REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 112 OF 2017

JOSEPH MUKONYI GIBENDI.....PAINTIFF

VERSUS

MOSES UGUSIMBA.....1ST DEFENDANT

MORINE NASAMBU.....2ND DEFENDANT

R U L I N G

JOSEPH MUKONYE GIBENDI (the plaintiff herein) has by his Notice of Motion dated 18th September 2017 and predicated upon the provisions of **Order 40 Rule 1** and **Section 3A** of the **Civil Procedure Act** sought the following orders against **MOSES UGUSIMBA** (the correct names are infact **MOSES KUSIMBA WAMALWA** as per the replying affidavit) and **MORIENE NASAMBU** (herein the 1st and 2nd defendants respectively): -

1. Spent

2. Spent

3. That pending the hearing and determination of this suit there be an order for a temporary injunction against the defendants restraining them by themselves, their agents, servants and/or any other person acting under their authority or direction from transferring, wasting, damaging. Alienating, trespassing, selling, utilizing, developing, removing or otherwise disposing of land parcels NO EAST BUKUSU/SOUTH NALONDO/4691 and 4692.

4. Costs be provided for.

The application is premised on the grounds set out therein and is supported by the plaintiff's affidavit also dated 18th September 2017.

The gravamen of the application is that the plaintiff is the owner of the land parcels **NO EAST BUKUSU/SOUTH NALONDO/4691** and **4692** (the suit land) which he purchased in 1968. That without any colour of right or justification, the defendants have illegally entered the suit land and curved off a portion measuring 50 x 100 feet which they have started utilizing yet the plaintiff has not sold to them any portion of the same. That unless the defendants' trespass is curbed, they might displace him from the suit land and cause him irreparable loss and damage hence this application. Annexed to the application are the Certificate of Search showing that the plaintiff is indeed the registered proprietor of the suit land as well as photographs of fenced off portions of the same (annextures **JMG** – 1(a), 1(b) and **JMG** – 2).

The application is opposed and the 1st defendant by his replying affidavit dated 11th October 2017 has deponed, inter alia, that on 17th April 2015 he purchased from the plaintiff a portion measuring 50 x100 feet at a consideration of Kshs. 400,000/= which was to be excised from the land parcel **NO EAST BUKUSU/SOUTH NALONDO/4693**. That at the time of the transaction, the plaintiff's sons had lodged restrictions on the said land. However, the 1st defendant took possession of the portion following a survey and after the plaintiff had assured him that he had already given his sons and two wives their portion. The 1st defendant thereafter fenced his portion but the plaintiff's sons pulled it down and forced the 1st defendant to keep off the land. The 1st defendant then requested the plaintiff to refund the purchase price but in vain. Meanwhile, the plaintiff sued his sons in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 90 of 2015** seeking orders that they allow him to give the 1st defendant and other buyers the portions of land which he had sold to them. The dispute was also referred to elders who resolved that fresh sub – divisions be done to create land for the 1st defendant. The plaintiff however allowed him to occupy the portion of land and he is therefore surprised that he now wants to restrain him yet the 1st defendant has dug a borehole and developed it without any objection. The 1st defendant therefore seeks a refund of Kshs. 640,000/= and accused the plaintiff of engaging in shenanigans. He avers further that the application does not meet the requirements set out in the case of **GIELLA .V. CASSMAN BROWN 1973 E.A 358**. Annexed to the replying affidavit is a copy of a land sale agreement dated 17th April 2015 between the plaintiff (as seller) and the 1st defendant (as purchaser) for a portion measuring 50 by 100 feet out of the land parcel **NO EAST BUKUSU/SOUTH**

NALONDO/4693, a Certificate of Search in respect to the land parcel **NO EAST BUKUSU/SOUTH NALONDO/4693** and a copy of the plaint in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 90 of 2015** involving the plaintiff and **VINCENT CHOLE MUKONGE & ASWANI ADAGALA MUKONGE** as defendants with respect to the land parcel **NO EAST BUKUSU /SOUTH NALONDO/4693**.

This may be the right time to explain why a ruling in an application filed on 18th September 2017 is being delivered 4 years later!

When the parties appeared in Court on 16th November 2017, both **MR AMANI** holding brief for **MR KASSIM SIFUMA** for the defendants and **MR OLONYI** for the plaintiff agreed that the application be canvassed by way of written submissions. Those submissions were subsequently filed and Counsel requested that they highlight the same and were given the date of 21st February 2018. However, they did not attend Court on that day and **MUKUNYA J** penalized them to each pay Court adjournment fees of Kshs. 1,000/= and listed the matter for highlighting of submissions on 15th May 2018. The parties still failed to appear and the file remained in the registry until 3rd February 2021 when the Deputy Registrar fished it out and I directed that ruling would be delivered on 1st March 2021. However, by a letter dated 27th January 2021 **MR KASSIM SIFUMA** Counsel for the defendant wrote to the Court conveying the parties' decision to settle this matter and seeking time to record a consent. I therefore directed that the matter would therefore be mentioned on 1st March 2021 to record the consent. On that day, however, the Court was informed that no consent had been arrived at. I therefore ordered that I would deliver the ruling on 27th May 2021 after my leave.

This is a clear illustration of how parties can delay the finalization of cases. Todate, the Kshs. 1,000/= remains unpaid but I have no intention of leaving the parties un – punished. They will certainly pay the said Court adjournment fees if that is what made them give the Court a wide berth.

I have considered the application, the rival affidavits and the submissions by Counsel.

This being an application for a temporary injunction pending trial, it has to be determined in accordance with the guidelines set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358**. These are: -

> **1. The Applicant must show a prima facie case with a probability of success.**
>
> **2. An interlocutory injunction will not normally be granted unless the Applicant shows that he will suffer irreparable injury which cannot otherwise be adequately compensated by an award of damages.**
>
> **3. If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case was defined in the case of **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No 39 of 2002 [2003 eKLR]** as: -

> ***"…….. 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."***

In **NGURUMAN .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No 77 of 2012**, the Court stated that: -

> ***"The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the Applicant's case is more likely than not to ultimately succeed."*** Emphasis added.

The Court then went on to add as follows: -

> ***"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation."*** Emphasis added.

Finally, in **FILMS ROVER INTERNATIONAL LTD .V. CANNON FILMS SALES LTD 1986 3 ALL. E.R 772**, the Court observed that while considering whether or not to grant an interlocutory injunction, the Court must take the route that appears to carry the lower risk of injustice should it turn out to have been ***"wrong".*** It must also be remembered that an interlocutory injunction is an equitable remedy and therefore, the party seeking it must approach the Court with clean hands.

Guided by the above principles, it is not in dispute that the plaintiff is the registered proprietor of the suit land. By his plaint dated 14th September 2017 and filed in Court on the same day, he alleged in paragraph 5 as follows: -

> ***"The plaintiff avers that both the 1st and 2nd defendants without any colour of right, justification, and/or my authority, have illegally entered into my parcels of land namely EAST BUKUSU/SOUTH NALONDO/4692 and 4691 and curved off a 50 ft by 100 ft plots respectively and have begun utilizing the same."*** Emphasis added.

In paragraph 13 of the plaint, he not only seeks an order permanently injuncting the defendants from the suit land but also an order to evict them from the same. As the registered proprietor of the suit land, the plaintiff is the absolute and indefeasible owner of the suit land and enjoys all the rights and privileges that go with that ownership subject of course to any other interests recognized by **Section 25 of the Land Registration Act**. Such rights include the right to bar and evict trespassers from the suit land.

However, from a perusal of the pleadings in this case, I am far from persuaded that the plaintiff has established a prima facie case to warrant the grant of the orders sought in his Notice of Motion dated 18th September 2017. This is because, in his replying affidavit dated 11th October 2017, the 1st defendant has averred that by a sale agreement dated 17th April 2015, the plaintiff sold to him a portion measuring 50 by 100 feet out of the land parcel **NO EAST BUKUSU/ SOUTH NALONDO/4693** at a consideration of Kshs. 400,000/= which was not only fully paid but also the 1st defendant took possession and has developed it including sinking a bore hole thereon. That averment was not rebutted and the 1st defendant annexed a copy of the sale agreement to his replying affidavit (annexture **MKW 1**). Further, the 1st defendant averred that the plaintiff has infact sued his sons in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 90 of 2015** seeking orders that they allow him to give land to persons who have bought from him. A copy of the plaint in that case was annexed (annexture **MKW 3**) and in paragraph 5 it reads: -

