AYOI.....1ST DEFENDANT

JOSEPH NGOLUA.....2ND DEFENDANT

DISTRICT LAND ADJUDICATION OFFICER.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

R U L I N G

The applicant through an application dated 5th March, 2012 brought under Section 1A,3,3A and 63(e) of Civil Procedure Act and Order 40 Rules 1, 2 and 4 of Civil Procedure Rules seeks the following orders.

That the 1st defendant be restrained personally, his servants, employees and/or agents from interfering with the plaintiff's user and occupation of parcel No.920 situate at KIENGU-KANJUU adjudication section pending the hearing and determination of the suit.

That the costs of this application be in the cause.

That the honourable court be pleased to make such further or better orders it deems fit and expedient.

The application is based on the grounds set down on the face of the Notice of Motion being the following:-

- (a) ***That the 1st defendant has commenced depositing building material upon the suit land.***
- (b) ***That in the process of perpetrating the said unlawfully act the 1st defendant through his servants and/or employees and hired goons threatened physical harm to the plaintiff who was forced to flee for her life.***

- (c) ***That the said people who committed the said crime on 22nd February, 2012 acted in such high handed manner while threatening to kill the plaintiff who is defenseless being a widow.***
- (d) ***That the 1st defendant has vowed to ensure that the plaintiff vacates the suit land.***
- (e) ***That the actions of the 1st defendant are demeaning to the court since he is aware that the suit is pending yet he is taking the law in his hands.***
- (f) ***That a report was made of the actions by the 1st defendant and his employees and agents at Maua Police Station.***
- (g) ***That unless the 1st defendant is restrained he will continue to take advantage of the plaintiff.***
- (h) ***That it is the interest of justice to protect the plaintiff who is a poor widow.***

The application is supported by applicant's affidavit dated 5th March, 2012. The applicant has in her affidavit stated as follows: - That on 2nd February, 2012 the 1st defendant sent his employees and/or servants and hired goons to deliver building materials at the suit land. That the 1st respondent's agents were armed with slashes and machetes and they chased the applicant threatening to kill her as she was a poor widow and had no one to protect her. That the applicant made a report at Maua Police Station as per annexure marked "JMMI". The applicant averred that it is in the interest of justice that the court do protect her pending the hearing of the case.

The 1st defendant in opposition to applicant's application filed a replying affidavit dated 19th March, 2012 stating as follows: - That the 1st respondent/defendant used to be the owner of land registration number 920 Kiengu/Kanjoo Adjudication Section before 22nd October, 2010. That 1st respondent averred that he sold the suit land to 2nd defendant Joseph Ngolua Kairi as per sale agreement annexed to the affidavit herein and marked "JKMI". That the suit property is not in 1st respondent/defendant's legal or physical possession and the allegation made against 1st respondent/defendant are false and without any legal basis. He stated that the suit property changed hands to 2nd defendant as per certificate of ownership dated 5th January, 2012 marked "JKMII". The 1st respondent averred that the orders sought by the applicant against him are directed to the wrong party and should have been sought against the 2nd defendant. The 1st respondent in his affidavit has further stated that the plaintiff through her brother Ayub Gikundi M'Ikiara had in 2001 filed an objection proceedings against 1st respondent/defendant being objection NO.98/09 over the same parcel of land, 920, Kiengu/Kanjoo which objection was partially allowed as per copy of the ruling annexed to the affidavit and marked "JKMII". The 1st respondent stated that the said Ayub Gikundi M'Ikiara had brought the suit land on behalf of his siblings and was supposed to share the three acres which were awarded to him with his family members including the plaintiff. The 1st respondent has further stated that the objection NO.92/007 clearly stated that the objector had brought the objection on behalf of other family members including the plaintiff and that the plaintiff should therefore direct her demands to her brother so as to get her share of the land from him. 1st respondent further states there is no way he can be delivering materials on a land that he does not own and the applicant is mistaken. That the two parcels of lands are distinct from each other and there is no delivery of building materials taking place on the land that the 1st respondent gave the family of the plaintiff/applicant pursuant to the objection ruling as per the attached bulk of photos, marked "JKMIV".

