



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 6 OF 2020 (OS)

JAMES GACHRI MWANGI PLAINTIFF

-VERSUS-

JOHN WAWERU MURIUKI 1ST DEFENDANT

SARAH WAITHERA WAWERU2ND DEFENDANT

SAMWELWAWERU NDUNGU3RD DEFENDANT

MARTIN MACHARIA WAMBUI4TH DEFENDANT

RULING

A. THE PLAINTIFF'S APPLICATION

1. By a notice of motion dated 25th February, 2020 brought under **Order 50 rule 2 and Order 40 rules 1 & 3 for the Civil Procedure Rules, 2010 (the Rules), and Sections 1A, 1Bnd3A of the Civil Procedure Act (Cap. 21)**, the Plaintiff sought a temporary injunction restraining the Defendants from entering, farming, depositing building materials, erecting structures and beacons, evicting the Plaintiff or interfering with his quiet enjoyment of Title No. Laikipia/Marmanet/2294 and 2295 which were sub-divisions of Title

No. Laikipia/Marmanet/55 (extension) (*Parcel 55*).

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 the Plaintiff on 25th February, 2020 and the exhibits thereto. The Plaintiff contended that he bought a portion of 1.25 acres from the 1st and 2nd Defendants in 2007 which was to be excised from parcel 55. It was further contended that even though he took possession thereof, the 1st and 2nd Defendants had failed to transfer that portion to him and that they had purported to sell and transfer the same to the 3rd and 4th Defendants. It was also contended that the latter had deposited building materials on parcels 2294 and 2295 and threatened to evict the Plaintiff therefrom.

B. THE DEFENDANTS' RESPONSE

3. There is no indication of the 1st and 2nd Defendants having entered appearance to the suit or having filed a response to the application even though the order sought affects them as well.

4. The 3rd Defendant filed a replying affidavit sworn on 23rd April, 2020 in opposition to the application. He stated that he was the sole and absolute proprietor of parcel 2295 having bought it for valuable consideration in 2019 from the 1st and 2nd Defendants who were then the registered proprietors and the persons in possession thereof. He further stated that he took possession in 2019 and dug a borehole and pit latrine thereon and later on fenced it. The 3rd Defendant contended that the Plaintiff had failed to satisfy the legal requirements for the grant of an injunction and prayed for the application to be dismissed.

5. The 4th Defendant filed a replying affidavit sworn on 16th April, 2020 in opposition to the application. He similarly stated that he was the registered proprietor of parcel 2294 together with one, Mary Wangechi Wambugu having bought it for valuable consideration in 2018 from the 1st and 2nd Defendants. He contended that he took possession thereof and deposited construction materials thereon in January, 2019. He further stated that in February, 2020 he dug a pit latrine and fenced the said parcel.

6. The 3rd and 4th Defendants further contended that by the time the Plaintiff obtained *ex parte* interim orders for maintenance of the *status quo* they were already in possession of their respective parcels hence a grant of the interim injunction would result in their eviction from their respective parcels of land. They contended that the Plaintiff's application lacked merit and that it was an abuse of the court process. They consequently asked the court to dismiss it with costs.

C. DIRECTIONS ON SUBMISSIONS

7. When the said application was listed for directions on 2nd March, 2021 it was directed that the application shall be canvassed through written submissions. The parties were granted 14 days each to file and serve their respective submissions. The record, however, shows that the Plaintiff filed his submissions on 25th May, 2021 whereas the 3rd and 4th Defendants filed theirs on 7th June, 2021. There is no indication of the 1st and 2nd Defendants having filed any submissions.

D. THE ISSUES FOR DETERMINATION

8. The court has considered the Plaintiff's application for a temporary injunction, the 3rd and 4th Defendants' replying affidavits in opposition thereto and 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 a temporary 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 a temporary injunction

9. The court has considered the submissions and material on record on this issue. The Plaintiff submitted that he had satisfied the requirements for the grant of an injunction as set out in the case of **Giella v Cassman Brown & Company Limited [1973] EA 358**. The Plaintiff also relied upon the cases of **Mrao Limited v First American Bank of Kenya and 2 Others [2003] KLR 125**, **Robert MugwaKaranja v Eco Bank (Kenya) Limited and Another [2019] eKLR**, **Pius KipchirchirKogo v Frank Kimeli [2018] eKLR** and the case of **Carol Silcock v Kassim Sharif Mohammed [2013] eKLR** among others in support of his application.

10. The 3rd and 4th Defendants, on the other hand, submitted that the Plaintiff had failed to satisfy the requirements for the grant of an interim injunction as required by law. They contended that the Plaintiff had failed to demonstrate a *prima facie* case with a probability of success at the trial. They relied upon the case of **Mrao Limited v First American Bank of Kenya Limited and 2 Others (supra)** in support of that submission. They further contended that they had already taken possession and partially developed the suit properties before the instant suit was filed hence granting an injunction would be tantamount to evicting them.

11. The principles for the grant of an injunction were enunciated in the case of **Giella v Cassman Brown and Co. Ltd (supra)** as follows:

- (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.

12. It is evident from the material on record that the Plaintiff bought a portion of 1.25 acres from the 1st and 2nd Defendants which was to be excised from parcel 55. It is also evident that the 3rd and 4th Defendants bought parcels 2294 and 2295 and that they were excised from parcel 55 which measured about 2.1 ha. The record shows that the 3rd Defendant bought 0.345 ha. whereas the 4th Defendant bought about 0.2 ha. out of parcel 55. It is not clear from the material on record what happened to the balance of parcel 55.

13. Whereas the portions of land sold to the 3rd and 4th Defendants out of parcel 55 appear to have been surveyed and designated as parcel Nos 2295 and 2294 respectively, there is no material on record to show on which portion of parcel 55 the Plaintiff's portion was located. It is not clear from the copy of the mutation exhibited by the Plaintiff on which of the six sub-divisions of parcel 55 his portion was to come from. The court is thus not satisfied that the Plaintiff has made out a *prima facie* case with a probability of success at the trial. As was held in the case of **Mrao Limited v First American Bank of Kenya and 2 Others (supra)**, a *prima facie* case is more than an arguable case. It is not sufficient merely to raise an arguable issue.

14. The court has also considered the material on record against the second principle for the grant of an injunction. The Plaintiff contended that he was cultivating crops on the suit property which constituted his means of livelihood. He did not disclose how much income he derived from the two plots and he did not contend that the 3rd and 4th Defendants would not be able to meet any compensation in damages should he succeed at the trial. It was not also contended that the value of the suit properties was incapable of computation in monetary terms.

15. 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.”

16. Since the Plaintiff has failed to demonstrate the first two principles for the grant of an injunction it shall not be necessary to consider the third principle on balance of convenience. As a consequence the court is not inclined to grant the interim injunction sought.

(b) Who shall bear the costs of the application

17. 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 parties should not be awarded costs of the application. Accordingly, the 3rd and 4th Defendants shall be awarded costs of the application.

F. CONCLUSION AND DISPOSAL

18. The upshot of the foregoing is that the court finds that the Plaintiff has failed to satisfy the requirements of the grant of an interim injunction. As a consequence, the Plaintiff’s notice of motion dated 25th February, 2020 is hereby dismissed with costs to the 3rd and 4th only.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 29TH DAY OF JULY 2021

In the presence of:

Ms Wanjiru Muriithi for Plaintiff

No appearance for the 1st and 2nd Defendants

Mr. Nderitu Komu for the 3rd and 4th Defendants

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Y. M. ANGIMA

ELC JUDGE