> ***"That on 2.4.15, the plaintiff sold the (sic) a portion of land measuring 0.5 Ha to one MAUREEN NASAMBU SIMIYU and on 17.4.15 the plaintiff sold a portion measuring 50 x 100 feet to one MOSES KUSIMBA WAMALWA all out of land parcel EAST BUKUSU/SOUTH NALONDO/4693."***

The plaintiff goes on to plead in paragraph 6 of that case that on 24th June 2015 when the aforesaid purchasers accompanied by surveyors visited their respective portions of land for purposes of sub – division, his said sons chased them away. It cannot therefore be correct, as the plaintiff has averred in this application at paragraph 4(c) that the defendants: -

> ***"……. Without any colour of right, justification whatsoever, and/or any authority from the Applicant have begun construction, baking bricks and digging holes on their respective plots."***

Having already pleaded in previous proceedings that he had infact sold portions of land parcel **NO EAST BUKUSU/SOUTH NALONDO/4693** to the two defendants in this case, he cannot now turn around and allege that they have started constructing thereon ***"without any colour of right, justification whatsoever, and/or any authority"*** from him. He cannot approbate and reprobate at the same time. The only issue, and which in my view can be resolved during the trial, is that in the plaint, the plaintiff alleges that the defendants have illegally entered the suit land whereas as per the sale agreement, the defendants purchased their respective portions from the land parcel **NO EAST BUKUSU/SOUTH NALONDO/4693**. However, since the 1st defendant has averred in paragraph 11 of his replying affidavit that the plaintiff has allowed him to ***"occupy the portion"*** which he purchased, and which has not been rebutted, neither the 1st defendant, and indeed also the 2nd defendant (although she filed no replying affidavit), can be deemed to be on the plaintiff's land illegally. I have not heard the plaintiff aver, which is infact what he should have claimed if his hands are clean, that although he sold the defendants two portions out of the land parcel **NO EAST BUKUSU/ SOUTH NALONDO/4693**, they have instead taken possession of other parcels being land parcels **NO EAST BUKUSU/SOUTH NALONDO/4692** and **4691**. He has therefore not come to Court with clean hands and neither has he established a prima facie case to warrant the orders of interlocutory injunction. I do not see which of his rights have been or are threatened with violation in view of his own admission in his earlier pleadings in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 90 of 2015**. To grant the plaintiff the orders sought would amount to evicting the defendants from the portions of land which they occupy with the consent of the plaintiff. That is not the purpose which an order of interlocutory injunction is meant to achieve. Clearly, the plaintiff has not satisfied the first principle in the case of **GIELLA .V. CASSMAN BROWN** (supra) which is to establish a prima facie case. On that basis, his application must collapse because, the principles set out in the **GIELLA .V. CASSMAN BROWN** case (supra) must be considered sequentially. If prima facie case is established, then the Court must proceed to consider whether the injury that the Applicant will suffer is irreparable and if in doubt, determine the application on a balance of convenience. In this case however, the plaintiff has failed to surmount the first hurdle in the **GIELLA .V. CASSMAN BROWN** case (supra) and his application must therefore collapse. In **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS 2014 eKLR**, the Court of Appeal stated that: -

> ***"If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."***

The above was affirmed by the Court of Appeal in the case of **GESA BUILDING AND CIVIL ENGINEERING LTD .V. GEORGE NGURE CHIRA & ANOTHER C.A CIVIL APPEAL No 49 of 2013 [2019 eKLR]** where it said: -

> ***"We truly cannot find any fault in the manner the learned (Judge) disposed of the application, save only to stress that he did not have to consider the last two principles after finding that there was not prima facie case."***

I am guided by the above and since no prima facie case has been established, the Notice of Motion dated 18th September 2017 is dismissed with costs to the 1st defendant. The 2nd defendant did not file any response to the application and is therefore not entitled to any costs.

It is further directed that the parties herein pay the costs of Kshs. 1,000/= each as directed on 21st February 2018 within 7 days of this ruling failure to which the Court will consider other options in recovering the same.

The parties shall thereafter appear before the Deputy Registrar on 3rd June 2021 for purposes of confirming compliance and fixing a hearing date.

Boaz N. Olao.

J U D G E

27th May 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 27th day of May 2021 by way of electronic mail in keeping with the **COVID – 19** guidelines.

Boaz N. Olao.

J U D G E

27th May 2021.