



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. E003 OF 2021 (OS)

JOSEPHINE KAGIRI M'TURUCHIU.....PLAINTIFF

VERSUS

M'MWIRICHIA M'IGUATU & CECERINA KAROKI M'IGUATU

(Sued as the legal representatives of the estate of M'IGUATU M'ITANIA).....DEFENDANT

RULING

1. Before me is a notice of motion dated 11/01/2021 brought pursuant to provisions of Section 1A, 1B, 3A and 63 (c) and (e) of the Civil Procedure Act (Cap 21) and Order 40 rule 1, 2, 3 and 4 of the Civil Procedure Rules, Section 68 of the Land Registration Act 2012 and Section 13(1) and (7) of the Environment and Land Court.
2. The plaintiff/applicant is seeking an order of inhibition in respect of land parcel no. KIIRUA/NAARI-MAITEI/505 (the suit land). She is also seeking injunctive orders against the defendants whether by themselves, their servants or agents from any dealings appertaining to the aforementioned suit land, until the suit is heard and determined.
3. The application is premised on the grounds on the face of it and on the supporting affidavit of the applicant. The applicant contends that the respondents are the children and legal representatives of the estate of M'GUATU M'ITANIA (deceased), in whose name, the suit land is registered under. That vide an agreement dated 17th November 1988, the applicant bought 0.5 acres which was to be excised from KIIRUA/NAARI-MAITEI/505 for a consideration of Kshs. 7,000. That upon execution of the agreement, she took possession of the portion of land but the defendants' deceased father refused to obtain Land Control Board Consent and as such the agreement became null and void.
4. That she filed a suit CMCC NO.49 of 1989 which was dismissed for want of prosecution. She has been occupying half an acre of the suit land KIIRUA/NAARI-MAITEI/505 and has extensively developed the same. She avers that the defendants have recently been sending brokers and potential buyers seeking to alienate the land to 3rd parties to her detriment. She further avers that if the land is sold, she will suffer irreparable damages as half an acre belongs to her by virtue of adverse possession.
5. In support of her case, the applicant has relied on the following cases; **James Maina Kinya V Gerald Kwendaka [2018]eKLR, Peter Mbiri Michuki V Samuel Mugo Michuki [2014]eKLR.**
6. The Application is opposed vide a replying affidavit dated 03/02/2021 sworn by Cecerina Karoki M'guatu who averred that the suit land is registered in her deceased husband's name and the 1st defendant is her step-son. That her deceased husband entered into an agreement with the plaintiff for sale of half an acre of suit land KIIRUA/NAARI-MAITEI/505 and paid Kshs. 5,400 leaving a balance of Kshs. 1,600. That the plaintiff filed a suit CMCC NO.49 of 1989 seeking specific performance of the sale agreement, and her husband being frustrated by this suit offered to refund her the deposit already paid.
7. Further, the plaintiff together with the 1st defendant colluded and filed Meru H.C Succession Cause No. 401 of 1994 of where the 1st defendant obtained a grant and distributed the estate of her husband including the suit land. However, she made an application for the revocation of the said grant. That on 14.12.2020, the succession court ruled that 1/2 an acre of the suit land was to be set aside pending the determination of the ownership tussle.
8. She further contends that she has no plans of disposing off the suit land and that it is unfair and unjust to issue an order of inhibition as it would prevent herself and her children from developing the rest of the land.
9. I have carefully perused the application, the supporting affidavit, the authorities as well as the replying affidavit. The issue for determination is whether to grant the inhibition and injunctive orders in favour of the applicant.

10. The purpose of a temporary injunction is to conserve the suit land pending the determination of the case in which the suit property is in dispute - See **Hannah Wangui Mathenge & 2 Others vs. Rose Muthoni Mathenge (2017) eKLR**. 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 that:-

"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."

11. The conditions for consideration in granting an injunction were settled in **Giella vs Cassman Brown & Company Limited (1973) E A 358** in the following terms:-

"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."

12. Has the Plaintiff 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** 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."

13. It is averred that the plaintiff bought a parcel of land from the 2nd defendant's deceased husband, of which she has provided the court with a sale agreement. Though the land was never transferred to her, she has been in possession of the same and has developed and cultivated it. In paragraph 6 of the replying affidavit of Cecerina Karoki, she does admit that the applicant was allowed to occupy a portion of the suit land by her husband.

14. I am convinced that the applicant has raised pertinent issues that can be canvassed in the originating summons application. Thus the applicant has established a prima facie case with a probability of success. The remedy of injunction is therefore essential in order to maintain the status quo until the issues raised in the suit are determined.

15. On the issue of inhibition, I make reference to the provisions of **Section 68(1) of the Land Registration Act** which provides 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."

16. 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 2nd defendant avers that she has no plans to dispose off the property and an order of inhibition would be unjust and unfair as she wants to develop the portion of land already determined to be hers.

17. In **Dorcias 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"**. The court was guided by the principle that the Court should always take the course that carries the lower risk of injustice.

18. In this regard the lower risk of injustice favours the plaintiff who is in occupation of a portion of the suit land. I allow the application dated 17.1.2021 save that the injunctive orders shall remain in force for a period of one year only. The costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 21ST DAY OF APRIL, 2021 IN PRESENCE OF:

C/A: Kananu

Ms Murithi for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE