



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 16 OF 2020

MUNYILA KILONZO.....APPLICANT

VERSUS

WAMBUA MUTIKU.....1ST RESPONDENT

KYALO WAMBUA.....2ND RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff's/Applicant's application expressed to be brought under Sections 1A, 1B, 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya and Order 40 Rule 1(a), 2 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law for orders: -

i) Spent.

ii) Spent.

iii) Spent.

iv) That court be pleased to make interim orders that the Defendants/Respondents by themselves, their agents and or servants be restrained from entering into and/or trespassing on, remaining on, and or erecting/constructing houses or buildings, cutting down trees, digging terraces, cultivating on, or any one claiming through them and/or any other manner whatsoever interfering with the land parcel number NZAUI/KIKUMINI/609 pending the hearing and determination of the main suit.

v) That there be an order of eviction against the Defendants from the said property being NZAUI/KIKUMINI/609.

vi) That the orders be enforced by the OCS NZAUI police station.

vii) That cost of the application be borne by the Defendants/Respondents.

2. The application is dated 17th January, 2020 and was filed in court on 14th July, 2020.

3. It is predicated on the grounds that the estate of Kilonzo Nthiwa (deceased) is the registered owner of land parcel number Nzau/Kikumini/609, that the Defendant/Respondent has been cutting down trees, cultivating, digging terraces, selling and committing other acts of wastes (sic) on the said land, that the Plaintiff/Applicant and more so the estate of the deceased has been denied use and enjoyment of the said parcel of land and has been subjected to great inconvenience, loss and damage and that unless restrained by this court, the Defendant/Respondent will continue cultivating on and or cutting dozen trees on or remain in wrongful occupation of the suit property and or trespass thereon.

4. The Plaintiff/Applicant has further supported the application vide her supporting affidavit sworn at Nairobi on 17th January, 2020.

5. The Defendants/Respondents have opposed the application vide the replying and further affidavits of Wambua Mutuku, the 1st Defendant herein, sworn on his own behalf and with the authority of the 2nd Defendant/Respondent. The two affidavits are dated 19th October, 2020 and 9th November, 2020 respectively.

6. The application was canvassed by way of written submissions.

7. The Plaintiff/Applicant has deposed inter alia that she is the administrator of the estate of Kilonzo Nthiwa (deceased), the registered owner of land parcel number Nzau/Kikumini/609 as shown by copies of certificate of official search and letters of administration ad litem annexed to paragraph 1 of her affidavit as **MK – 1(a) and (b)** respectively, that the Defendants/Respondents have been erecting/constructing houses, cutting down trees, cultivating, digging terraces, selling and committing other acts of waste on the said land parcel despite her pleas to stop doing so and that she will suffer great loss which cannot be compensated by any award of damages since the suit land is valuable and she is unable to utilize it.

8. The 1st Defendant/Respondent has deposed inter alia in his replying affidavit that land parcel number Nzau/Kikumini/609 is family property which ought to be shared between Kilonzo Nthiwa (deceased) and their late grandmother Kithia Nthiwa, that during the process of land adjudication, the aforesaid land was registered in the name of Kilonzo Nthiwa (deceased) as he was the elder son of one Mbane Nthiwa (deceased) who was the original owner of the land, that they have lived on the suit land for more than 40 years and built a permanent home and developed their portion for all those years and it is laughable that the Plaintiff/Applicant wants to have them evicted, that an order of status quo pending the hearing and determination of the main suit would be appropriate.

9. In their submissions, the learned counsel for the Plaintiff/Applicant urged the court to allow the application since the Defendant/Respondents have not given sufficient reasons in their replying affidavit. The counsel relied on the cases of **Zablon Kamau Nyoro (suing as the legal representative of the estate of John Nyoro Ngigi -Vs- Lason Mayodi Ombisa & 2 Others [2019] eKLR** and **Kenleb Cons Ltd -Vs- New Gatitu Service Station Ltd & Another [1990] eKLR**.

10. On the other hand, the learned counsel for the Defendants/Respondents cited the case of **Giella -Vs- Cassman Brown & Company Ltd [1973] EA 358** and submitted that the Plaintiff/Applicant has not satisfied the three principles enunciated in the aforementioned case for the grant of an order of interlocutory injunction.

11. Having read the application, the replying and further affidavits as well as the rival submissions filed by the counsel for the parties on record, I would agree with the counsel for the Defendants/Respondents that the principles for the grant of interlocutory injunction are as enunciated in Giella's case (supra). The counsel for the Plaintiff/Applicant misdirected himself in his submissions. In my view his submissions would have been appropriate after the substantive hearing of the main suit. Needless to say, the order of eviction sought at interlocutory stage would, if granted, determine the suit. This is bound to cause injustice to the Defendants/Respondents. I need not emphasize the fact that the purpose of an interlocutory injunction is to preserve the suit property so as to enable the parties to present their respective evidence during the substantive hearing of the suit. Suffice it to say, the Plaintiff/Applicant has not shown that she has a *prima facie* case with probability of success and that she will suffer irreparable injury if the injunction is not granted. Reading the affidavit evidence, I am not in doubt so as to decide the application on a balance of convenience.

12. The upshot of the foregoing is that the application has no merits and same is dismissed with costs.

SIGNED, DATED AND DELIVERED VIA EMAIL AT MAKUENI THIS 30TH DAY OF JULY, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi.