



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 8 OF 2020

ANTHONY MURIITHI NJERU.....1ST PLAINTIFF/APPLICANT

LAWRENCE NJERU.....2ND PLAINTIFF/APPLICANT

VERSUS

MERCY WAMBUA NJERU.....1ST DEFENDANT/RESPONDENT

ANTHONY NJOROGE KABERI.....2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This ruling is on a notice of motion dated 20th February 2020 filed by the applicants on even date. The Application is expressed to be brought under **Article 40 (2)(a) of the Constitution of Kenya, Order 40 Rule 1 & Order 50 Rule 10 of the Civil Procedure Rules, Section 68(1) of the Land Registration Act, Section 1A & 3A of the Civil Procedure Act and all other enabling provisions of the law.**

APPLICATION

2. The motion came with Seven (7) prayers but prayers 1, 2 and 3 are spent. The prayers for consideration are therefore four (4) – prayers 4, 5, 6 and 7 – and

they are as follows:

Prayer 4: That this Honourable court be pleased to temporarily restrain the Defendants their agents and servants by way of injunction from damaging crops, cutting trees, encroaching, cultivating, ploughing, planting, selling, evicting or interfering in any manner with the Plaintiff's use of land parcels numbers Gaturi/Nembure/341 and Kagaari/Kanja/251 pending the hearing and determination of the suit herein.

Prayer 5: That an order of inhibition be issued by this honourable court against Land Parcel Numbers Gaturi/Nembure/341 and Kagaari/Kanja/251 pending the hearing and determination of the suit herein.

Prayer 6: That the OCS Embu Police Station to ensure compliance with the orders herein.

Prayer 7: That costs of this application be provided for.

3. The application is premised on grounds, *inter alia*, that the 1st applicant purchased the suit parcel of land through public auction from Barclays Bank when the 1st Respondent's husband defaulted on a loan he serviced with the bank. The 1st Applicant avers that he was issued with transfer documents by the bank, however, he never registered the transfer. He further avers that he has been in occupation of the land from the year 2001 and has extensively developed it. He also further avers that on 17th February 2020, the 1st Respondent invaded the land with thirty goons, chased his workers away and cut down his crops, destroyed property and has continued with the said actions to date. The Applicants aver that the orders be issued to preserve the suit properties and avoid any further alienation.

4. In a supporting affidavit sworn by the 2nd Applicant, he reiterates the contents in the notice of motion. He avers that the 1st Respondent took advantage of the 1st applicant's delay in registering the transfer and secretly filed succession proceedings, transferred the property to

herself and sold land parcel Kagaari/Kanja/251 to the 2nd respondent. There was no notice to the applicants. The applicants have attached copies of green cards as evidence of the sale. They are apprehensive that if the respondents are not restrained by the court there will be extensive damage to their developments and their suit will be rendered nugatory as they have a claim on adverse possession.

5. To the application is attached: a copy of notification of sale by the auctioneers, duly executed transfer forms not registered, land board consent, and photographs evidencing the development and destruction to the property.

RESPONSE

6. There are four replying affidavits on record. The first is filed by the 1st Respondent on 18th March 2021 who avers that her late husband was the registered owner of parcel numbers Kagaari/Kanja/251 and Gaturi/Nembure/341. The 1st Respondent denies the alleged sale to the 1st Applicant by public auction. She, however, confirms that her husband had charged the suit lands with Barclays Bank but according to her at the time of his demise he had paid up the loan. She avers that the properties were transferred to her pursuant to succession proceedings to which she obtained a discharge of charge from the bank and sold one of the parcels to the 2nd Respondent.

7. According to 1st respondent, the developments alleged to have been made by the applicants were done by her husband during his lifetime and she had only allowed her nephews to work on the land by tendering the coffee stems. She avers that she repossessed the land on 18th February 2020 after receiving information that her nephews had cut down trees, an act she reported to the police. It is her case that the applicants have not met the threshold for grant of the prayers sought.

8. The 2nd and 3rd affidavits are sworn by Peter Njagi Kagori and Jadwell Muriuki Mwaniki. The two are said to be former farm workers for the applicants, they have reiterated the averments in the 1st Respondent's affidavit. The fourth affidavit is dated 1st September 2020 and filed on 1st February 2021 by the 2nd Respondent. According to the 2nd Respondent, he purchased land parcel Kagaari/Kanja/250 for Kshs. 9,000,000/= and was issued with a title on 17th December 2020. He avers that he obtained a consent from the land board and no objection was raised. It is his further averment that prior to purchase of the land he conducted a search that confirmed that the title was clean. He therefore contends that he is a bona fide purchaser for value. In support of his replying affidavit, he has attached a copy of agreement, land board consent, title deed and certificate of search.

SUBMISSIONS

9. The application was canvassed by way of written submissions. The Applicants submissions were filed on 27th April, 2021. They relied on the averments in the notice of motion and the supporting affidavit.

10. The Applicants correctly traced the law on injunctions to the case of **Giella Vs Cassman Brown & Co. Ltd [1973] EA 358**. On the first limb, in establishing a prima facie case they averred that they have been in possession of the land prior to the 17th of February 2021 when their workers were chased away and their agricultural crops cut down. They relied on the case of **Nguruman Ltd Vs Jan Bonde Nielsen & 2 others** to submit that they need not delve into the veracity of the arguments advanced by either party as doing so would be tantamount to engaging in a mini trial. It is their case that at this stage they need to establish that there is a right which is likely to be infringed. It is their further case that they need not venture to address the issue of whether or not an auction was conducted. They aver that their right to ownership and use of land stands to be greatly hampered and curtailed if the Respondents actions of trespassing on the suit land are not restrained.

11. On the second limb, they aver that the suit land is their source of livelihood and they have invested in agricultural produce destruction of which it would be hard to quantify damages that would be incurred if the respondent is not restrained. On the issue of balance of convenience, they urged the court to consider if it is fair and equitable to grant an injunction while considering all relevant facts.

12. The applicants further urged the court to grant them an inhibition and relied on the case of **Elijah Njeru Mugo Vs Njeru Samuel M'Rwingoe ELC No. 6 of 2019** to submit that having been in occupation of the suit land they need some form of protection, in form of inhibition orders. With that, they submitted, that the court grants their application.

13. The 1st Respondent's submissions were filed on 10th June 2021. She submitted that her husband was the registered proprietor of the land and upon his demise she filed for succession, obtained a discharge of charge, registered the property in her name and sold one of the lands Kaagari/Kanja/251 to the 2nd Respondent.

14. She also submitted that an injunction is an equitable remedy and one who seeks the same should be honest and candid. She cast doubt on the reasons given by the applicant for not transferring the land before her husband's demise. The 1st Respondent relied on the case of **Showind Industries Vs Guardian Bank Limited & Another (2002) I E.A 284** (Justice A.G.Ringera) to submit that an injunction being an equitable remedy it may be denied where it would be inequitable to grant the relief for the reason that the applicant's conduct does not meet the approval of a court of equity or his equity has been defeated by laches. It's her case that the applicant has never been in possession of the suit land and no damages would be occasioned to him if injunctive orders are not granted. Further, the applicant was said to have failed to establish a prima facie case as there are no triable issues. The Respondents urged the court to dismiss the application with costs.

ANALYSIS

15. 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 applicants are seeking orders of temporary injunction, and inhibition pending hearing and determination of this suit.

16. From the analysis of the facts of the case, it is clear that this is a dispute on ownership of the land. The 1st applicant is alleging to own

the land, having bought it by way of public auction, and the 1st and 2nd respondents who are the registered owners are calling upon the court to uphold their ownership to the parcels of land. It is clear that the contention on the ownership can only be determined in a trial by calling upon witnesses and scrutinizing the relevant documents to establish ownership.

17. I note that this is an interlocutory application and it ought not determine the merits of the case at this stage. I will follow the decision in the case of **Shitakha Vs Mwamodo & 4 Other [1986] KLR 445** where the court cautioned against dealing with substantial issues at the interlocutory stage.

18. The court therefore seeks to determine whether the applicants have satisfied the requirements for the grant of an interlocutory injunction as enunciated 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.)”

19. On the first limb the court in **Mrao Ltd v. First American Bank of Kenya Ltd & Others** Civil Appeal No. 39 of 2002, described a prima facie case 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”

The 1st Applicant has expressed the position that he purchased the suit land by way of public auction from Barclays Bank of Kenya Ltd in the year 2001. It is his case that he never registered the transfer and the 1st Respondent took advantage of the situation and registered the land in her name and further sold one of the parcels to the 2nd Respondent. The 1st Applicant has averred that the land has now been invaded and crops destroyed and he seeks an injunction and/or inhibition to preserve the suit property and avert further damage. The court notes that the Applicant has attached: A notification of sale by way of public auction, duly executed transfer documents though unregistered, Letter of consent, photographs and a chief's letter.

20. The Respondents on their part possess ownership documents to the land and have denied knowledge of any auction having taken place or the alleged ownership by the 1st Applicant. They have gone further to deny the occupation of land by the applicants. The Respondents have shown documents of ownership of the land and documented the genesis of their acquisition of the land, the onus at this preliminary stage is therefore on the applicants to persuade the court that indeed they have a prima facie case. The applicants have stated that they are in possession of the land and further that they have a right of ownership of the land, the court however is of the opinion that the applicants have done little to convince the court that they have a prima facie case. No document has been exhibited before the court to prove the alleged sale by auction. Further, the unregistered transfer does not confer any proprietorship rights on the applicants. Without determining the issue of ownership of the land and with the evidence presented before the court, the court finds that the applicants have not established a prima facie case.

21. In the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** it was held as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

The applicants, therefore, having failed to prove the first limb set down in *Giella versus Cassman Brown* (supra), this court need not consider the other two limbs. **The prayer for restraining orders is therefore rejected.**

22. In their application the applicants further sought orders of inhibition against land parcels Gaturi/Nembure//341 and Kagaari/Kanja/251 pending hearing and determination of the suit. Section 68 (1) of the Land Registration Act provides: **“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, or generally until a further order, the registration of any dealing with any land, lease or charge.”**

Justice B.N. Oloo in the case *Dorcias Muthoni & 2 others v Michael Ireri Ngari [2016] eKLR* while elaborating on an order of inhibition stated “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 further orders or until the suit in which the said property is a subject is disposed off. 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 trial.”

23. The applicants in the case have claimed to be in possession of the land while the respondents have denied such assertion and have claimed to be the ones in possession of the land. The court notes that the 1st Respondent has already transferred one of the parcels to the 2nd Respondent yet the claimants are claiming a proprietary interest on both parcels of land. Further, it is noted that both parties claim to be in possession of the land. The court is of the view that no prejudice will be occasioned on the respondents if an order of inhibition is granted.

24. The court in upholding the principle of the lower risk of injustice in the case **FILMS ROVER INTERNATIONAL & OTHERS VS CANNON FILMS SALES LTD 1986 3 ALL E.R 772** stated as follows:

“It is my view that the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial outweighs the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case.” Balancing the two competing interests, the cause of justice will best be served if the order of inhibition is granted.

25. This court finds that an order of inhibition to prevent any further dealing on the suit parcels of land will lower the risk of injustice and preserve the land. Ownership is a seriously contested issue. An order preserving the property will best serve justice as the court determines the parties' proprietary interests on the land.

The upshot of the foregoing is that prayer 5 in the application, which is for inhibition, is granted. Costs of the application to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 3RD DAY OF NOVEMBER, 2021

In the presence of M/s Mutua for Kathungu for 1st Respondent/defendant, Kimanze for Andande for Plaintiffs/Applicants.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

03.11.2021