



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 456 OF 2017

PATRICK MWANGI WAWERU.....1ST PLAINTIFF/RESPONDENT

CECEILIA WANJIKU KIRRUTHI.....2ND PLAINTIFF/RESPONDENT

PETER MBOCHI WAWERU.....3RD PLAINTIFF/RESPONDENT

TERESIA MUGURE WAWERU.....4TH PLAINTIFF/RESPONDENT

VERSUS

WILLIAM NJIHIA KIMANI.....DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 1st November 2018 brought under *Order 40 Rules 1, 2, 3, and 4 and Order 51 Rule 1 and 3 of the Civil Procedure Rules* and Section 1A, 1B and 3A of the Civil Procedure Act where the Applicant seeks for interim orders of injunction against the Respondents in the counter claim injuncting them from interfering with parcel LR No. Nyandarua /Olaragwai/1694 and 7866.

2. The application was disposed of by oral evidence wherein the Applicant submitted that the Defendant who also happens to be the Plaintiff in the counter claim, is seeking for a temporary injunction restraining the Respondents from entering, remaining, demolishing structures, ploughing, planting and or evicting the Applicants from parcels No Nyandarua/Ol Aragwai/1694 and 7866 pending the hearing and determination of the counter claim, for the OCPD Engineer to ensure the orders issued are complied with and for costs.

3. They relied on the grounds set out on the face of the application and on the supporting affidavit sworn on the 1st November 2018 and a further affidavit sworn on 14th February 2019.

4. A brief history of the matter in question was that the Applicant acquired a portion of land measuring 20 acres from one Francis Waweru Mbachu, the initial Plaintiff in this matter, on the 29th November 1986 as per the annexed sale agreement herein marked as annexure No. WNK 1. The said land was to be excised from parcel No. Nyandarua/Ol Aragwai/77

5. The two titles deeds were issued on the 23rd December 1995 and assigned parcel No Nyandarua/Ol Aragwai 1693 and 1694 as per annexure WNK 2

6. That the Applicant had taken possession of the land in the year 1986 upon purchase and had started farming thereon after putting up some temporary structures which were occupied by his employees. That the Respondents have attempted to evict him by filing several court cases which have been withdrawn upon the Applicant filing his pleadings as per annexures marked as WNK 3.

7. That the initial Plaintiff had filed the instant suit in the year 2017, where his main prayer which happens to be the same prayers as that which the Plaintiffs seek in their amended plaint, was for an order of injunction restraining the Applicant from entering into the suit properties

8. From the prayers and averments in the plaints and amended plaint, it is clear that it is the Applicant who was in possession of the suit properties. That Parcel No. 7866 was a subdivision of parcel No 1693 and the said subdivision and transfer to the Plaintiff were done without the knowledge of the Applicant who still has in his custody the original title deeds dated 23rd December 1994 for parcels No 1693 and 1694.

9. Upon being served with Pleadings, the Applicant lodged a counter claim against the initial and current Plaintiffs where he sought for orders of injunctions.
10. On the 17th September 2018, the Respondents accompanied by their father and police officers from Murungaru police post trespassed into the suit property where they assaulted and evicted the Applicant and his employees and also burned their houses and properties as seen in the annexures marked as WMK 4.
11. The matter was reported at engineer police station and before completion of the investigations, on the 24th October 2019 the Respondents and officers at Murungaru police station invaded the suit properties and destroyed a mature food crop using a tractor as evidenced by the Agricultural officer's report dated 5th November 2018 and marked as annexure WNK 5.
12. That the heinous acts had been committed during the pendency of the suit and without a court order. The act of eviction was meant to steal a match from the Applicant by ensuring that he is not in possession of the suit property during the hearing of the matter. That at paragraph 11 of the supporting affidavit filed on 30th January 2019, the 4th Plaintiff admitted the acts complained of.
13. The Applicant seeks for protection of the court by way of injunction restraining the Respondents from committing further heinous acts. That the Respondents have attempted to justify their illegal acts by deponing that the title deeds in custody of the Applicant was revoked by the High Court. What they ought to have done was to seek for eviction orders from court, assuming that that was the position.
14. The Applicant has deponed that he heard of the orders cancelling his title deed after he had been served with pleadings filed on the 13th February 2018 by the initial Plaintiff in Engineer ELC suit No 4 of 2018.
15. That the said orders were issued on the 23rd November 2010 see annexure WNK 6 wherein he had sought for leave to appeal out of time and for the orders to be set aside
16. That the purpose of the injunctive orders so sought was so as to preserve the status quo on the property pending a final determination of the suit. That the status quo in this case was that it is the Applicant who was in actual possession of the suit property even after the acts were committed upon him.
17. That the Respondents ought not to be allowed to benefit from an illegal status quo which they purportedly created on the 17th September 2018 and 24th September 2018. The issue of ownership of the suit property was yet to be determined, and that they had satisfied the 3 principles set out in the case of **Giella vs Cassman Brown** to warrant the court to issue the injunctive orders sought.
18. In opposition of the said application, it was the Respondent's submission that there are two affidavits sworn by the 4th Respondents in the matter, being the affidavit dated the 16th November 2018, which was wrongly headed as supporting affidavit and the supplementary affidavit sworn on 30th January 2019 filed with the leave of the court.
19. That the gist of this matter was that there had been various cases filed in various courts between the original proprietor Francis Waweru Mbochi and the current Defendant, William Njehia Kimani, with the original case being Nairobi ELC Case No. 2761 of 1994 wherein vide a ruling, annexed to the supporting affidavit and marked as TWM 2(a), the court had directed the Land Registrar in Nyahururu land office to rectify the land register in respect of the suit property by cancelling the Plaintiff's name and re-instating the suit property back to the original proprietor, Francis Mboche.
20. That the ruling was delivered on 23rd November 2010 more than 8 years ago. There was further a subsequent ruling delivered in the same case by Hon J. Aburili on the 8th January 2016 dismissing yet another application by William Njehia Kimani the Defendant herein and ordering the Deputy Register to close the court file No. ELC 2761/94 and thereafter archive it as appropriate for referring by interested party.
21. Having lost in the High Court and having not appealed against the two decisions, the Applicant has now attempted to use the cancelled titles to hood wink this court into thinking that the titles are still valid so as to issue an injunction. He is estopped by record for doing so as against either the original antagonist or the present Plaintiffs.
22. That for the Applicant to establish a prima facie case, he ought to have demonstrated that he was the current registered proprietor of the suit properties herein. The Respondents had annexed to the supporting affidavits two title deeds marked TMW 1(a) and (b) respectively in respect of the suit properties which titles were clearly in their names. In the circumstances, an injunction cannot issue to a person who has come to court with unclean hands. That the Applicant had not annexed an official search or copies of the land register to show that he was the proprietor of the two parcels of land.
23. That the court had initially issued an order for the DCIO Nyandarua South /Engineer police station to come to court to give a report on the position on the ground in respect of the suit land. That was never to be and there is still a dispute as to who is in actual occupation of the suit premises.
24. According to the Respondents, at paragraph 10 of the supplementary affidavit the Applicant was not in possession of the suit land until the 12th April 2017 and again on the 3rd May 2017 when he forcibly entered upon the suit land and ploughed a portion of 13 acres and uprooted the barely crop planted by the 4th Respondent wherein he was forcibly removed as a trespasser by the Plaintiffs with the assistance of police officers. The removal was within the right conferred by law to evict a trespasser using reasonable force.
25. The Applicant could not now come to court to seek restoration of an illegal status quo created by an illegal entry on the suit land. That the

application before court is one though couched as an application for temporal injunction was in fact an application for a mandatory injunction. The Applicant was bound by his pleadings and the court has no jurisdiction to issue a mandatory injunction in place of a prayer for temporal injunction.

26. As regards the issue of damages, counsel submitted that the value of the barely crops stated in annexure 5 of the Applicant's/affidavit sworn on the 14th February 2019 clearly stated that the value of the oat crop was Ksh. 1,620,000/= which is capable of compensation in monetary terms upon successful hearing of the counter claim. They prayed that the application for injunction be dismissed.

27. In rejoinder, Counsel for the Applicant submitted that the mere fact that a party was in a position to compensate for the loss incurred should not be grounds for disallowing an application for injunction. Many other factors including the persons in possession should be taken into consideration.

28. That it was not true that the ruling dated 8th January 2016 by Justice Aburili was as a result of an application filed by the Applicant but rather it was as a result of an application annexed as JNK 3, filed by Francis Mbochi dated 7th January 2016 where he had sought for orders of injunctions against William Kimani and his employee Wainaina restraining them from trespassing on the suit premises which application had been dismissed.

29. That it was not true that the Applicant had taken possession of the suit property on the 22nd April 2017 and 23rd May 2017 as submitted, but as deposed in the supporting affidavit marked as WNK3, at paragraph 2 – 5, the Applicant in this matter had entered the suit property in June 2015.

30. That the Respondents and their father were not truthful when they purported to claim possession was in the year 2017. Further, it was not true that the orders sought in the present application were orders of mandatory injunction. That the Applicant was in actual possession of the suit property despite attempts to evict him and the mere fact that the Respondents hold titles did not justify their illegal acts of evicting the Applicant without a court order.

31. That the court had powers to protect the Applicant who had rights as the person in possession and occupation and which rights were registerable as a constructive trust. Counsel prayed that their application be allowed as drawn.

Determination.

32. The issue for determination by this court is whether the Applicant has established a prima facie case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the case of **Giella vs Cassman Brown [1973] EA 358** which sets out the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction by firstly establishing and demonstrating that they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

33. My first task is to determine whether the Applicant has demonstrated a prima facie case. A prima facie case was described as follows in the case of **Mrao v First American Bank (2003) KLR 125**;

“..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard that is higher than an arguable case.

34. Looking at the facts of this case, the court has been moved under 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.

35. The first issue that I need to consider for determination is whether the Applicant has established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.

36. I have considered all the material facts placed before me and find that the parties herein are disputing over the ownership of parcel of land No Nyandarua/Ol Aragwai 1693 and 1694 which parcels of land had initially been registered in the name of one Francis Waweru Mbochi.

37. On the 22nd December 2010, vide an order in the Nairobi High Court Civil suit No.2761 of 1994, in a matter that had been filed by the Applicant herein, who was the Plaintiff then, as against the Defendant one Francis Waweru Mbochi, the court had directed the Land Registrar in Nyahururu land office to rectify the land register in respect of the suit property No. Nyandarua/Ol Aragwai 1693 and 1694, by cancelling the title issued to the Plaintiff and re-instating the suit property back to the original position before the transfer to the Plaintiff. There having been no appeal filed, Francis Waweru Mbochi was registered as proprietor of parcels of land No. Nyandarua/Ol Aragwai 1693 and 1694 on the 12th January 2011 and 29th January 2016 respectively.

38. Parcel No. 1693 was later subdivided giving rise to several other parcels of land, parcel No. 7866 inclusive, and which land is registered in the name of Francis Waweru Mbochi. A title deed was issued on the 21st January 2016, to which effect, parcel No 1693 is no longer in existence.

39. On the 11th September 2017, Parcel No. Nyandarua/Ol Aragwai 7866 was registered to the name of the 1st Defendant/Respondent herein, while on the 16th October 2017, parcel No. Nyandarua/Ol Aragwai 1694 was registered to all the Respondents, the children of Francis

Waweru Mbochi. This was the status pertaining as at the time this application as filed. The Applicant has not provided any evidence to the contrary.

40. Section 26 of the land Registration Act obliges me to take the certificate of lease as conclusive evidence of proprietorship. It provides as follows :-

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

41. The Respondents having demonstrated that they were currently the registered proprietors of the suit property namely No. Nyandarua/Ol Aragwai 7866 and 1694 respectively, by virtue of the fact that they had been issued with a certificate of lease, prima facie their title is indefeasible and the burden shifts to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

42. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Respondents title but the mere proof that they hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicant has not established a prima facie case.

43. That having been said, I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed 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”.

44. Consequently, I dismiss the application dated the 1st November 2018 with costs to the Respondents.

45. Parties to comply with the provisions of order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 2nd day of July 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE