



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 13 OF 2012

PETER WANJUKI THEURIAPPLICANT

-VERSUS-

HANNINGTON WAMBUGU NJOROGE1ST RESPONDENT

CHARITY NJERI GAITHO 2ND RESPONDENT

RULING

A. INTRODUCTION

1. By an originating summons dated 18th December, 2012 expressed to be based upon **Order 37 rules 1 and 7** of the **Civil Procedure Rules 2010 (the Rules)** the applicant sought a declaration to the effect that the 2nd Respondent was registered as proprietor of *Title No. Tetu/Karaihu/107 (the suit property)* subject to a customary trust in his favour; in the alternative, that he had acquired a right to be registered as absolute owner of the suit property on account of adverse possession, an order for rectification of the register so that he is registered as proprietor in place of the 2nd Respondent; and costs of the suit.

B. THE APPLICANT'S APPLICATION

2. During the pendency of the said suit, the Applicant filed a notice of motion dated 27th January, 2021 under **Order 40** of the **Rules** seeking an interim injunction to restrain the Respondents from constructing, cutting down trees, or wasting the suit property pending the hearing and determination of the suit. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on 27th January, 2021 and the exhibits thereto.

3. The Applicant contended that he had been in possession and occupation of the suit property for over 50 years and that the Respondent had recently started cutting down trees and demolishing structures on the suit property. It was contended that unless restrained by injunction the Respondents shall continue with their wrongful actions with the consequence that he shall suffer great prejudice.

C. THE RESPONDENTS' RESPONSE

4. The 2nd Respondent filed a replying affidavit sworn on 3rd March, 2021 in opposition to the said application. He stated that the suit property was registered in the name of Charity Njeru Ngotho who had bought it for valuable consideration from the father of the 1st Respondent in 1999. It was further contended that at the time of purchase it was being utilized by the 1st Respondent's father and not the Applicant. He further stated that the Applicant was residing on a different parcel of land known as Thegenge/Ihithe/375 and that it was not true that he was in occupation of the suit property.

5. The 2nd Respondent denied that any acts of waste had been committed on the suit property and contended the acts complained of constituted normal user and cultivation of the suit property. The 2nd Respondent therefore considered the application to be frivolous and to have been brought in bad faith hence he urged the court to dismiss it with costs.

D. DIRECTIONS ON SUBMISSIONS

6. When the application was listed for hearing on 22nd February, 2021 it was directed that it shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their submissions. The record shows that the Applicant filed his submissions on 16th April, 2021 whereas the 2nd Respondent filed his on 9th April, 2021.

E. THE ISSUES FOR DETERMINATION

7. The court has considered the Applicant's notice of motion dated 27th January, 2021 together with the supporting affidavit, the 2nd Respondent's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Applicant has made out a case for the grant of an interlocutory injunction.*

(b) *Who shall bear costs of the suit.*

F. ANALYSIS AND DETERMINATION

(a) Whether the Applicant has made out a case for the grant of an interlocutory injunction

8. The court has considered the material and submissions on record on this issue. Whereas the Applicant contended that he had satisfied the requirements for the grant of an interim injunction, the 2nd Respondent contended otherwise. Both parties relied on the famous case of **Giella v Cassman Brown & Co. Ltd. [1973] EA**

358 in support of their respective positions whereas the 2nd Respondent also relied on the case of **Mrao Ltd. v First American Bank of Kenya Ltd & 2 Others [2003] eKLR**.

9. In the case of **Giella v Cassman Brown & Co. Ltd [1973]EA 358**, the court enunciated the following principles for the grant of an interim injunction:

(a) *An applicant must demonstrate a prima facie case with a probability of success at the trial.*

(b) *An injunction will not normally be granted unless the applicant demonstrates that he shall otherwise suffer irreparable loss or damage.*

(c) *Where the court is in doubt on (b) above it shall decide the application on a balance of convenience.*

10. The court has noted from the material on record that despite the 2nd Respondent's denial, the Applicant appears to have been in possession of the suit property for a long period of time and he appears to have developed it over the years. This is evident from the exhibits to the originating summons which indicate that the Applicant had obtained permits from Kenya Tea Development Authority in 1993 and 1994 to operate a tea nursery and tea

plantation on the suit property. There is further evidence in the form of a replying affidavit to the originating summons sworn by the late Charity Njeri Ngotho on 15th January, 2013 in which she indicated that the Applicant was merely a trespasser who should be evicted from the suit property.

11. The court has also noted that the 1st Respondent filed a replying affidavit sworn on 14th February, 2013 in answer to the originating summons in which he contended that the Applicant was merely cultivating the suit property as a licensee and that he was actually residing on parcel 374. It was further stated that during succession proceedings in Nakuru High Court Succession Cause No. 629 of 2003 the suit property was lawfully granted to the 2nd Respondent as purchaser for value.

12. It was further contended that during the process of land consolidation and land adjudication the Applicant's father was allocated parcel 374 which he caused to be registered in the name of the Applicant's eldest brother Gathua Thiuri. It was contended that is where the Applicant's entire family settled and their deceased mother was buried there.

13. The 2nd Respondent further contended that in 1999 the Applicant was given a chance to purchase the suit property but he failed to raise the required purchase price hence it was sold to a third party.

14. The court has noted that the Applicant did not file any further affidavit to controvert the 1st Respondent's allegations in his replying affidavit. He did not also file any further affidavit to refute the 2nd Respondents' replying affidavit sworn on 3rd March, 2021 that she was actually resident on parcel 375. It would thus appear that the Applicant is in possession of the suit property for farming purposes whereas he resides in parcel 375.

15. The court has further noted from the copy of the green card attached to his affidavit in support of the originating summons that on 18th January, 2006 the Applicant lodged a caution against the suit property claiming interest as a **purchaser**, developer and beneficiary. He did not, however exhibit a copy of the affidavit accompanying the caution to enable the court identify the nature of the purchaser's interest claimed. That may lend credence to the 1st Respondent's contention that the Applicant was given the option of purchasing the suit property but he ultimately failed to raise the purchase price.

16. The court is not satisfied on the basis of the material on record that the Applicant has made out a *prima facie* case with a probability of success at the trial. There is no *prima facie* evidence of a trust on the basis of the material on record. There is no *prima facie* evidence of adverse possession on record. The Applicant has never controverted the 1st Respondent's sworn affidavit on how the Applicant and his late

mother came into possession of the suit property. The mere fact of possession or cultivation does not necessarily create a customary trust or adverse possession in favour of the possessor. Since the action is pending trial, the court need not say more on the issues which shall be the subject of the trial.

17. The court has also considered the material on record against the second principle on irreparable loss or damage. The court has noted that the Applicant has not alleged or demonstrated in his supporting affidavit that he shall suffer irreparable loss or injury in the absence of an injunction. All the Applicant did was to allege that he shall suffer great *prejudice* unless the injunction sought was granted. The nature and extent of the apprehended loss or prejudice was not disclosed. The felling of trees does not necessarily constitute irreparable loss and neither does the destruction of structures. There was no allegation and demonstration that the Applicant cannot be adequately compensated with an award of damages for whatever loss or prejudice he may suffer.

18. In the case of **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal considered the element of irreparable loss as follows:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is,

injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

19. Having found that the Applicant has failed to demonstrate a *prima facie* case with a probability of success at the trial and the element of irreparable loss, the court is of the opinion it is not necessary to consider the third principle on balance of convenience. In the premises, the court finds that the Applicant has failed to satisfy the requirements for the grant of an interim injunction as set out in the case of **Giella v Cassman Brown & Co. Ltd (supra)**. Accordingly, the court is not inclined to grant the injunction sought.

(b) Who shall bear costs of the application

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the application. Accordingly, the 2nd Respondent who participated in the application shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL ORDER

21. The upshot of the foregoing is that the court finds no merit in the application for interim orders. Accordingly, the Applicant’s notice of motion dated 27th January, 2021 is hereby dismissed with costs to the 2nd Respondent only.

22. The court has noted that although directions on the hearing of the originating summons dated 18th December, 2012 were given on 27th June, 2013, the Applicant has never taken steps to set down the suit for hearing on merit. Accordingly, the court shall make directions for the parties to file their respective trial bundles in preparation for hearing. The court, therefore make the following orders:

(a) *The Applicant’s notice of motion dated 27th January, 2021 is hereby dismissed with costs to the 2nd Respondent.*

(b) *The parties shall file and exchange their respective case summaries, issues for determination and trial bundles, duly bound and paginated within 30 days from the date hereof.*

(c) *The parties shall be at liberty to file any additional documents and witness statements and incorporate them into their respective trial bundles within the period specified in order (b) above.*

(b) *The suit shall be mentioned on 21st September, 2021 to confirm compliance and fix a hearing date.*

Orders accordingly.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 16TH DAY OF JUNE 2021.

In the presence of:

No appearance for the Applicant

No appearance for the Respondents

Court assistant – Wario

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Y. M. ANGIMA

ELC JUDGE