



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 36 OF 2020

SAMSON NDAMBO NGUGI.....PLAINTIFF/APPLICANT

VS

ANTHONY MUCHINA KAMAU.....1ST DEFENDANT/RESPONDENT

STANLEY KINUTHIA KAMAU.....2ND DEFENDANT/RESPONDENT

RULING

1. The Applicant moved the Court on the 13/11/2020 seeking the following orders;
 - a. Spent
 - b. That the Honourable Court be pleased to issue or grant a temporary injunction to restrain the 2nd Respondent/ Defendant by himself, employees, agents or assigns from wasting, damaging, alienation, sale, removal or disposition of land parcel or PLOT NO. LOC. 4/ GAKARARA/ 1156/ 23 KANDARA MARKET as the Court may think fit pending the hearing and determination of this application and/ or the disposal of the suit or until further orders.
 - c. That the costs of this Application be provided for, or the Respondents be liable for the costs of the application.
2. The application is premised on the grounds adduced thereto and the supporting affidavit of Samuel Ndambo Ngugi who deponed inter alia that the suit property is encumbered by a family trust and the same was succeeded by the 1st Respondent in a manner tainted with secrecy fraud and illegality to the exclusion of the other family members. That the property belonged to Samson Ngugi Kamau, the family patriarch who died in 1954. That the suit land was registered in the name of Paul Kamau Ngugi & Bros to hold in trust for his siblings and the three wives/mothers in the family. Upon the death of Paul Kamau Ngugi the suit land was succeeded under his estate despite the existing family trust. subsequently following the death of Paul Ngugi's wife Rebecca the suit land devolved to the 1st Respondent. That both successive succession of the suit land were fraudulent and irregular. Thereafter the 1st Respondent sold the suit land to the 2nd Respondent. It is his case that the transfer is encumbered with a family trust.
3. The Applicant is apprehensive that the suit land may be sold to third parties before the conclusion of the case and urges this Court to grant the injunctive orders as no prejudice will be occasioned upon the Respondents.
4. The application is opposed. The 1st Respondent highlighted the various cases filed by the Applicant in various Courts to wit Succ Cause No 19 of 1993; Succ cause No 3711 of 2004; HCCC No 80 of 2005; Succ cause No 46 of 2017. He faulted the Applicant for filing multiple applications over the years on the some misguided legal position on the suit land. Inter alia he contends that the suit land was transmitted to Paul Kamau and their beneficiaries and the estate of Samson Kamau cannot be a subject of succession 60 years later.
5. That the claim of trust is time barred and is premised on a forged letter of more than 39 years old. He posited that equity does not aid the indolent and urged the Court to dismiss the application.
6. Parties elected to canvass the application through written sub missions which I have read and considered.
7. Relying on the case of **Giella Vs Cassman Brown** the Applicant urged the Court that the suit land is subject to trust and that if the orders are not granted the 2nd Respondent may dispose of the land before the suit is heard and determined and that no prejudice shall be occasioned on the Respondents.

8. The Respondents submitted that to the contrary the Applicant has not demonstrated an iota of a prima facie case as set out in the **Giella Case**. That the suit is resjudicata/subjudice as the issue was raised in Succ cause No 605 of 2002 when the Applicant sought to revoke the grant issued in Succ cause No 19 of 1993 on grounds of fraud interalia.

9. On the issue of customary trust, the Respondents argued that trust is an issue of evidence and that Courts have held over time that trust cannot be inferred but a party must lead evidence to prove trust. They accused the Applicant of peddling hearsay premised on a forged letter.

10. It is the position of the Respondents that the Applicant is guilty of laches. That the Applicant despite the advice of the Court in 2004 has taken over two decades to do so and that the Applicant cannot partake of an equitable relief from a Court of equity.

11. That the 2nd Respondent is a bonafide purchaser for value without notice and or taint on the title.

12. That the Applicant will suffer no irreparable loss to warrant the issuance of the orders. They urged the Court to dismiss the application with costs.

13. The key issue for determination is whether the Applicant is deserving of the grant of interim injunctive orders.

14. The celebrated case of **Giella Vs Cassman Brown** (supra) The principles for the grant of an injunction were laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. In the said case the Court stated that the Court needs to consider three principles. First, that an Applicant has to establish a prima facie case with a probability of success, secondly that an injunction will not normally be granted if damages can be a sufficient remedy, and thirdly, if in doubt decide the matter on a balance of probabilities.

15. A “prima facie case” was defined by **Mustill J in the Iedersachsen [1983] 2 Lloyd's Rep 600 at page 605** to be a good arguable case which connotes one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.

16. The Court of Appeal in **Mrao vs first American Bank of Kenya Ltd & two others C.A. No. 39 OF 2002 (2003 eK.L.R)** defined a prima facie case in the following terms;

“A prima facie case in a civil application include 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”.

17. The Applicant has argued a case of customary trust. I have been presented with the minutes of the Trade and Market Committee of Kandara area council held on the 19/2/1965, 24/2/65 and 25/2/65 where a lease by Samson Kamau to Mwema Karachiu was approved on the suit land. A change of name from samson Ngugi to P Kamu Ngugi & Sons was approved over the suit land. The Respondents have argued that there was no customary trust on the suit land and that the same belonged to Kamau absolutely. These are arguments and counterarguments that are best left to the trial Court to examine in a full hearing.

18. It is trite that in an interlocutory application for grant of injunction, the Court is not required to make final findings on contested facts and the law but only needs to weigh the relative strength of the party’s cases. Weighing the case on the basis of the affidavit evidence adduced, I find that the Applicant has set out a prima facie case.

19. As to whether the Applicant shall suffer irreparable harm if the injunction is not granted, I can quote the case of **Muiruri Vs Bank of Baroda (Kenya) Limited (2001) KLR 183 at page 188** when it was pointed out that; -

“besides, disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”.

In the instant case property that is rooted in family lineage is wrought with emotional attachment that in some cases may not be adequately compensated with damages.

20. With respect to the last limb, this Court is guided by Order 40 Rule 1(a) and (b) of the Civil Procedure Rules which provides as follows;

“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 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 purposes 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”.

21. Even if I were to be wrong on the two limbs, to preserve the subject matter of the suit, I find that the balance of convenience tilts to this Court granting status quo orders in the following terms;

a. A temporary injunction do hereby issue to restrain the 2nd Respondent/ Defendant by himself, employees, agents or assigns from wasting, damaging, alienation, sale, removal or disposition of land parcel NO. LOC. 4/ GAKARARA/ 1156/ 23 KANDARA MARKET pending the hearing and determination of the suit.

22. The Applicant shall have the costs of the application.

23. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 11TH DAY OF MARCH 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Kirubi HB for Gori for the Plaintiff

1st & 2nd Defendants: Absent. Advocate is absent.

Njeri, Court Assistant