



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 18 OF 2020

JOSEPH MUSYOKI MWANIA.....PLAINTIFF/APPLICANT

VERSUS

MUSYOKI NZIVU.....DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff's/Applicant's notice of motion application dated 16th July, 2020 and filed in court on 17th July, 2020 for orders: -

1) Spent

2) Spent

3) That a temporary injunction do issue against the Defendant and his cohorts and his agents employees and/or servants or any other person acting at his behest from trespassing into, invading and/or in any other manner from interfering with the Plaintiff's lawful ownership, passion, use and occupation of his 3.29 acres of all that property known Nzaui/Nziu/41 sold to him by one Monica Nzula Mwaiwa (Mrs. Mwanthi Nzivu) on 30th September, 2017 pending hearing and determination of this suit.

4) That the Officer Commanding Station, Makueni Police Station do assist in the execution of the orders issued pursuant to this application.

5) That costs of this application be in the cause.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Joseph Musyoka Mwanza, the Plaintiff/Applicant herein, sworn at Nairobi on 16th July, 2020.

3. The application is expressed to be brought under Order 40 Rule 1,2 and 4 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Chapter 21 of the Laws of Kenya and all other enabling provisions of the law.

4. The application is opposed by the Defendant/Respondent vide his grounds of opposition dated 18th October 2020 and filed in court on 26th October, 2020 where he states:-

1) That the application and the cause demonstrate no urgency than that demonstrated by other land causes unless the Plaintiff/Applicant wishes for a special treatment.

2) That the Plaintiff/Applicant has not approached this honourable court with clean hands as he has not concealed material and relevant information relating to the actual situation on the ground and therefore this should disentitle him to the equitable remedy of injunction.

3) That the threshold established in the Giella Vs Cassman Brown Ltd 1973 E.A 358 has not been met and this application is unmeritorious and an abuse of the court process.

4) That an injunction orders cannot be issued to restrain from happenings that which has already happened as the Defendant/Respondent has been in occupation in the suit land since 2012.

5) That the Defendant/Respondent herein has been in occupation and possession of the suit parcel of land since 2012 and

cannot be injuncted in the interim; an interlocutory injunction cannot be issued restraining entry if the Defendant/Respondent has been in occupation in which case the Defendant/Respondent has been in occupation. This principle of the law was set out by Justice Makhandia in *Nganda Kalandi Vs Timothy Mutinda Nzioka* CMC No. 82 of 2009.

6) That Defendant/Respondent purchased the suit property from his brother one Stanlaus Mwanthi Nzivu(lawful owner) in January, 2012 and he has been lawful and legitimate owner seized and /or possessing absolute rights to use, abuse and/or dispose of the same without intervention of the Plaintiff/Applicant.

7) That later the Plaintiff/Applicant purchased the same parcel of land being Nzau/Nziu/41 from the wife of Stanlaus Mwanthi Nzivu(Lawful owner) one Monicah Nzula Mwaiwa in full disregard of Section 55 and 71 of the Law of Succession as no letter of administration had been issued to her and therefore the Plaintiff/Applicant is not entitled to be heard.

8) The purported purchase by the Plaintiff/Applicant is a nullity at the first instance as the estate of the deceased could firstly have been dealt with under the law of succession after his death and not otherwise. The purported seller was neither the registered owner nor a beneficiary the estate of the deceased, had no interest on the land to pass and therefore this whole transaction amounted to intermeddling of the estate of the deceased Stanlaus Mwanthi Nzivu(lawful owner.)

5. Directions to canvass the application by way of written submission were issued on 20th July, 2020 and by the time of writing this ruling; it is only the Plaintiff/Applicant who had filed his. On the 9th November, 2020, the Defendant's/Respondent's counsel who was present in court was directed to serve the Plaintiff/Applicant who was absent with a ruling notice after the application was fixed for ruling on 20th January, 2021.

6. As was correctly submitted by the counsel for the Plaintiff/Applicant, the principles for the grant of an interlocutory injunction are enunciated in the case of *Giella Vs Cassman Brwon & Co ltd (1973) EA 358*. I need not repeat those principles herein save to say that the counsel submitted that the Plaintiff/Applicant has satisfied this court that he has a prima facie case with probability of success, has shown that he will suffer irreparable damage if the order sought is granted and that the balance of convenience tilts in favour of the Plaintiff/Applicant. The counsel further relied on the Ugandan Case of *Osuna Otwani V Abdul Ziwa Kampala High Civil Suit No. 246 of 1994[1994] III KALR 28* where the court stated thus;

“The purpose of the purpose of a temporary injunction is to preserve matter in status quo until the question to be investigated in the main suit. As to whether the Applicant has a prima facie case with probability of success, the Applicant pleaded in his plaint that the trailer belonged to him and produced a sale agreement between him and Samuel Muwonge although the registration book still shows Samuel Muwonge as the owner the court from facts and evidence can believe the Applicant and it is held that the Applicant has a prima facie case with high probability of success in the main suit.”

7. The counsel also cited the case of *Ugantico Supermarket V Registrar of Titles & others Kampala High Court Civil Suit No. 256 of 1993 [1994] V KALR* where the court stated thus:-

“On the issue of balance of inconvenience the Applicant who has already carried developments on the land, would be more inconvenienced if the structure were demolished. ... it is more reasonable to halt activities by both sides at this stage.”

8. I have read the application and the grounds of opposition. I do note that whereas the Plaintiff/Applicant has deposed that he purchased all that parcel of land known as Nzau/Nziu/41 from one Monicah Nzula Mwaiwa (Mrs. Muathi Nzivu) on 30th September, 2017 and subsequently took possession of the suit land, he is silent on the contention by the Defendant/Respondent that he has been in occupation and possession of the suit land since 2012 and injunction orders cannot be issued to restrain from happening what has already happened. I further note that the Plaintiff/Applicant is silent on when the act complained of took place. He is also silent on the issue of having bought the suit property from a person who had no letters of administration thus making the transaction to amount to intermeddling with the property of a deceased person. Given those circumstances, it is my considered view that the most appropriate orders to issue is one of status quo as at the time of filing this suit.

Consequently, I hereby proceed to grant the order of status quo. Costs will be in the cause.

Signed, dated and delivered via email at Makueni this 29th day of January, 2021.

MBOGO C.G.,

JUDGE.

Mr. Kwemboi Court Assistant