**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO. 33 OF 2019 (OS)**

**JOHN MAINA NGUNJIRI.....PLAINTIFF/APPLICANT**

**VERSUS**

**ESTHER WACEKE KIMANI (Sued as the Administrator of the estate of**

**Harun Kimani Musa-Deceased).....1st DEFENDANT/RESPONDENT**

**MOSES NGARI KIMANI.....2nd DEFENDANT/RESPONDENT**

**RULING**

1. Vide an Application by way of Notice of Motion dated 29th July 2019 brought under Order 40 Rule 1(a), and 3(3) of the Civil Procedure Rules, Section 1A, 1B, 3A, and 63(e) of the Civil Procedure Act and Article 22,40,45 and 64 of the Constitution of Kenya and all enabling provisions of the Law, the Applicant seeks for interim injunctive orders against the Respondents by themselves, their representatives, servants, agents and/or assigns from howsoever selling, alienating, trespassing onto and/or in any manner whatsoever interfering with or otherwise dealing with the property known as No. Gituamba/Muhotetu BLK 2/2486 (0.545 ha) (the suit property)

2. On the 29th July 2019 ex-parte orders of status quo were issued pending the hearing and determination of the Application.

3. Subsequently, the Application was opposed through the Respondents' Replying Affidavit of the 7th October 2019 for reason that the Applicant purchased 1 acre of land being Gituamba/Muhotetu/block 2/2482, land which he had taken possession of and which had been excised from land parcel No. LR Gituamba/Muhotetu/block 2/177 and not the 2.5 acres that he had lay claim to in land parcel No. Gituamba/Muhotetu/block 2/2486 which was registered to the 2nd Respondent.

4. By consent, parties agreed to dispose the Application by way of written submissions wherein in his submission, the Applicant framed their issues for determination as follows:

i. Whether there is an established a Prima facie case with a probability of success.

ii. Whether the Plaintiff Applicant is likely to suffer irreparable loss/injury.

iii. Whether the balance of convenience tilts in favour of the Plaintiff/ Applicant.

5. On first issue for determination and while placing reliance on the celebrated decision in **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125,** the Applicant submitted that in the year 1996, the deceased Harun Kimani sold to him and 3 other persons 2.5 acres of land which was to be excised from parcel No. Gituamba/Muhotetu Block 2/2411.

6. That upon sub division of Gituamba/Muhotetu Block 2/2411, the Applicant took possession of Plot No. Gituamba/Muhotetu Block 2/2486 and it was when the deceased Harun Kimani realized that the land was small by 1.2 acres that he had given the Applicant another plot No Gituamba/Muhotetu Block 2/2482 in addition.

7. That in 2018, the Applicant received notice from the 2nd Respondent to vacate from the suit land, land which he had been in occupation of long before the 2nd Respondent was allegedly registered as its proprietor.

8. The Applicant relied on the decided case of **Grace Chemutai Koech Vs Francis Kiplangat Chebiror & 2 Others [2018] eKLR** to

submit that he risked being evicted from the suit land and his property destroyed if the said temporary injunction was not granted.

9. The Applicant also relied on the decided case of **Olympic Sports House Limited vs School Equipment Center Limited [2012] eKLR** to submit that an injunction would ordinarily issue to arrest an illegality and where the law stood to be infringed so as to protect the parties and the law itself. The Applicant submitted that he had established a prima facie case in the circumstance.

10. On the second issue for determination, it as his submission that no one land could be equated to another. That although the value of the suit land could be ascertained, yet he could not be compensated in damages especially where he had established a clear breach of a legal right.

11. He relied on the decided cases in **JM Gichanga vs Co-operative Bank of Kenya Ltd [2005] eKLR** and **Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & 20 Others CA 111/2002 referred to in the case of Mbarak Islam Abeid vs Rural Electrification Authority & Another [2018] eKLR** to submit that a condition on irreparable loss in granting an injunction should not fall for consideration especially where the Applicant had proved a prima facie case with a probability of success which is what they had done in the present case by proving that he was the owner of the suit land by virtue of the sale agreement of 1996, his quiet possession, occupation and use thereafter for two decades.

12. Lastly, the Applicant submitted that the balance of convenience titled in his favour for having adduced sufficient evidence that he had been in possession and occupation of the suit property for more than twenty years in contrast to the 2nd Respondent who had only produced a title deed issued to him on the 14th November 2017.

13. Additionally, it was his submission that suit property ought to be preserved pending the hearing and determination of the suit by granting the injunction as was held in the case of **Naftali Ruthi Kinyua vs Patrick Thuita Gathure & Another [2015] eKLR.**

14. The Application was opposed by the Respondent in their submissions dated the 31st January 2020 in which they submitted that The deceased, Harum Kimani Musa had only sold to the Applicant a portion of 1 acre out of LR Gituamba/Muhotetu/Block 2/177 as per their annexed agreement, wherein the Applicant had taken possession and had been in possession of the said 1 Acre.

15. That it would beat logic for the deceased to have excised two separate portions of land for the same person and out of the same parcel of land. That LR Gituamba/Muhotetu/Block 2/2411 and LR Gituamba/Muhotetu/Block 2/2486 came into existence after the death of the deceased.

16. That pursuant to the determination of a Succession Cause for the estate of the deceased, parcel No. Gituamba/Muhotetu/Block 2/177 was distributed to the concerned beneficiaries and persons who had bought portions of the land from the deceased had also been given their respective portions of land and title deeds issued. That despite the knowledge of the succession proceedings, no objection proceedings to be recognized as creditor of the Estate, had been filed by the Applicant.

17. It was therefore the Respondent's submission that the Applicant herein had not established a prima facie case against him. That further, although the Applicant's claim was over a portion of 2.5 acres which was to be excised from land parcel No. Gituamba/Muhotetu/Block 2/2411, it was clear from the annexure marked as JMN 6 that the said parcel of land did not form part of the deceased's estate but rather, was registered to the 1st Respondent who caused it to be sub-divided into 5 portions.

18. That it was misleading for the Applicant to state that he had been in possession of land parcel No. Gituamba/Muhotetu/Block 2/2486 for more than 12 years yet it came into existence on the 11th October 2012 making it hardly 7 years since the claim was filed.

19. On the second principle, the Respondent submitted that the Applicant had not demonstrated the kind of irreparable loss he would suffer if the orders of injunction were not issued for reason. That he did not reside on the suit land No. Gituamba/Muhotetu/Block 2/2486 but had only planted nappier grass which was the only tangible thing on the said parcel of land and therefore he would not suffer any irreparable loss.

20. That it had been when the Applicant learnt that the 2nd Respondent had procured title to the said suit land No. Gituamba/Muhotetu/Block 2/2486, that he had started planting the nappier grass thereon. His entry on the said parcel of land was unlawful and therefore the balance of convenience could not tilt in favour of granting him the orders sought. They relied on the case of **Mbarak Islam Abeid** (Supra)

21. The Respondent submitted that the Applicant had not satisfied the principles of granting the injunction and as such his application should be dismissed.

**Determination.**

22. Having heard submissions by both sides as well as having regard to the annexures filed herein, consequently the pending issue for determination is whether this court should grant the Applicant an interim injunction pending the hearing of the suit.

23. The celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian **case of R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

i. Is there a serious issue to be tried( prima facie case)

ii. Will the Applicants suffer irreparable harm if the injunction is not granted;

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

24. On the first issue as to whether the Plaintiff/Applicants in this matter had made out a prima facie case with a probability of success. I am guided by the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described 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."*

25. Looking at the facts of this case as submitted, the Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

26. Has the Applicant herein demonstrated that he has a genuine and arguable case? In asserting the ownership rights over the suit property, the Applicant annexed a copy of a sale agreement between him and the deceased Harun Kimani Musa dated the 8th November 1996 for the sale of 2.5 acres for a consideration of ksh 90,000/=, land which was to be excised from parcel No 117 Majani Muhotetu.

27. It was his submission that the land was sub-divided and he took possession of part of the resultant land being No. Gituamba/Muhotetu/Block 2/2486, which was shy of 2.5 acres by 1.2 acres. The deceased, upon realizing that the land fell short of the agreed acreage, allocated to him the suit land parcel No. Gituamba/Muhotetu/Block 2/2482 measuring 0.405 hectares. That he took possession of parcels of land in 1997 where he constructed his permanent house, planted trees, began cultivating and grazing his animals. That unfortunately, the deceased died before he could transfer the land to him.

28. The 2nd Respondent on the other hand was categorical that his father had sold to the Applicant 1 acre of land to be excised out of land parcel No. Gituamba/Muhotetu/Block 2/177 wherein after he had put him in possession therein.

29. That via a Succession Cause, the estate of the deceased was distributed accordingly. That after parcel No. Gituamba/Muhotetu/Block 2/177 had been subdivided, the Applicant had been given his 1 acre being parcel No Gituamba/Muhotetu/Block 2/2482. The (2nd Respondent) was registered as proprietor of parcel No. Gituamba/Muhotetu/Block 2/2486.

30. The 2nd Respondent having demonstrated that he was the registered owner of the suit property namely No. No. Gituamba/Muhotetu/Block 2/2486 and having been issued with a title, prima facie his title is indefeasible and the burden thus shifted to the Applicant to show or demonstrate that the title was challengeable within the provisions of the law.

31. Since it is not disputed that the Applicant had been utilizing the suit parcel of land, by not granting orders of injunction so sought in a situation where the Applicant was in occupation and the Respondents were bent on dealing with the suit land, there could be an eviction at this interlocutory stage which would be premature and would cause irreparable harm to the Applicant who has been utilizing the suit land from 1997.

32. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Applicants claim of adverse possession but the mere fact that he has been in possession of the suit land since 1997 is sufficient to lead the court to hold that the Applicant has established that he has a prima facie case.

33. On the second issue as to whether the Applicant would suffer irreparable harm if the injunction was not granted, I have seen the pictures herein attached in his application that show that indeed there is activity that has been carried on the suit land in addition to the mature trees growing therein.

34. Based on the above findings, I am convinced that the Applicant has shown that he has beneficial interest in the suit land which is capable of being preserved and/or protected. The balance of convenience therefore tilts in favour of granting an interlocutory injunction as we await the conclusion of this case.

35. Accordingly, the court grants the Applicant the order of injunction sought, with the result that the Applicant's Notice of Motion dated 29th July 2019 succeeds with costs.

**Dated and delivered at Nyahururu this 6th day of May 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**