



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 259 OF 2015**

**MZEE WEVI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**THOMAS NJERU NTHUNI.....DEFENDANT/APPLICANT**

**RULING**

**INTRODUCTION**

1. What is before the court for determination is a notice of motion dated 7<sup>th</sup> October 2020 and filed by the defendant on 5<sup>th</sup> November 2020. The Application is expressed to be brought under **Sections 1A & 3A, and 63 (e) of the Civil Procedure Act, Order 40 Rule 1, 2 & 3 and Order 50 Rule 10 of the Civil Procedure Rules, and all other enabling provisions of Law.**

**APPLICATION**

2. The Applicant is **THOMAS NJERU MTHIUNI**, the defendant in the suit, while the Respondent is **MZEE WEVI**, who is the plaintiff.

The motion came with four (4) prayers but prayers 1, 2 are spent. The prayers for consideration are therefore two (2) – prayers 3 and 4 – and they are as follows:

*Prayer 3: That respondent herein be restrained by way of temporary injunction from constructing, erecting structures on Land parcel No's Evuvore/Nguthi/3445 and 3446 pending hearing and determination of the main suit.*

*Prayer 4: That costs of this application be provided for.*

3. The application was supported by grounds inter alia, that the applicant has been residing on the suit parcel of land for over twelve years, which land is said to have been subject of dispute for a number of years. It is pleaded that the respondent has commenced constructing and erecting structures on land parcels No. Evurore/Nguthi/3445 and 3446. The applicant further pleaded that if the orders sought are not granted he would be dispossessed and rendered homeless and his properties destroyed/wasted. He averred it was in the interest of justice and to avert hardships that he has filed the application before the court.

4. The applicant filed a supporting affidavit on 5.11.2020, in which he reiterated the grounds in the application in support of the case. He avers that the suit parcel of land belonged to his clan, the Nditi Clan, and the Mukera clan to which he alleges the respondent belongs. He claims that his father obtained land parcel No. Evuvore/Nguthi/1317 in 1999 and the land was transmitted to him. After that he subdivided it into the suit parcels of land. It is his further averment that the respondent illegally entered and resided on the land in 2015 and filed a suit on adverse possession.

5. The applicant beseechs the court to grant orders to have the respondent stopped from erecting structures on the land and alleges that the purpose of such construction by the respondent is to portray possession of the suit parcels of land. To support his claim, he has annexed photographs to prove construction on the land. He further defends his reason for not filing the application earlier and alleges that the respondent had not erected any structures on the land at the time. According to him the court should grant the orders sought to enable the suit to be heard and determined on merit as the respondent will not be prejudiced if the orders are granted.

**RESPONSE**

6. The application is defended by way of replying affidavit dated 16.12.2020 filed on even date. It is sworn by the respondent who denies the averments in the supporting affidavit. The Respondent claims to belong to Nyonga Clan and not Mukera clan as alleged by the applicant and disputed that the land was awarded to Nditi clan. He terms the claim as misconceived. He further denies the assertion that he occupied the land in 2015 and alleges to have been in occupation from his time of birth in the year 1954. His matrimonial home is said to be on the suit

parcel of land and alleges to reside there with his family.

7. According to the respondent, he developed the parcel of land awhile back and he has even erected cowshed and structures to rear poultry. Further, the claim on recent construction of structures on the land has not been denied. He acknowledges to be constructing brick houses and avers that the applicant is bent on delaying completion of the construction.

8. It is his case that the applicant is undeserving of the orders sought and court is called upon to dismiss the application, as according to the respondent, the same is unmerited.

### **SUBMISSIONS**

9. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 2.6.2021. He largely relied on the averments in the notice of motion and supporting affidavit. He further submitted that the land parcel has been subject of litigation in the court of appeal and averred that the respondent's suit seeks to overturn the judgment of the court of appeal which, according to him, denied the respondent and members of his clan the parcels of land litigated upon. He further reiterated that the court should preserve the property by granting an injunction order.

10. The respondent on his part filed his submissions on 4 .5.2021. He correctly laid out the three principles to be met for grant of an order of injunction. To wit, whether the applicant has shown prima facie case with a probability of success, whether the applicant shall suffer irreparable injury which cannot be compensated by damages, and if the court is in doubt, then the application be decided on a balance of convenience.

11. On the first limb, that is establishing a prima facie case he relied on the case of **Mrao Ltd Vs American Bank of Kenya Ltd & 2 others**, to define what a prima facie case entails and further on the case of **Nguruman Ltd Vs Jan Bonde Nielsen & 2 others** on what the court should consider in establishing whether an applicant has a prima facie case.

12. The respondent averred, that the applicant's claim is overtaken by events as he has been in occupation of the land since 1954 and has erected his matrimonial home there. According to him the applicant's recourse would have been in expeditiously setting down the suit for hearing.

13. He emphasized on his claim of being in occupation of the land and, according to him, the applicant therefore cannot have prima facie right to development of the land. He submitted that the remedy of temporary injunction should be sought expeditiously when the right is infringed and averred that the applicant is guilty of delay by bringing the application when construction of the building is nearing completion. To him, the doctrine that delay defeats equity is applicable.

14. The respondent accused the applicant of inviting the court to delve into issues of ownership of land which require detailed arguments and considerations of the court, which according to him ought to be dealt with during trial. Reliance was placed on the cases of **American Cyanamid Co (No. 1) Vs Ethicon Ltd [1975]** and **Mbuthia Vs Jimba Credit Finance Corporation & Another** both cited in the case of **Thomas Mumo Mingey Vs Sarah Nyiva & Others 2017 eKLR** in support of this.

15. On the second limb, the respondent was of the view that damages would be an adequate remedy in the event the applicant is successful. He further submitted that the applicant has not demonstrated what damages he stands to suffer. He placed reliance on the case of **Paul Gitonga Wanjau Vs Gathuthi Tea Factory Co. Ltd Civil Suit No. 28 of 2015** in support of this.

16. On the issue of balance of convenience, the respondent submitted that the same lies in declining the prayer for interim orders. This, he supported by stating that he has been in occupation and has developed the suit properties while the applicant is yet to establish his rights to the suit properties. The Respondent urged the court to dismiss the application with costs.

### **ANALYSIS**

17. I have considered the application, the response made, the rival submissions, and the material on the court record in general. In the application filed, the applicant is seeking orders of temporary injunction to restrain the respondent from erecting and constructing on the suit parcels of land pending hearing and determination of this suit.

18. The substratum of the suit is an application by way an originating summons filed by the respondent claiming ownership of the suit parcels of land as an adverse possessor, with the applicant disputing such ownership with claims that the respondent only occupied the land in the year 2015 and has therefore not been in peaceful, continuous and uninterrupted occupation over a period of twelve years.

19. The respondent is said to engage in construction and erection of structures on the suit parcel of land during the pendency of the suit, which actions have prompted filing of the present application.

20. The requirements for the grant of an interlocutory injunction is set out in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 360** where it was stated:

*“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 (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)”*

21. What is a Prima facie case was described in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & Others** Civil Appeal No. 39 of 2002, as:

*“In civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”*

22. On whether the applicant has established a prima facie case with a probability of success, It is not in dispute that the applicant is the registered owner of the suit parcel of land as evidenced by the copies of search annexed to the suit. The respondent on the other hand is claiming ownership by way of adverse possession.

23. The present application is brought on grounds that the respondent is developing the land by constructing and erecting structures during the pendency of the suit. According to the applicant, he is apprehensive that the respondent is trying to portray that he has been in possession of the suit land. The respondent though opposing the application has admitted to such developments. It is his position that the application has been overtaken by events for reason that he has been developing the land from the year 1954.

24. The court’s duty at this juncture is not to determine the issues raised in the suit but to determine whether the orders sought in the application based on what is before it, ought to be granted. As stated above, the applicant is the registered owner of the property and considering the claim against his title is on adverse possession which needs to be proven during trial, it is not difficult to find that he has a prima facie case.

25. As already pointed out, the applicant is the registered owner of the land. But it appears clear that he does not live on it. It is reasonably clear that it is the respondent who lives there. The respondent admits that there are new structures on the land. He made available some photographs to show the structures. There is a brick house that is already roofed. There is what appears to be a chicken coop. There is an old mud-walled structure roofed with corrugated iron sheets. The photograph made available by the applicant himself shows a brick structure build up to the lintel level.

26. While it would be easy to say that the applicant has a prima facie case because he is the registered owner, it would not be equally easy to say that damages would not be an adequate remedy. And the structures that the applicant is complaining about are themselves not at the commencement or foundation stage. They are up, some even roofed or nearing roofing, and are most likely not the only structures that the respondent has on the land. It is a fact that whatever harm the applicant is fearing can be quantified and compensated with damages. It is also a fact that the application came rather late, with the structures complained of already constructed to an advanced stage.

27. It was even suggested by the respondent that it is him, rather than the applicant, who will suffer more if it ultimately turns out that he is not an adverse possessor. This is so because his structures will have to be demolished. I agree with this observation. It is the respondent, not the applicant, who is likely to suffer more if he loses the case. The applicant has nothing much to lose. There are no noticeable developments that he has done on the land.

28. It is trite that in applications for temporary injunction, you don’t get a restraining order if damages are an appropriate relief. My considered view is that damages are an adequate remedy in this matter.

29. But I also find a crucial omission in the applicant’s application, namely: Failure to give an undertaking to pay damages. In **Gati Vs Barclays Bank (K) Ltd [2001] KLR 525**, the court held, inter alia, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given, an injunction can not issue.

30. Then there is the consideration of the balance of convenience. My understanding of the law is that the court only resorts to this if it has doubts regarding the first two considerations spelt out in Gielas’ case (supra). I would wish to state that I don’t feel doubtful about my position regarding the first two considerations. I don’t therefore see the need to consider the balance of convenience.

31. The upshot, in light of the foregoing, is that the merits of the application have not been demonstrated on balance. I therefore dismiss the application with no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021.**

In the presence of M/s Muriuki for Andande for plaintiff/respondent and M/s Ndorongo for defendant/applicant

Court Assistant: Leadys

**A.K. KANIARU**

**JUDGE**

**8.12.2021**