



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 3 OF 2020

IN THE MATTER OF LAND PARCEL NO. WEST AKITHI III/1241 REGISTERED IN THE NAMES OF MATIITA MUTHONI M'IBUI

KAIMURI NCEENE.....PLAINTIFF

VERSUS

PETER KAILEMIA AMBURUKUA DEFENDANT

RULING

1. Before me is a notice of motion dated 10TH January 2020, where the plaintiff applicant is seeking an order of temporary Injunction restraining the defendant whether by himself, his agents, employees, assigns or any person working on his behest and/or authority from evicting the plaintiff, interfering with the plaintiffs exclusive possession and occupation of land parcel number WEST/AKITHI III/1241 pending the hearing and determination of the application and the suit. The applicant is also seeking an order of inhibition in respect of the suit land as well as costs of the application.

2. The application is based on the grounds on the face of it and on the supporting affidavit of Kaimuri Nceene, the applicant who avers that her late husband gathered and measured the suit land in 1968 and put her and their children in actual possession. Since then, she has had exclusive possession and use of the said land and further made substantial developments by putting up a house as well as cultivating trees and crops and has leased part of the land to some lessee.

3. It was submitted for the applicant that she has been in exclusive and uninterrupted occupation and use of the suit land for a period of over 50 years of which she has made substantial developments. She avers that if the injunction orders sought are denied, she will suffer irreparable harm that cannot be compensated by an award of damages as she will be rendered homeless and destitute. She urges the court to maintain status quo. She relied on the cases of **EWK V JKN [2020]eKLR** and **Robert Mugo wa Karanja V Ecobank (Kenya) Limited & another [2019]eKLR**.

4. The respondent opposed the Application vide his replying affidavit dated 24/09/2020. He contends that he is the rightful and bonafide owner of the suit parcel no. TIGANIA WEST/AKITHI III/1241 which he acquired from one Anna Kiiku Kanai who got it from John Ibui who is the brother of the plaintiff's deceased husband. He avers that he has been in actual possession of the suit land since 2015 where he has put up developments and cultivated the land and also put up a barbed wire fence.

5. He also averred that sometime in 2017 the plaintiff started making frequent visits to his land and deposited construction materials alleging that she was simply storing the materials on the land but soon thereafter the plaintiff illegally entered and started putting up permanent structures and laying claim on his parcel of land.

6. The defendant reported the matter to the area chief who wrote a letter to the plaintiff asking her to vacate the suit premises. Later in 2018, the plaintiff took the matter to the Njuuri Ncheke Council of Elders who after hearing proceeded to decide in favor of the defendant. The respondent also reported the matter to the police station of which, the applicant was arrested and charged with a criminal case before the Tigania law court.

7. He further averred that the plaintiff has no right to the suit property and if this application is allowed he stands to suffer great loss as he will be under threat of eviction.

8. In his submissions, the respondent avers that the applicant has failed to demonstrate why the orders sought should be granted, since the respondent is the bonafide owner of the suit land and has been in actual and physical possession since 2009. He contends that it is the plaintiff who has encroached on his land, and that the said land is not in danger of being alienated. He urges the court to dismiss the application.

9. The respondent has relied on the following cases; Winfred Nyawira Maina V Peterson Onyiego Gichana [2015]eKLR, Pius Kipchirchir Kogo V Frank Kimeli Tenai [2018]eKLR, Paul Gitonga Wanjau V Gathuthis Teafactor Company Ltd @& 2 Others [2016] eKLR, Thathy vs. Middle East Bank (K) (2002) 1KLR 595, Japheth Kaimenyi M'ndatho V M'ndatho M'mbwiria [2012] eKLR, Films Rover International & others V Cannon Films Sales Ltd 1986 3ALL E.R 772.

10. The applicant has come under section 10, 16 3a of the Civil Procedure Act and Order 40 rule 1, 2 and 3 of the Civil Procedure rules. The said Act does not have a section 10, while section 16 provides for objection to jurisdiction. The interest of Justice on the other hand demands that the court deals with the substantive issue in dispute rather than dwelling on procedural technicalities in line with the provisions of Article 159 (2) (d), which gives Court the mandate as follows;

“In exercising Judicial authority, courts and tribunal shall be guided by the following principles:

- Justice shall be administered without undue regard to procedural technicalities.”

11. I have carefully perused the application, the supporting affidavit and the submissions. I frame the issue for determination as follows;

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?

12. 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."

13. 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."

14. 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 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.”

15. The plaintiff claims that she has been in continuous possession and occupation of the suit land since 1940 and has developed the land extensively. In such a scenario, one would expect a claimant to readily have evidence of the long period of occupation in form of photographs of houses, mature trees, etc. In this case, the applicant has not availed such evidence.

16. Secondly, I find that the respondent too has claimed to be in occupation of the suit land save that the applicant had encroached on the suit land in 2017 whereby the respondent reported the matter to the police culminating in the arrest and arraignment in court of the applicant. The applicant has not rebutted this claim. Thus already the element of peaceful occupation anchored on the doctrine of adverse possession by the applicant has been put to question.

17. Finally, I find that the title availed by the respondent shows that it was issued on 15.5.2018. Since the applicant's claim is based on adverse possession, then the element of occupation of land adversely to a registered owner for a period of over 12 years has also been put to question.

18. With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 stated that,

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

19. I find that on the material so far presented before me, the applicant has not established a prima facie case. I need not interrogate the other criterias.

20. As to whether to issue an order of inhibition **Section 68(1) of the Land Registration Act 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.”

21. 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 said property is a subject is disposed of.

22. 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 not indicated the manner in which the land may be alienated. The respondent has stated that he has no plans to dispose or alienate the land as he intends to continue using and occupying the same. I am therefore not convinced that the suit property is in danger of being alienated, disposed off or damaged in any way.

23. In the final analysis, I find that the application dated 10.1.2020 is not merited. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF APRIL, 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 28.1.2021. 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