



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Civil Case 82 of 2012

FLORENCE MUMBI NJINE PLAINTIFF

-VERSUS-

KEFA OKETCHI MUINDE RESPONDENT

RULING

The applicant has filed the present application seeking orders that:-

- 1. The instant application be certified urgent and same be heard ex-parte in the first instance.*
- 2. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction restraining the defendant/ respondent, either by himself, his agents, servants and/or employees from trespassing upon the suit land and/or otherwise interfering with the plaintiff/applicant's occupation and/or use in respect of LR No. Bukira/Buhurimonono/2022.*
- 3. This honourable court be pleased to grant an order of temporary injunction restraining the defendant/ respondent, either by himself, his agents, servants and or employees, from trespassing upon the suit land herein and/or otherwise interfering with the plaintiff/applicant's occupation and/or use in respect of LR No. Bukira/Buhurimonono/2022 pending the hearing and determination of the instant suit.*
- 4. Costs of this application be borne by the defendant/ respondent.*
- 5. Such further and/or other orders be made as the court may deem fit and expedient.*

The application is premised on the grounds that she is the registered proprietor of the suit and upon which the respondent has trespassed. In her supporting affidavit, she avers that she is the administrator of the estate of her deceased husband who previously owned the land. She claims that the respondent has re-entered the suit premises and started constructing temporary structures thereon. In her plaint filed contemporaneously with this application, the applicant is seeking a permanent injunction and eviction order against the respondent.

The respondent has opposed the application on the grounds that he acquired a portion of **LR No. Bukira/Buhimonono/237** from one **Nyamosi Orwongo** and one **Esther Bosibori Minyonga** who were owners of the land and that the said land was later fraudulently acquired by **Simion Robi Maroa** who subsequently transferred it to **James Njine Ndigirigi** the applicant's late husband. He has deponed that he has been in occupation of the said land since 1976.

The application has been canvassed by way of written submissions which I have carefully considered along with the pleadings on record. In consideration of this application, I am guided by the principles set

out for the grant of injunctions set out in the celebrated case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358**. For the applicant to succeed she must:

- i. Demonstrate that she has a prima facie case with a probability of success;
- ii. Show that if the order is not granted, she will suffer irreparable and substantial loss that cannot be made good by payment of damages; and,
- iii. If the court is in doubt, it will decide the case on a balance of convenience.

The applicant is a registered proprietor having come into such proprietorship by virtue of being the legal administrator of the estate of her late husband **James Njine Ndigirigi** which legal position she obtained vide Succession proceedings concluded in Kisii High Court Succession Cause No. 391 of 2008. The suit property **Bukira/Buhirimonono/2022** formed part of the estate of the deceased. It is the ownership of this property that is now contested with the respondent claiming that the deceased had acquired it fraudulently. Such a claim can only be determined at the hearing of the main suit. In the main suit, the applicant seeks a permanent injunction and an eviction order against the respondent while the later seeks in his counter claim a declaratory order that the suit land was fraudulently registered in the name of **James Njine Ndigirigi** (deceased) and an order of cancellation and rectification of the register from **Bikira/Buhirimonono/2022** to **Bukira/Buhirimonono/ 237**. On the basis of the pleadings and submissions on record, it is clear that the applicant’s counter claim can only be determined at the hearing of the main suit. At this point neither party can be said to have demonstrated a prima facie case with probability of success.

The respondent has averred in the replying affidavit that he has been living on the suit land. He has provided photographs of his homestead and the developments on the suit land. This averment has not been controverted by the applicant. This leaves a scenario where the applicant holds title and the respondent is in physical possession of the land. It is my considered view that the balance of convenience in this case militates against the grant of an injunction.

However, in order to preserve the suit property pending the determination of the case, I grant an order of status quo. There shall be no further alienation sale, or transfer of the suit land till further orders of this court.

The costs of this application will follow the outcome of the main suit.

Orders accordingly.

Ruling dated, signed and delivered at Kisii this 20th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE

