



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. E011 OF 2021 (OS)**

**MISHECK BAARIU NDUBAI ..... PLAINTIFF**

**VERSUS**

**JOYCE MURIATI GITUMA .....1<sup>ST</sup> DEFENDANT**

**STEPHEN MUKANGU'S ESTATE..... 2<sup>ND</sup> DEFENDANT**

**THOMAS MURUGU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before me is a notice of motion dated 18<sup>th</sup> January 2021 brought pursuant to Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules and Section 68 of the Land Registration Act. The plaintiff applicant seeks orders of injunction and inhibition against the defendants in relation to the suit parcels LR. NO. URINGU II/5599, 2140 and 1631 pending hearing and determination of the suit, plus cost of the application.
2. The application is premised on the grounds on the face of it and on the supporting affidavit of **Misheck Baariu Ndubai**, the plaintiff, who avers that his late father one Ndubai Mukaria Marara had back in 1950's occupied a virgin and unoccupied piece of land in Kamaruki area in Tigania West and established his home there. His family has since then occupied the same portion of land which measures 4.85 acres. That during adjudication, his father gathered the suit land and had it recorded under serial no. 703, folio no. 1539. However, the defendants had by use of crooks caused the suit land to be demarcated in their names.
3. That even though the defendants are the registered owners of the suit land, they have never set foot on the same. The plaintiff's family has extensively developed the land and if the orders sought are not granted they might be evicted rendering the pending suit useless.
4. The application is opposed by the 1<sup>st</sup> and 3<sup>rd</sup> defendants vide replying affidavits dated 19/02/2021. The 3<sup>rd</sup> defendant, Thomas avers that he does not own, utilize or occupy the suit land and he has no interest whatsoever in the three suit lands. He added that he owns and cultivates his separate parcel of land in Kamaruki, measuring 0.44 Ha (1 acre) to which he is the registered owner having bought it from one Zakayo Kimathi. The plaintiff and his kin live and utilize their late father's land which is opposite his and the 1<sup>st</sup> defendant's. He contends that the allegation that the plaintiff's land measures 4.85 acres is false as it is only 2 acres. He further states that the plaintiff intends to obtain the orders herein in order to encroach into his land and illegally evict him as he is 72 years old thus elderly and defenseless.
5. The 3<sup>rd</sup> defendant also states that the plaintiff has failed to disclose to the court that vide A/R objections, his claim to various parcels of land were dismissed.
6. The 1<sup>st</sup> defendant, Joyce has stated that she and her family have occupied the land parcel LR. NO. TIGANIA WEST/URINGU II/1631 since her marriage in 1970 and she buried her late husband in 1995 and her late son on the same land. Her husband obtained the land from their Bothanja clan and during the adjudication stage, it was registered in the name of her late husband, she has extensively developed the land and shares the same with her 3 sons, 2 daughters and a granddaughter. The plaintiff and his family have never owned, occupied, cultivated or utilized her parcel. That the plaintiff and his kin live on their late father's land measuring 2 acres which is opposite her land and the 3<sup>rd</sup> defendant's. That the plaintiff intends to obtain the orders herein in order to encroach into her land and illegally evict her and her vulnerable children. Just like the 3<sup>rd</sup> defendant, the 1<sup>st</sup> defendant avers that plaintiff has failed to disclose to the court that vide A/R objections, his claims to various parcels of land were dismissed.
7. The application was heard orally in court on 19/4/2021. It was argued for the plaintiffs that the applicant and his family have occupied the suit land for over 60 years and reside there to date, but the respondents used their financial powers to have the land allocated to them during

the adjudication process. The parties went through dispute resolution mechanisms to which the plaintiff's objections were dismissed and they filed JR NO. 70 of 2010 and their claim was upheld. Further, the defendants had the registry index map altered to defeat the plaintiffs claim.

8. It was further argued that the orders sought are geared towards preserving the suit land as there is a claim of adverse possession and if the plaintiffs are evicted, their claim will come to an end. Also if the order of inhibition is denied, it will be prejudicial to the applicant.

9. On the side of the defendants, it was argued that there is no prima facie case to warrant injunction orders, that the plaintiff has sued 2 dead persons. That in the application, the 2<sup>nd</sup> defendant is Stephen Mutangu's Estate, and in the supporting affidavit of the OS, the 2<sup>nd</sup> defendant is James Gituma's Estate. That it is not in dispute that Stephen Mutangu is the registered owner of parcel no. 2140 which does not change the fact that orders cannot be issued against the dead persons and the plaintiff has not substituted the parties.

10. The plaintiff filed A/R objections over the suit land no. 1631 & 2140 which objections were dismissed. The plaintiff ought to have exhausted the dispute resolution mechanisms as provided in Cap 283 & 284 hence no prima facie case. Further no irreparable damage has been demonstrated, the defendants have attached photos showing that they are the occupants of the suit lands together with their families and the balance of convenience tilts in their favor as the plaintiff is 40 years and could not occupy the suit land for over 60 years.

11. In rejoinder, it was argued for the plaintiff that the suit parcels in question emanated from Thinabu's clan and that is where their claim is based. He is not a squatter as the defendants have also not denied that the plaintiff and his family are on the suit land 2140. He added that if their application is not allowed the land shall be sold and the plaintiffs shall be evicted,

### **Analysis & determination**

12. I have carefully perused the application and the various affidavits for and in opposition to the application as well as the oral submissions made by the advocates for the parties. To grant or not to grant the orders of injunction and inhibition is the question before me for determination. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010.

13. The principles of injunctions were enunciated in the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358** and 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 favour.***

***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”***

14. The first point to consider is whether the plaintiff has established a prima facie case. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** the Court defined a prima facie case as follows;

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

15. From the documents provided by the parties, the 1<sup>st</sup> defendant is the registered owner of parcel 1631 where her title deed was issued on 29.2.2016. The 2<sup>nd</sup> defendant is apparently the owner of parcel 2140 as per adjudication register. As per the adjudication proceedings availed herein, the objections in regard to parcel no. 1631 & 2140 were dismissed. The plaintiff claims that he filed JR. NO. 70 of 2010 and got orders, but the said pleadings and subsequent court order have not been availed. One David Mwilaria has sworn an affidavit averring that there were similar suits allegedly filed by the plaintiff being MERU ELC CASE E006, E007 & E009, but the full particulars thereof have not been availed. Further, it has emerged that the 2<sup>nd</sup> defendant is deceased and there is no clarity from the plaintiff regarding the locus of the 2<sup>nd</sup> defendant.

16. What resonates from the material availed before this court is that the plaintiff has no document of ownership. The issue of occupation is contested as the defendants aver that plaintiffs land is but 2 acres. Thus it is the word of the plaintiff against that of the defendants and vice versa. The plaintiffs also has to give cogent grounds of suing the 2<sup>nd</sup> defendant in the format of “the estate”. It is also quite clear that the suit parcels have been a subject of litigation in other forums particularly in the adjudication arena.

17. Further, the plaintiff has not demonstrated that the suit properties are about to be disposed of or alienated by the defendants. From the above analysis, this court is not convinced that the plaintiff is deserving of the orders sought.

18. In **Robert Mugo Wa Karanja v Ecobank (Kenya ) Limited & ano.[2019] EKLR** the court in deciding on an injunction application stated that;

***“circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the***

*court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”*

19. I conclude that the plaintiff has not established a prima facie case, thus I need not interrogate the other criterias. The prayer for injunction therefore fails.

20. In regard to the prayer for inhibition, I make reference to the provisions of **Section 68(1)** of the **Land Registration Act**, where it is stated that:-

*“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, generally until a further order, the registration of any land lease or charge.”*

21. In the case of **Films Rover International & Others Vs Cannon Films Sales Ltd 1986 3 All E.R 772**, the court stated as follows;

*“It is my view that the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial outweighs the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Balancing the two competing interests, the cause of justice will best be served if the order of inhibition is granted. Since each of the parties claim to be in possession of the property subject of this suit, an order of inhibition will not affect those rights but serve the greater interest by preserving the said land while their proprietary interests are determined.”*

22. Guided by the above decision, I find it prudent to preserve the suit land by way of issuance of inhibition orders.

23. In the final analysis, the application is partially allowed where the orders of inhibition are granted in terms of prayer no. 4 of the application. The costs herein shall abide the outcome of the suit.

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

C/A: Kananu

Kithinji for applicants

Mutisya holding brief for P. Mbaabu for respondents

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**