When the matter came up for hearing on 10/5/2012 the applicant was acting in person following her filing of Notice of withdrawal of Advocates dated 7th May, 2012. The applicant in her oral submissions stated that she is the owner of the suit land because that is where she was born in 1972 and where she lives. She submitted that she was brought up on the suit land; and the land was given to her deceased father by the clan members in 1966. Applicant argued that they continued cultivating the suit land but when the land Adjudication Officer came into their area they were not given any land. That they pursued the issue and

found the land was given to Samwel Kaumbuthu M'Ajoi. That she then sued him. The applicant stated that the first case was between the 1st respondent and her brother; and second one was before Council of Elders at Kiegoi, who resolved the piece of land belonged to the applicant. The applicant further submitted that the council of elders found that she was the one living on the land. The applicant submitted that she has three houses, Kiln, miraa plants, Mikima trees and other trees. She stated that she has also installed water and she has bananas on the suit land. The applicant submitted that she would suffer substantial loss if 1st defendant is not restrained because that is where she lives and she has no other place where she can move to. She further submitted that she has a good case and if she is chased she would suffer irreparable loss and damage.

The learned counsel Mr. Ogoti for the 1st respondent/defendant opposed the application. He submitted that he was relying on the replying affidavit dated 19/3/2012. He submitted that the application is incompetent since the applicant confirmed the land belonged to her deceased father. He referred to paragraph 6 and 8 of the plaint. He submitted that the applicant has no letters of administration to prosecute this suit and he should have obtained the letters of administration before instituting the suit. He further submitted that the applicant confirmed that their brother did an objection in land office against the respondent over the same parcel of land. He referred to Exhibit 3 in which Ayub Gikundi M'Ikiara was awarded 3 acres. He alleged that the 3 acres were for the brother of applicant and his family and were transferred to applicant's brother. The respondent's Counsel submitted that the respondents sold the suit land and transferred it to 2nd respondent hence 1st respondent has no interest in the land. He further argued that the applicant's suit has no chance of success as the applicant did not obtain consent of the Land Adjudication Officer to sue 2nd defendant but 1st defendant.

The applicant in her reply submitted that the respondent's Counsel did not tell the court the truth as she is the one who is residing in the suit property and that the 1st respondent has never at any one time sued the applicant on her behalf. That 1st defendant came to land in September, 2011, cut trees and fenced the land. She submitted that 2nd defendant has never entered into the suit land and she does not know him. Applicant averred that 1st respondent put up a structure on the suit land in February, 2012.

I have considered all the affidavits and submissions by the Counsel for the 1st respondent. The 1st respondent seems to raise two issues. The first issue is whether the orders sought should be directed against 1st respondent or 2nd respondent as the 1st respondent sold the land to 2nd defendant and has no interest over the suit land.

Under the provisions of Order 40 rule 1(a) and (b) of the Civil Procedure Rules, it is provided:-

“1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

In view of the above-mentioned order where in any suit it is proved by an affidavit that any property in dispute in a suit is in a danger of being wasted or damaged or alienated by any party to the suit the court may by an order grant a temporary injunction to restrain such an act. There is no legal requirement that such an order be sought only against the registered proprietor. The orders being sought herein against the 1st respondent cannot therefore be said to be directed to the wrong party simply because he is not the

registered proprietor. The applicant's application is therefore properly directed at the 1st respondent who is said to be the aggressor.

The application cannot simply be directed against 2nd respondent simply because he is registered proprietor without having committed any acts which can be said to be endangering or amounting to wastage or alienation of the suit property. After all the entire applicant in her affidavit in support of the Notice of Motion is only complaining of the 1st respondent/defendant's acts and not those of the 2nd defendant.

The 2nd issue that was raised in the 1st respondent's counsel submissions were whether the applicant was required to have obtained grant of letters of administration over her father's estate in order to pursue this claim. The applicant and the 1st respondent admit that the suit property P/No. 920 Kiengu Kanjoo Adjudication Section was subject of dispute in objection NO.98 of 2009 between applicant's brother and 1st respondent/defendant.

The applicant submitted that the 2nd time the dispute was before Council of Elders at Kiegoi who resolved the matter in applicant's favour and declared the land to be property of the applicant. That the applicant was issued with consent to file this suit by District Land Adjudication Officer on 6th October, 2011. The suit herein was filed on 6/12/2011 following granting of consent of the Land Adjudication Officer. The suit land is yet to be registered in the name of parties in this case under the provisions of the Registered Land Act(Cap.300). What the 1st respondent referred to as registration of 2nd defendant is a Provisional Registration under the Land Adjudication Act(Cap.284).

