



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 184 OF 2016

WAMAMU UNITED COMPANY LIMITED.....PLAINTIFF

-VERSUS-

JOSEPH GITHIRA MUCHIRI..... 1ST DEFENDANT

JOSEPH MUTHUA WACHIRA.....2ND DEFENDANT

GIDEON MAINA WAGEKE.....3RD DEFENDANT

CHARLES MUNUHE MUGWERU..... 4TH DEFENDANT

RULING

A. THE PLAINTIFF'S APPLICATION

1. By a notice of motion dated 28th September, 2021 based upon **Order 40 rule 1** of the **Civil Procedure Rules, 2010** the Plaintiff sought the following orders against the Defendants:

(a) Spent.

(b) Spent.

(c) That the Respondents, their agents and/or servants be restrained by a temporary injunction from further encroachment on, leasing out or in any other way further dealing with the suit land L.R. No. 3277/4, Pesi/L. Laikipia pending the hearing and determination of this suit.

(d) That the Officer Commanding Station, Rumuruti Police Station be directed to enforce the orders herein.

(e) That costs be provided for.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Duncan Wamai Mugwe on 20th September, 2020 and the exhibits annexed to the affidavit. The gist of the Plaintiff's case was that it was the registered owner of the suit property and had allowed the Defendants to occupy only 30 acres thereof but the Defendants had recently started leasing to strangers large portions of the suit property beyond the area in their actual occupation.

B. THE DEFENDANTS' RESPONSE

3. The Defendants filed a replying affidavit sworn on 15th March, 2021 by Joseph Githira Muchiri. It was contended that the Defendants were *bonafide* purchasers of the suit property and that it was the Plaintiff who was seeking to encroach on their property. They claimed to have been in occupation of the suit property for

over 40 years and that it was the Plaintiff who had delayed in processing the requisite transfer documents in their favour. The Defendants exhibited copies of allotment letters, ballot papers and share certificates which they claimed demonstrated their interest in the suit property.

4. The Defendants further contended that they and their families were in occupation of the entire suit property and not just 30 acres as alleged by the Plaintiff. They contended that there was no vacant land on the suit property. It was their contention that should the interim injunction sought be granted then they shall effectively be evicted from the suit property before the suit and their counterclaim are heard and determined. The Defendants also disputed that the photographs exhibited by the Plaintiff were taken on the suit property.

C. DIRECTIONS ON SUBMISSIONS

5. When the application was listed for hearing on 8th March, 2021 it was directed that it shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their submissions. The record shows that the Plaintiff's submissions were filed on 16th April, 2021 whereas the Respondents' submissions were filed on 30th April, 2021.

D. THE ISSUES FOR DETERMINATION

6. The court has perused the Plaintiff's application for an interim injunction, the Defendants' 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 Plaintiff has satisfied the requirements for the grant of an interim injunction.*

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

E. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff has satisfied the requirements for the grant of an interim injunction

7. The court has considered the submissions and material on record on this issue. Whereas the Plaintiff contended that it had satisfied

all the requirements for the grant of an interim injunction, the Defendants contended otherwise. The parties cited various authorities in support of their respective positions. However, there is one common authority which was cited by all the parties, that is, the famous case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**.

8. In the said case the former East African Court of Appeal enunciated the following principles for the grant of an interlocutory 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.*

9. There is no dispute in this matter that the Plaintiff is the registered proprietor of the entire suit property. The Defendants, on the other hand, claimed an interest in the suit property as *bona fide* purchasers from the Plaintiff. They claimed that it was the Plaintiff who had delayed to process the relevant transfer and ownership documents in their favour. The court has noted that none of the copies of the documents exhibited by the Defendants make reference to the suit property. In fact, some of the documents do not even bear their names. The court is thus satisfied that the Plaintiff as the owner of the suit property has demonstrated a *prima facie* case with a probability of success at the trial as required by law.

10. The court has considered the material on record against the second principle. Apart from alleging that the Defendants' actions were illegal and that the Plaintiff had suffered 'great harm', the Plaintiff did not allege that it shall suffer irreparable loss which cannot be adequately compensated by an award of damages. The nature and extent of the alleged loss was not disclosed and demonstrated by the Applicant.

11. In the case of **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal considered irreparable injury 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.”

12. The court is far from satisfied that the Plaintiff has demonstrated any risk of irreparable loss or injury on the basis of the material on record. The element of irreparable loss was neither alleged nor demonstrated as required by law. Accordingly, the court finds and holds that

the Plaintiff has failed to satisfy the second crucial requirement for the grant of an interim injunction.

13. Even if the court were to consider the balance of convenience, the material on record indicates that the Defendants are in possession of the suit property. What is in dispute and unclear from the affidavits and exhibits on record is whether they are in occupation of the whole or only a small portion of the suit property. The court is of the opinion that the balance of convenience would still tilt in favour of the Defendants who appear to have established their homes on part of the suit property. Accordingly, the court finds that the Plaintiff has failed to satisfy the requirements for the grant of the interim injunction sought.

(b) Who shall bear costs of the application

14. 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**. In the case of **Giella v Cassman Brown & Co. Ltd (supra)** the court held that the appropriate order to make is for costs in the cause where the application is allowed and costs against the applicant where the application is dismissed. Accordingly, the court is inclined to dismiss the application for injunction with costs to the Defendants.

F. CONCLUSION AND DISPOSAL

15. The upshot of the foregoing is that the court finds that the Plaintiff has failed to satisfy the requirements for the grant of the interim injunction sought. Accordingly, the Plaintiff's notice of motion dated 28th September, 2020 is hereby dismissed with costs the Defendants.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 3RD DAY OF JUNE 2021.

In the presence of:

Mr. Mugo holding brief for Mr. C. M. King'ori for the plaintiff

Ms Wambui Mwai holding brief for Mr. Gitonga for the Defendants

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Y. M. ANGIMA

ELC JUDGE