



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 90 OF 2011

SYMON NYAMU MUTHIGANI.....PLAINTIFF

VERSUS

CHARITY WANGUI MUNENE..... DEFENDANT

R U L I N G

This is the notice of motion dated 28/7/2011 filed by the Applicant/Plaintiff. He has brought it under Section 64 of the Constitution, Section 71 of the Law of Succession Act, Section 27, 28, 29 and 119 of the Registered Land Act, Section 3A of the Civil Procedure Act, Order 36(1)(b), Order 51(1) Civil Procedure Rules for the following orders:

- 1. Temporary injunction to restrain the Respondent/Defendant and/or her servants/agents from dealing with the land in any manner that may prejudice the interests of the Applicant/Plaintiff in the land which includes or letting out from doing any act aimed at further development/use of the parcel of land, known as MWERUA/KAGIO/18 until this suit is heard and determined.***
- 2. Pending the hearing and determination of this Application, an order to issue restraining the Respondent/defendant or her servants/agents from inviting and allowing other persons to occupy and used or develop the said parcel of land.***
- 3. The Plaintiff be declared the sole proprietor vested with absolute ownership of the parcel of land MWERUA/KAGIO/18.***
- 4. The Defendant and her servants/agents do move and vacate out of land parcel MWERUA/KAGIO/18 failing which the court bailiff of this court do forcibly evict them at their own costs.***
- 5. The Defendant/Respondent and her servants do exhume any remain of any of their person(s) who they might have buried in the land known as MWERUA/KAGIO/18 which land belongs to the Applicant/Plaintiff.***
- 6. The Defendant to pay mesne profit and pecuniary damages to the Plaintiff for preventing him from using his land from 1998 to date.***

The main ground is that the Plaintiff/Applicant is the registered owner of the suit land having acquired it by transmission vide **Nyeri High Court Succession Cause No. 560 of 2005**. He further says the Defendant/Respondent is in occupation of the said land. The other grounds are in the body of the Application. The application is supported by the affidavit of the Applicant which reiterates the grounds.

The Defendant/Respondent filed grounds of opposition saying the Application is incompetent as it is a *resjudicata* by virtue of **Kerugoya PM'S Civil Case No. 228 of 2010**. In Mr. Maatwa's submissions before court he just reiterated the averments in the supporting affidavit. He says the Applicant has full rights to the land. Mr. Mugo for the Respondent opposed the Application saying the Respondent occupies the land, and there is a matter pending before Kerugoya SPM's court; a fact not disclosed in the verifying affidavit. He further says the provisions cited are irrelevant. Further he says under Section 30(g) of the

Registered Land Act there are overriding interests which must be guarded. And it is only when the Defendant filed her defence that the court will know which her rights are as she is in occupation. In response Mr. Maatwa said failure to disclose the issue of the case was an oversight.

I would first of all deal with the issue of the file vide Kerugoya SPM's Civil Case No. 228/2010. I called for this file and I have noted that the parties therein are the same as those herein. The subject matter is the same but the prayers are a bit different. The trial court found that he did not have jurisdiction to entertain the claim. He did not order dismissal but I think that is what he ought to have done. My finding is that the file is closed because of that declaration by the court. So there is nothing pending for determination as far as that case is concerned.

It is not disputed that the plaintiff/Applicant has a title in respect to suit land. There is also no dispute that the Defendant/Respondent is in occupation of this land. From the Applicant's averments the Defendant/Respondent has been in occupation of this land since 1998. This is a period of 13 years. Why was she allowed to stay there? The Applicant got the grant confirmed in 2006. How come it is only this year that he has decided she must move out? These pricking questions can only be addressed when all pleadings are filed and evidence is adduced.

The principles of granting injunctions are well set out in the case of **GIELLA VS CASSMAN BROWN**. Yes, the Plaintiff/Applicant has title but is not in occupation. And the Defendant/Respondent is yet to produce any title but is in occupation for the last 13 years. Why? Would it be just to evict her upon an interlocutory application? That would in fact be determining the main suit. Declaring the Plaintiff the sole proprietor at this stage would also amount to determining the suit, before the Defendant presents her case.

In the *Giella* case the first principle is that the Applicant needs to show a *prima facie* case with a probability of success. In the case of **AMERICAN CYANAMID VS ETHICON** states that there only needs to be a serious question to be tried. The scenario prevailing herein is that there is a serious question to be tried. And I have already raised the serious issues above. Secondly *prima facie* the holder of a title to land is the proprietor – Section 27 and 28 of the Registered Land Act.

The Applicant is in possession of a title copy of which has been annexed herein. The acreage of the land in issue is 6.1 hectares, which is not a small portion of land. He says he has not utilized the land for 13 years. An injunction is meant to preserve matters in status quo. i.e. keep things the way they are at the moment until the case is tried.

In the Applicant's case it becomes tricky because he is not in actual occupation. The kind of orders he wants would be actually putting him in occupation, control and management. That is not the present status quo.

The only order I can issue for the moment is an order restraining the Defendant/Respondent and/her servants/agents from dealing with the land in any manner that could prejudice the interests of the Plaintiff/Applicant in particular disposal of the land through sale.

The other prayers must await the full hearing. Costs in cause.

DATED, DELIVERED AND SIGNED AT EMBU THIS 13TH DAY OF DECEMBER 2011.

H. I. ONG'UDI
JUDGE