



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. E005 OF 2020 (OS)

IN THE MATTER OF ADVERSE POSSESSION OVER L.R NO. NKUENE/NKUMARI/716

AND

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT (CAP 22)

AND

AND IN THE MATTER OF THE LAND ACT NO. 6 OF 2013 AND IN THE LAND REGISTRATION ACT NO. 30 OF 2012

SIMON MURIUNGI.....PLAINTIFF

VERSUS

M'IGWETA M'MPRIA alias IGWETA MPURIA.....DEFENDANT

RULING

1. Before me is a notice of motion dated 12/11/2020 brought pursuant to provisions of Section 1A, 1B, 3A and 63 (c) and (e) of the Civil Procedure Act (Cap 21), Section 68 of the Land Registration Act 2012, Section 13(1) and (7) of the Environment and Land Court Act, and Order 40 rule 1, 2, 3 and 4 of the Civil Procedure Rules. The applicant is seeking a temporary order of Injunction restraining the defendant whether by himself, his servants, his agents or any person whomsoever from doing any of the following acts; evicting, selling, leasing, charging or howsoever interfering with the plaintiffs/Applicants quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the land known as Title Number ABOTHUGUCHI/L-KAONGO/1396 pending the hearing and determination of the application and the suit. She is also seeking an order of inhibition in respect of the aforementioned suit parcel as well as costs.
2. The application is based on the grounds on the face of it and on his supporting affidavit dated 12/11/2020. The applicant avers that vide an agreement dated 15th November 1994, he bought 3.5 acres from the defendant for a consideration of Kshs. 96,250 which was to be excised from the original parcel Abothuguchi/L-Kaongo/481. However upon survey he was only able to get 2.62 acres.
3. That the defendant thereafter refused to obtain the Land Control Board Consent and as such the agreement became null and void. That he retained possession since then and has carried out extensive development on the said land and even built a house thereon.
4. He states that the defendant has secretly subdivided the original parcel of land Title Number ABOTHUGUCHI/L-KAONGO/481 resulting in parcels 1396, 1397 and 1398 and has sent brokers and potential buyers with the intention of alienating the aforesaid land to third parties. He contends that he will suffer irreparable loss and damage as his parcel of land Title Number ABOTHUGUCHI/L-KAONGO/1396 is part of the subdivision of the original parcel Number ABOTHUGUCHI/L-KAONGO/481.
5. He further avers that he has a good prima facie case against the defendant and it is only fair and just that his application be allowed to conserve the suit property.
6. The Application is not opposed.
7. I have carefully perused the application and the supporting affidavit and the issues to be determined are;

a) Whether the plaintiff has 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**:-

"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 averred that the plaintiff bought a parcel of land from the defendant and has provided the court with a sale agreement. Though the land was never transferred to him, he has been in possession of the same since 1994 and has developed and cultivated it. He claims ownership over the parcel of land through the doctrine of adverse possession. He risks losing the land if the orders are not granted. I find that the applicant has met the criteria for the issuance of the injunctive orders.

12. On inhibition, I make reference to the provisions of **Section 68(1) of the Land Registration Act** where it is provided that:-

"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."

13. As it were, 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 transaction over the said property until the suit in which the property is a subject matter is dealt with.

14. 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. The applicant has given an account of how the respondent has stealthily and secretly subdivided the original parcel 481 to give rise to parcels 1396-1398 and the respondent is sending potential buyers to the suit land. There is no doubt that the suit property is in danger of being alienated, hence the prayer for inhibition is warranted.

15. In **Dorcas Muthoni & 2 others v Michael Ireri 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"

The court was guided by the principle that the Court should always take the course that carries the lower risk of injustice.

16. In light of the foregoing analysis, the application dated 12.11.2020 is allowed in the following terms;

- 1) The order of inhibition is allowed in terms of prayer no. 4 in the application until the suit is heard and determined.**
- 2) An order of injunction is allowed in terms of prayer no 5 in the application but for a period of ONE YEAR.**
- 3) The costs of this application shall abide the outcome of the main suit.**

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF MARCH, 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 27.1.2021. 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 17th March, 2020 and published in the Kenya Gazette of 17th 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