It must be remembered that proceedings under Land Adjudication Act (Cap.284) are special proceedings within the context of that Act. That under the Land Adjudication Act(Cap.284) Laws of Kenya, the lands being gathered, and demarcated pending registration are still held under customary law and it is those rights that should be ascertained before registration is effected and title issued under the Registered Land Act(Cap.300). It should be noted since the applicant's father died the first objection between applicant's brother and 1st respondent, the 1st respondent did not raise the issue of applicants' brother's claim being incompetent for want of grant of letters of administration in respect of his father's estate. That although applicant's father died before filing of this suit, going to court of law to obtain letters of administration of deceased estate would defeat the purpose of the proceedings under the relevant customary law if the parties that felt aggrieved by any decision of the Land Adjudication Officers, would be required to first go to court of law and obtain letters of administration and be expected to meet the time limits set by the Land Adjudication Act. The consent granted by Land Adjudication Officer is clear that it requires a copy of the final order made by the court for the purposes of implementation of the decision as per provisions of the Land Adjudication Act(Cap.284).

I have gone through the plaint and it is clear that the applicant pleads that though the land was gathered by her late father in 1966, the plaintiff claims that at all material times relevant to the suit, the applicant/plaintiff was and is the actual owner and occupier of the land parcel NO.920 Kiengu/Kanjoo/Adjudication Section.-

In view of the foregoing I do not find any merits in that the applicant lacks capacity to bring up this application. The applicant did not need grant of letters of administration to bring up this suit and application for reasons stated herein-above(see **Republic – V- the Special District Commissioner, Machakos Joshua M. Nthenge & 4 others Hc.Misc.Application No.63 of 2004** in which case Hon. Justice Isaac Lenaola, in an application, in which the proceedings were being challenged for want of Letters of Administration, stated as follows:-

“ It must be remembered that under the Land Adjudication Cap.284 Laws of Kenya, the land is still held under customary law and it is those rights that should be ascertained before registration is made and title issued under the Registered Land Act, Cap.300. I wholly agree with the Interested Parties that although NdumbiNzeki died after his success in the Committee Stage, it would defeat the purpose of proceedings under the relevant customary law if the parties that are affected by one decision to first go

to a court of law and obtain letters of administration and expect to meet the time limits set by the Land Adjudication Act. In any event, the ex-parte applicants fully participated in the proceedings from inception and the challenge raised now is in bad faith.”

Going back to the applicant’s application the issue for determination is whether the applicant has met the test for granting interlocutory injunction. The test for granting interlocutory injunction are well settled. The often cited case of ***Giella V Cassman Brown & Co.(1973) EA 358*** set out the tests for granting an injunction as follows:-

- 1. Firstly an applicant must show he has a prima facie case with reasonable probability of ultimately succeeding upon trial.***
- 2. Secondly, that in the event that the injunction be refused he stands to suffer loss or damage of such a nature and magnitude that damages will not adequately compensate him.***
- 3. Thirdly, that the comparative mischief likely to result to him should the injunction be refused outweighs that which results to the opposite party should it be granted.***

The applicant herein claims the ownership of the suit land. She stated that she was born and brought up on the suit land. She claimed the land was gathered by her father in 1966 and he gave it to her. The applicant stated that she is the one who is in occupation and her three houses, kiln, miraa trees, mikima trees, and other trees and that she has installed piped water. That the 1st respondent has admitted that he is not in legal or physical possession of the land nor is 2nd defendant in possession though 1st respondent/defendant averred that he had sold the suit land to the 2nd defendant.

The applicant’s assertion that she was born on the land and has since been in occupation has not been controverted. I find that the applicant has shown that she has a prima facie case with reasonable probability of ultimate succeeding upon trial.

The applicant has been living on the suit premises since her birth. She has her home at the suit land and earns her living through cultivation of the suit land. She has a number of crops including miraa trees and other trees. The applicant stated that if the application is not granted she would suffer substantial loss as she has no other home to go to. I find that if injunction is refused the applicant would suffer damages of such a nature and magnitude that an award of damages will not adequately compensate her. Once being evicted and losing her home which has a lot of sentimental value the applicant cannot be adequately compensated by way of damages. It is with all due respect to evict one from what he refers and knows her home pending hearing and determination of the rights of the litigants.

Lastly as the 1st defendant has stated he has no legal or physical possession of the suit property; the comparative mischief likely to result to the applicant should the injunction be refused outweighs that which results to the 1st respondent should the injunction be granted.

The upshot is that the application dated 5th March, 2012 is allowed and I proceed to make the following orders:-

1. The 1st respondent/defendant, his servants, employees and/or agents be and are hereby restrained from interfering with the plaintiff’s user and occupation of land parcel No.920 situated at KIENGO-KANJOO ADJUDICATION SECTION pending the hearing and determination of this suit.

2. That costs of this application be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE, 2012.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Joyce Nkatha Musa applicant
2. Mr. Ogoti for the respondent(absent)

J. A. MAKAU
JUDGE