



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC SUIT NO. 19 OF 2020**

**MICHAEL NDONG'ONG'I NJIRU.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JUSTIN KITHAKA NJIRU .....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**JUSTA NGITHI .....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**GACONI NJIRU ..... 4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**GABRIEL MAGARA NJIRU .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NJERU NJIRU .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The application before me for ruling is a Motion on Notice dated 29.7.2020 filed by the applicant on even date. It is expressed to be brought under Order 40 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act (Cap 21) and Section 68 of the Land Registration Act, 2012. The substratum of the suit is an Originating Summons contemporaneously filed with it and dated the same. The applicants in the application- **MICHAEL NDONGONGI NJIRU, JUSTIN KITHAKA NJIRU, JUSTA NGITHI** and **GACONI NJIRU** - are the plaintiffs in the suit while the respondents – **GABRIEL MAGARA NJIRU and NJERU NJIRU** - are the defendants.

2. The motion came with six (6) prayers but prayers 1 and 2 are now moot as they were for consideration at the *ex parte* stage. The prayers for consideration now are therefore four (4) – prayers 3,4,5 and 6 - and I hereby set them out hereunder ***ipssisima verba*** (word for word),

**Prayer 3: That the honourable court be pleased to inhibit any dealings with parcels of land No's EMBU/MAVURIA/319 and EMBU/MAVURIA/1033 pending the hearing and determination of the Originating Summons.**

**Prayer 4: That the Honourable court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants by themselves, their servants, agents workmen and/or whomsoever from evicting, interfering with the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs quite enjoyment of the two acre portion that the 1<sup>st</sup> plaintiff occupies on parcel of land No. EMBU/MAVURIA/1033, and the two acre portion. That the 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs occupy on land parcel No. EMBU/MAVURIA/319 pending the hearing and determination of the suit.**

**Prayer 5. That in the alternative to prayer 4 above, the Honourable court be pleased to order that the status quo regarding the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs peaceful occupation and access of parcels of land No's EMBU/MAVURIA/1033 and EMBU/MAVURIA/319 be maintained pending the hearing and determination of this suit.**

**Prayer 6: That the costs of this application be provided for.**

3. The application is anchored on the grounds, inter alia, that the respondents have threatened to evict the applicants and disturb their quiet enjoyment of the land. The applicants averred that the orders should be granted to safeguard their interest in the suit land and to meet the ends of justice. They further averred that they have a prima facie case and also stand to suffer irreparably if the orders are not granted. According to the applicants the respondents will not suffer any prejudice if the orders are granted.

4. The application came with a supporting affidavit deposited by 1<sup>st</sup> applicant. In it, the 1<sup>st</sup> applicant stated, inter alia, that the suit properties – parcels No. 319 (1.8 Ha) and 1033 (2.2 Ha) – were originally a single parcel of land, designated during adjudication process as plot No. 319 and registered in name of Njiru Gakuya at the time. Its size then was about 10 acres (4.04Ha). Njiru Gakuya is said to be the father of all the

first three applicants and husband to the fourth. He said to have died in 1974. He was also the father of the two respondents.

5. After Gakuya's death, the adjudication records were amended sometimes in 1975 and then the land was subdivided into two. One parcel retained the original number 319 while the other became parcel No. 1033. The new parcel no. 319 was recorded in the name of 1<sup>st</sup> respondent while the other parcel No. 1033 was recorded in the name of 2<sup>nd</sup> respondent. Some adjudication records and copies of searches were made available to give credence to this averment.

6. The Applicants allege that they were born and brought up on the land and when they came of age sometimes in 1991 the 1<sup>st</sup> respondent apportioned to each two (2) acres to settle on. They averred that they have developed their respective parcels and that the respondents and their children have started destroying their developments. They stated further that attempts to resolve the problem within family and clan circles have not been fruitful.

7. The applicants therefore seek a temporary injunction, an order of inhibition and/or an order for maintenance of status quo on the ground that it has become unbearable for them to reside on the land. They fear that the respondents may make good their threats and that would render them homeless. The suit land, they said, is the only place they have known as home.

8. The 1<sup>st</sup> respondent responded via a replying affidavit dated 12.8.2020. From the response, it is clear that the dispute is a family affair. It became clear too that the two parcels of land were originally one parcel then known as PLOT NO. 319. But according to the respondents, Gakuya, the family Patriarch, made it clear before his death that the land would belong to the two of them.

9. The death of Gakuya was said to have preceded the subdivision process but when subdivision eventually took place, the two respondent became the registered owners. The applicants were said to have been made aware of the whole process. The respondents denied the allegation that they hold the land as trustees. They averred that it is them, not the applicants, who have made developments on the land. The applicants were said to be trespassers.

10. There was also a further affidavit in response and this one is meant to dispel any notion that the applicants may be entitled to the land as adverse possessors. According to the respondents, the applicants are on the land courtesy of their permission. And the portions they occupy are not two acres each; it is ½ acre for each. The court was urged to dismiss the suit as the land belongs to the respondent. Further it was alleged that no damage would be suffered by the applicants as the suit has no chance of success and is an abuse of the court process.

11. The application was canvassed by way of written submissions. The applicant's submissions were filed on 9.4.2021. They relied heavily on the substance of their notice of Motion and the supporting affidavit. According to them, they have sufficient evidence to show that the suit properties are family land which the respondent hold in trust for them. They cited the case of **SELLY JEPCHUMBA SAMOEI & 3 OTEHRS VS KEMEI ARAP SAMOEI [2020] eKLR**, which relied on the decided case of **ISACK M'INANGA KIEBA VS ISAAYA THEURI M'LINTARI & Another; Supreme Court Pet. NO. 15 of 2015** to establish the existence of a customary trust. They submitted that they have a prima facie case and stand to suffer if they are evicted. They further submitted that the balance of convenience tilts in their favour.

12. The respondent's submissions were filed on 12.4.2021. Like the applicants, they relied on the two affidavits that they filed in response to the application. According to the respondents, adverse possession is not provable and this is so because the applicant's possession of the land is through permissible arrangements with them. The applicants were also said not to be in complete physical control and possession of the land. Twelve years were also said not to have expired since title was issued for parcel No. 1033.

13. Further, the respondents cited section 26 of the Land Registration Act in support of their averment that the title is to be held as conclusive evidence of ownership unless the contrary is shown or proved. They submitted too that in granting injunctive relief the court should always opt for the lower rather than the higher risk of injustice. They cited the case of **MADALINA MWARI & Another vs JANE KATHRE EZEKIEL [2017] e KLR** which cited with approval the case of **BERNACETTA ATSIENO QUESANGE vs JOSEPH M. SAKWA & 60 others HCCC NO. 77/ 08, KAKAMEGA** to drive the point home.

14. The respondent also outlined the threshold to be met for grant of injunctive orders as spelt out in the case of **GIELLA VS CASMAN BROWN & CO. LTD [1973] EA 358**. According to them, they are the registered owners of the land and the applicants claim as adverse possessors cannot defeat their ownership. This being the position, the applicants were said to have no prima facie case with probability of success. The respondents sought reliance on the decided case of **JAMES MWANIKI MUKUA & Another vs MARK MUGEKENY, KARIUKI & 2 others [2018] eKLR** to persuade the court to hold that no prima facie case is established. The applicants were also said to be unlikely to suffer irreparably. The court was urged to dismiss the application.

15. I have had a look at the entire court record generally. I have considered the application, the responses made, rival submissions, and the cited decided authorities. The applicants want an order of temporary injunction, an order of inhibition, or, as alternative, an order for maintenance of Status Quo.

16. The prayer for inhibition is captured or expressed in prayer 3. An order for inhibition is provided for under Section 68 of the Land Registration Act, 202. That section has three sub-sections as follows:-

*“68 (1) 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*

*(2) A copy of inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the registrar, who shall register it in the appropriate register.*

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

Further provisions about inhibitions are to be found in Sections 69 and 70 of the same Act.

17. In **Rosemary Wanjiku Njigi vs Nancy Munjiru Ngige [2013] eKLR**, LN Gacheru J cited with approval the decision of Makau J in **JAPHET KAIMENYI M'NDATHO VS M'NDATHO M'MBWIRIA [2012] eKLR** where the conditions necessary for grant of an order of inhibition were stated as follows:-

- a) *That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.*
- b) *That the refusal to grant orders of inhibition would render the applicant's suit nugatory.*
- c) *The applicant has an arguable case.*

18. I may venture to add that the above conditions are not exhaustive. An order of inhibition would also issue where there are genuine concerns or fears that the title of the land may be interfered with in a manner prejudicial to the claimed interest of the applicant. An example is where the land may be sold to third parties or transferred to children of those who are sued. In this regard, it would be true to say that the circumstances obtaining or prevailing in a given case are to be appreciated and considered in deciding whether or not to grant an order of inhibition. And those circumstances may vary from case to case.

19. Having read the court record generally in this matter, my considered view is that the applicants have an arguable case. The applicants have also expressed their fear that they may be evicted. There is no telling what might happen if such evictions take place. It is not inconceivable that the respondents may wish to subdivide the land and transfer it to their children or sell to parties who may not be aware of the case.

20. I am therefore persuaded that an order of inhibition would help to preserve the register of the two parcels of the land until this matter is decided. I therefore grant an order of inhibition as prayed.

21. Prayer 4 relates to an order of injunctive relief. It is clear to me that all the parties reside on the land. The locus classicus case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358** provides the guiding requirements necessary for grant or refusal of temporary injunctive relief. In that regard, the applicant is required to show a prima facie with a probability of success; demonstrate the real likelihood of suffering irreparable loss that cannot be compensated by an award of damages; and/or decide the application on a balance of convenience if in doubt.

22. The applicants have submitted that the suit properties were owned by their late father but were later vested in the respondents as their elder brothers in trust for them. The respondents have denied the issue of trust but have acknowledged that indeed the land was owned by the father as claimed by the applicants. The mere fact that the land was owned by the late family patriarch - and with no evidence or suggestion that the applicants have been living elsewhere and are only belatedly coming to claim the land - seems to suggest to me that a prima facie case is well established. And I hold that it is.

23. Then there is the issue of irreparable loss. If, as seems to be the case here, the applicants have been living on the land all along, any eviction would seriously affect them and their families. Any interference with their activities or developments on the suit land would also be ruinous to them. In my view the respondents are likely to suffer irreparable loss that damages may not adequately compensate.

24. An injunctive order would also help in maintaining the Status Quo. In Law, the order is often issued to serve that purpose. For instance in **Otieno vs Ougo & Another (102) (1987) KLR 400**, the court observed clearly that the established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action.

25. I will not address the issue of the balance of convenience as I am not in doubt concerning the fact that the first two requirements in Giella case (Supra) have been met. The law requires that you only address this limb if you are in doubt.

26. I am persuaded therefore that I should grant an order of temporary injunction and I hereby grant it as asked for in prayer 4. Prayer 5 is an alternative one and is only meant to be considered if prayer 3 and/or 4 are not granted. As prayer 3 and 4 are granted, this prayer is therefore un-necessary. Prayer 6 is about costs. I hereby order that the costs of this application be in the cause.

Ruling read and delivered in open court this 3<sup>rd</sup> day of June 2021.

In the presence of:

Plaintiff/applicant – present

Defendant/respondent – present

Court Assistant - Leadys

Interpretation – English/Kiswahili

Mayaga for Mwirigi for the defendant/respondent

Rose Njeru for applicant/plaintiff

Ruling on the application dated 29.7.2021 read and delivered in open court.

Right of appeal 30 days.

**A.K. KANIARU**

**JUDGE. – 3.6.2021.**