



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL CASE NO.87 OF 2003

KIRIGIA KIARUNYI.....PLAINTIFF

VERSUS

**DORIS CIOMPAKA IMATHIU
KABURU JAPHET IMATHIU
MWITI JAPHET IMATHIU.....DEFENDANTS**

RULING

The Applicant's Chamber Summons dated 22nd October 2010. It has been brought pursuant to OXXXIX R1, 2 & 9 of CPR. It seeks an order of temporary injunction to restrain the Defendants/Respondents from interfering with the Plaintiff's peaceful use of Parcel No. MITUNGUU/128 pending the hearing and determination of this suit.

The Application is premised on four grounds on the face of application as follows:-

- 1. That the Respondents have invaded the parcel number MITUNGUU/128 where the applicant have lived and worked all through;**
- 2. That the Respondents are erecting fences, cutting down plants, ploughing and otherwise committing waste on the land in issue;**
- 3. That the Respondents have demolished two semi- permanent houses belonging to the applicant;**
- 4. That if the acts of the Respondents are not stopped then the Applicant stands to suffer irreparably.**

The Application is also supported by the Affidavit sworn by the Applicant of even date. The gist of the affidavit is that the Applicant was registered as the owner of the suit land in 1966 and has lived there ever since. He deposes further that one Japheth Imathiu Marete, now deceased illegally transferred the suit

land to his name in 1967. He deposes that immediately after his advocate was served with the Application dated 17th September 2010 by the Respondent, Respondent invaded his land and erected a fence around it, demolished his two temporary houses and have threatened to pull down the house he lives in.

The Application has been opposed. The 1st Defendant has sworn a Replying Affidavit in her capacity as the Administratrix of the estate of Japhet Imathiu, her late husband. The gist of the Affidavit is that the suit land was registered in the name of the deceased in 1967. She deposes further that since then the deceased, the dependant and the family members the deceased gave part of the land to, have continued to occupy and cultivate their portions even after the deceased's demise in 1999, the dependant denies that the Applicant has even cultivated the land nor put up any structures on it and that further the applicant and his family lives in a Land Parcel in Mikumbune. The 1st Defendant deposes further that after death of the deceased, the Applicant started taking third parties to the suit land for purposes of leasing to them some portions of the land but that she has disallowed them to use the land.

The Applicant has sworn a Supplementary Affidavit with leave which he explain that he gave his late brother, deceased in this case, his title deed partly eaten by aunts for safe keeping in 1967. That the deceased brother kept the title deed up the time of his death and that any attempt to get it back was met with resistance. The dependant annexed a Green Card of the suit property. The Green Card shows the first entry was made on 13th May 1966 and the registered proprietor was **KIRIGIA KIARUNYI**, the Applicant herein. The second registration was entered on 31st January 1967 in name of the deceased.

I have considered the submissions by Mr. Wanjohi for the Applicant and Mrs. Ntarangwi for the respondents. The principles for the grant of interlocutory injunctions are well settled as set out in the celebrated court of **GIELLA-VS-CASSMAN BROWN&CO.LTD 1973 EA 358** thus;

“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 normally be 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.”

I have set out the case for each of the parties, the Applicant on the one hand and Respondents on the other.

I have also looked at the Originating summons filed herein through which this suit was brought. Among the issues raised for determination includes one for determination whether the suit land title was nor subject to the Applicant/Plaintiff overriding interest under S30 (f) of the RIA. Another issue raised is whether the Plaintiffs claim for adverse possession started running in 1967 when the deceased was illegally registered as owner of the suit land.

The Plaintiff/Applicant has two reasons – state he has a prima facie case with a probability of success. At this stage I am aware that the court cannot make any final conclusions on the issues at hand. The Plaintiff has shown that the suit land was registered in his name at one point in time i.e 1966 before it was transferred to the deceased . Applicant claims the transfer was illegal. The deceased, is not here to tell us how the land got registered from the Applicant to his name. The Administratrix of his estate did not attempt to offer any explanation for that occurrence. At this stage I have no evidence as to what documents the Land Registrar used to effect the transfer of the suit property to the deceased's name from that of the Applicant. Hopefully that will be made clear at the trial.

Mrs. Ntarangwi for the Respondents in her submissions challenged the manner in which the Respondents were sued. Counsel urged that the respondents were not sued as legal representatives of the deceased and that in the circumstances they were not properly sued. That I light of that observation the court must find that the Applicant has failed to establish a prima facie case.

Mrs. Ntarangwi also urged that since the applicant was seeking that his rights over the suit property be declared, he cannot claim any rights over the same property at the same time.

I have considered the Application, the Affidavits sworn by both parties and submissions by then counsels. The applicant seeks an Interlocutory Injunction pending the hearing and determination of the suit. An Injunction is an equitable remedy. The tests an Applicant must pass in order to succeed in such an Application were set out in the case of **GIELLA V CASSMAN BROWN & CO. LTD [1973] EA 358** 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 normally be 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.”

The Facts of the case are outlined herein above as set out in the various affidavits sworn by the parties. What comes out clearly is that the issues are hotly contested by the parties including whether either party have been in occupation or possession of the suit property or any part of it; and whether the Applicant has any rights over the suit property in **SIMIYU-VS-HOUSING FINANCE COMPANY OF KENYA LETD [2001]2 EA 540** at page 546. It was held;

“ In answering that question the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or law at the interlocutory stage particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here.”

At this stage therefore the court is forbidden to make any conclusive findings of fact or law. The Applicant has sought declarations under S30 of RCA and has also sought adverse possession. All the Applicant needed to demonstrate is that he has been in occupation or possession of the suit property, whether in part or whole. As I have stated, that was a hotly contested issue. However I am convinced that both parties may have been in occupation of pat of the suit land. The extent of that occupation will hopefully be resolved at the hearing.

Mrs. Ntarangwi has submitted that the Applicant does not lie because the Applicant is seeking a determination of his rights in this suit and that therefore he has no rights to protect. That is far from the truth. An injunction will lie if rights of the party seeking same are I danger of being violated. The Applicant has shown he owned the land at some point in time and that he has been using it. He has shown he has rights which are in danger of being violated and which out to b protected.

The Respondents have challenged the manner in which they have been sued, that is, not as legal representatives of the estate of the de eased. That Is not a fatal defect in my view. The Applicant is not suing the estate to recover anything. I have given due consideration to this Application and I find that the Applicant has a prima facie case with a probability of success. Even if he may not have established same,

I do find that equity would demand that each party be allowed to continue utilizing the portion of land they have been occupying pending the determination of this suit to prevent any irreparable loss to them. Further in my view the balance of convenience tilts in favour of granting the Applicant the right to continue utilizing the portion of land he has enjoyed so far until the suit is determined.

Having come to that conclusion I order:

- 1. An order of temporary injunction be and is hereby issued restraining the.**
- 2. The costs of this application be in the cause.**

Dated at Meru this 3rd day of December 2010.

LESIIT, J

JUDGE

3rd December 2010

Coram:

Lesiit J.....Judge

Kirimi/Mwonjaru.....Court clerks

Mr.Wanjohi.....For Applicant

Mrs. Ntarangwi.....For Respondent

Judgment was read, signed and delivered in open court this 3rd December 2010.

LESIIT J.

JUDGE