



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 50 OF 2018

ALICE KAMBURA (Suing as the legal representative

of the estate of NORMAN NTONGAI alias

NTONGAI AMBAU - Deceased).....PLAINTIFF/RESPONDENT

VERSUS

EVANGELINE GATITU KIREMA.....1ST DEFENDANT

JOSEPH BUNDI.....2ND DEFENDANT/APPLICANT

RULING

1. Before me is a notice of motion dated 26/05/2020 brought pursuant to Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules and other enabling provisions of the law. The applicant who is the 2nd defendant seeks the following orders;

1) Spent.

2) That the Honorable Court be pleased to issue an order of inhibition on the suit land being land parcel no. KIANJAI/KIANJAI/7772 until further orders of the court.

3) That this Honorable court be pleased to issue orders of temporary Injunction against the respondent restraining her by herself, her agents, servants, employees or anyone acting on her behest from selling/trespassing/interfering with the suit land being parcel no. KIANJAI/KIANJAI/7772 pending the hearing and determination of this application.

4) That this Honorable court be pleased to issue orders of temporary Injunction against the respondent restraining her by herself, her agents, servants, employees or anyone acting on her behest from selling/trespassing/interfering with the suit land being parcel no. KIANJAI/KIANJAI/7772 pending the hearing and determination of this suit.

5) Cost and interest of the application.

2. The application is based on the grounds on the face of it and on the supporting affidavit of **Joseph Bundi**, the 2nd defendant/applicant, who avers that he and one Dennis Mwenda Ikuamba bought land from the 1st defendant which was to be excised from land parcel no. KIANJAI/KIANJAI/7772 as they each bought 0.05 acres. That in succession cause No. 20 of 2016 the Principal Magistrate at Tigania awarded a certificate of grant to the 1st defendant in respect to the estate of the late Richard Kirema Mbaao alias Kirema Ambau and awarded the whole of KIANJA/KIANJA/7769 to the 1st defendant.

3. The applicant then sought consent of the land control board for subdivision of land parcel no. KIANJAI/KIANJAI/7772 and accompanied the surveyor to determine their portion but they were roughed up by the plaintiff and her cohorts. He avers that he has never encroached on parcel KIANJAI/KIANJAI/7768 which belongs to the plaintiff.

4. He sued the plaintiff for obstruction of a public officer and malicious damage to property, of which judgment was delivered in Tigania magistrate's court and the plaintiff was released on condition not to reoffend the defendants for a period of 12 months. The plaintiff has however proceeded to trespass upon the applicant's portion of the land by putting up wooden structures, thus causing a lot of pain and mental anguish to the defendants. That despite being urged to move away, the plaintiff has refused to take heed.

5. The application is opposed by the Plaintiff/Respondent vide a replying affidavit dated 5/08/2020, averring that the suit land in this suit is

KIANJAI/KIANJAI/7768 registered in her late husband's name in which she has resided on since her marriage to the deceased which spanned over 40 years. Their matrimonial property is built on the suit land, her husband is also buried thereon and she also carries on her timber business on it. That it is clear that the applicants interest lies in KIANJA/KIANJA/7772 which she has never encroached or erected any structure and she has no interest or claim over that land. Further, she has no objection to the status quo being maintained on both parcels so as to give the court an opportunity to hear the parties and properly determine the dispute. That the applicant's intentions are to work with the survey office at Maua so as to swap the ground positions between KIANJAI/KIANJAI/7772 and KIANJAI/KIANJAI/7768. She contends that the court has already issued orders that she remains in occupation of the disputed portion and prays that this application be dismissed with costs.

6. I have carefully considered the application, the affidavits both in support and opposition there of as well as the submissions of the parties. The question for determination is whether the court should issue the injunctive and inhibition orders as sought by the 2nd defendant.

7. The conditions for consideration in granting an injunction were settled in **Giella vs Cassman Brown & Company Limited (1973) E A 358**, as reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR** where the Court of Appeal held that;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favor. These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

8. I find that the plaintiff had filed an application dated 4.12.2019 seeking injunctive orders against the defendants of which the said application was marked as SPENT on 9.12.2019 in terms of the scene visit report. The said report indicated that the plaintiff is the one in occupation of the disputed portion of the land. How then can this court embark on issuing injunctive orders against the plaintiff before the trial. Such orders would only create more confusion and absurdity. This is an issue which the court pointed out the very first time that the current application was placed before me on 29.5.2020. In particular, the court stated that in paragraph 10 of the affidavit of the applicant (Bundi), he had stated as follows;

“I have urged the respondent to move away from my land but she has taken no heed”.

9. That averment from the applicant himself buttresses the point that plaintiff is in occupation of the disputed land. It is however not in dispute that the applicant's land is no. 7772 while that of the plaintiff is 7768. It appears that what is contested is the actual positions of these parcels on the ground. The best cause of action is for the matter to go to trial instead of dealing with interlocutory matters.

10. I however find that it is necessary to preserve the suit parcels until the dispute is brought to a conclusion, hence the inhibition orders shall be granted in line with the provisions of **Section 68(1) of the Land Registration Act provides.**

11. In the final analysis, the application is partially allowed by granting the order of inhibition in terms of prayer no. 2 in the application until the suit is determined. The cost of the applications shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14TH DAY OF JULY, 2021 IN PRESENCE OF:

C/A: Kananu

Ms. Otieno for 2nd defendant

Ms. Masaba for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE