



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MERU**

**ELC NO. E003 OF 2020 (OS)**

**PATRICK MWONGERA MUGAMBI**

**(suing in a personal capacity and also**

**as an administrator of the estate of the late**

**JULIUS MURUNGI MUGAMBI (deceased).....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**BEATRICE RIGIRI MURINGI (suing both**

**in a personal capacity and also as an**

**administrator of the estate of the late**

**JULIUS MURUNGI MUGAMBI (deceased)...2<sup>ND</sup> PLAINTIFF/APPLICANT**

**ERIC KIOGORA MUGAMBI.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**MARTIN KOOME MUGAMBI.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**JENNIFER KAIRIARI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KINYUA HOSEA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**NTINYARI AGNES.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

1. Before me is a Notice Motion dated 19/10/2020 brought pursuant to Order 40 rule 1 of the Civil Procedure Rules and section 68 (1) of the Land Registration Act seeking;

*a) An order of temporary injunction restraining the Defendants/Respondents either by themselves, their servants, agents, assigns or anybody else claiming under their names or title from interfering with the physical boundaries on the ground separating L.R No. Ntima/Igoki/9105-9108 (inclusive) all being subdivisions of the former L.R No. Ntima/Igoki/4229 and L.R. No. Ntima/Igoki/11097-11100 (inclusive) all being sub-divisions of the former L.R No. Ntima/Igoki/4228 as have been in existence since 1991 including but not limited to the late Julius Muringi Mugambi's homestead, residential house and grave pending the hearing and determinations of the application and the suit.*

*b) An order of inhibition to be registered against L.R. No. Ntima/Igoki/11097,11098, 11099 and 11100 pending the determination of this application and the suit*

*c) Costs of the suit.*

2. The application was based on the grounds of the face of it and on the supporting affidavit of Patrick Mwangera Mugambi who averred that he and the 2<sup>nd</sup> applicant were joint administrators of the estate of the late Julius Muringi Mugambi (deceased) who was the registered owner of parcel L.R No. Ntima/Igoki/4229 since 1990 which was later sub-divided and inherited by the applicants vides a succession cause.

3. He further states that the physical boundaries have been in existence for a long time since 1990, and all parties inherited the land as it is and were satisfied with boundaries for the last 30 years, until when the 1<sup>st</sup> Respondents sub-divided her parcel of land, encroached on the applicants' land and transferred some of the parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

4. He indicated that the boundary dispute had previously been the subject matter in **Meru HCCC NO 29 of 1990** before Justice S.O OGUK, where the the parties of their own volition wished the members of the clan to be given a chance to settle the dispute of which the clan gave recommendations inter alia that resurvey be done between the two parcels of land 4228 and 4229 and after adjustments, the parcel 4229 was to be transferred to the then plaintiff (who was father of Patrick Mwongera.

5. The applicants claim that they will suffer irreparable harm if the orders sought are not granted and therefore beseech the court to maintain the status quo pending the hearing and determination of this suit. The 1<sup>st</sup> applicant annexed to his affidavit in support of the application a copy of grant, a copy of the register for L.R No. Ntima/Igoki/4228 and L.R No. Ntima/Igoki/4229, bundle of official searches for the suit parcels, a copy of the proceedings in Meru HCCC No. 29 of 1990, a copy of the clans decision, survey report and graphic sketch, an extract of the Registry Index Map, and a bundle of photographs showing the cut down fence and newly erected structures done by the respondents.

6. The Application is unopposed.

7. I have carefully perused the application and the supporting affidavit and the issues to be determined are;

**a) Whether the plaintiff/applicants have met the threshold for the grant of temporary injunction in terms of order 40 of the Civil Procedure Rules 2010?**

**b) Whether the court should issue an order of inhibition?**

**c) Who should bear the cost of this application?**

8. The law on granting of interlocutory injunction is set out under **order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides:-

*“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”.*

9. The conditions for consideration in granting an injunction were settled in **Giella vs Cassman Brown & Company Limited (1973) E A 358** as follows:-

*“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.”*

10. The first question I must answer is whether the Plaintiff has established a prima facie case. A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** and with approval in **John Chuchu Muchai v Andrew Njenga & 2 others [2015] eKLR** as follows:

*“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

11. It is not disputed in the present application that both the applicants and 1<sup>st</sup> respondent are the registered owners of their respective parcels of land. What is in dispute is whether the respondents have encroached onto the applicants land. The documents provided by the applicants show that there exist a right which may have been infringed and raises issues for trial. I am satisfied that the applicant has established a prima facie case with a probability of success.

12. The applicants contend that if injunction orders are not granted they stand to suffer irreparable injury pending the hearing and determination of this suit, as they stand to lose part of their property and such loss cannot be adequately compensated by way of damages. The applicants have demonstrated through production of documents that they inherited the parcels of land in 2013 and have been in occupation of the same. Thus the prayer for injunction is merited.

13. On inhibition, **Section 68(1) of the Land Registration Act** is the applicable law where it is provided as follows;

***“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, generally until a further order, the registration of any land lease or charge.”***

14. An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transactions over the said property until the suit is determined or until further orders are given by the court.

15. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending the trial. There is no doubt that the suit property is in danger of being alienated as the 1<sup>st</sup> respondent has already sold the suit parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

16. In **Dorcas Muthoni & 2 others v Michael Ileri Ngari**[206]eKLR, the court held that ***“no prejudice will be caused to the defendant/respondent if an order of inhibition is granted as prayed”*** it was guided by the principle that the Court should always take the course that carries the lower risk of injustice and quoted – **Films Rover International & Others Vs Cannon Films Sales Ltd 1986 3 All E.R 772** – ***“it is my view that the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial outweighs the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Balancing the two competing interests, the cause of justice will best be served if the order of inhibition is granted. Since each of the parties claim to be in possession of the property subject of this suit, an order of inhibition will not affect those rights but serve the greater interest by preserving the said land while their proprietary interests are determined.”***

17. In light of the foregoing analysis, I find that the application dated 19.10.2020 is merited, and the same is allowed until the suit is heard and determined or until further orders are given by the court. The costs of this application shall abide the outcome in the main suit.

**DATED, SIGNED AND DELIVERED AT MERU THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 18.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**