



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE. NO 133 OF 2016

JACKLINE MORAA MANOTI.....1ST PLAINTIFF/APPLICANT

TERESIA KERUBO MANOTI.....2ND PLAINTIFF/APPLICANT

VERSUS

ALEX MISATI MANOTI.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Plaintiffs/Applicants filed a Notice of Motion application under Certificate of Urgency dated 16th September, 2020 seeking a temporary injunction restraining the Defendant/Respondent from entering, encroaching into, cultivating or in any way interfering with, threatening to forcefully enter upon, fencing or in any other manner dealing with land Parcels **No. WANJARE/BOGIAKUMU/7891 & 7898** (hereinafter, referred to as *the suit properties*) pending the hearing and determination of the suit herein.
2. In the alternative, the Applicants prayed for an order of maintenance of quo in respect of the suit properties more particularly barring the Defendant/Respondent from entering upon, harvesting sugar cane from, ploughing, cultivating and/or otherwise interfering with, alienating and or trespassing onto the suit properties or any portion thereof pending the hearing and determination of the main suit.
3. The application is premised on the grounds stated on the face of the Notice of Motion and the Affidavit of Jackline Moraa Manoti (1st Applicant) sworn on 16th September 2020 in which she averred that on or about 2nd March, 2016, the Applicant and the Respondents were registered as joint proprietors of land Parcel NO. WANJARE/BOGIAKUMU/933(hereinafter referred to as *the original parcel*).
4. She further averred that original parcel was subsequently subdivided into several parcels which were, land **Parcels No. WANJARE/BOGIAKUMU/7889, 7890, 7891 and 7892**. Land Parcels **No. WANJARE/BOGIAKUMU/7891 & 7892** (the suit properties) were later transferred and registered in the names of the Applicants.
5. The 1st Applicant deponed that on 25th August, 2020, the Respondent who is her brother commenced farming activities on the suit properties without the permission of the Plaintiffs thus prompting them to file the instant application. She deponed that as a result of the offensive farming by the Respondent, the Applicants were unable to access their respective houses as the only portion of the suit properties that was not ploughed was the one occupied by their respective houses.
6. She further deponed that the Respondent has continued to threaten the Applicants in a bid to stop them from using the suit properties and they have reported the said threats to the administrative authorities for action.
7. It is the 1st Applicant's contention that the forceful entry into the suit properties by the Respondent and the subsequent threats shall deprive them of their lawful and legitimate rights to the same.
8. The 1st Applicant contends that it is in the interest of justice that this court grants the orders of temporary injunction and or maintenance of status quo *ex-debito justitiae*.
9. In response the application, the Respondent filed a Replying Affidavit sworn on 23rd February, 2021. The Respondent averred that in 2003 he became joint proprietor of the original parcel with one Protas Taabu Manoti (now deceased) after receiving the same as a gift from the original owner. He denied having been a joint proprietor of the original parcel with the Applicants. The Respondent averred that there has never been any subdivision of the original parcel as alleged and in case there was any the same must have been fraudulent and the alleged

titles are non-existent.

10. The Respondent deponed that the Applicant has not approached this court with clean hands owing to fact that sometime in 2015 he filed a Succession Cause (KISII HC SUCCESSION CAUSE NO. 461) seeking to have the property considered as part of the estate of the Applicant's deceased father. However, the court declined to grant the orders sought because the said property had already changed hands during the lifetime of his deceased father.

11. It was his further averment that he has and is still in occupation of the original parcel and the prayers for injunction sought by the Applicants were not merited, since they were sought against non-existent properties. He thus urged the court to dismiss the application.

12. In response to the Respondent's Replying Affidavit, the 1st Applicant filed a supplementary Affidavit sworn on 18th March 2021. It was her deposition that the original parcel was originally registered in the joint names of the Applicants. She added that the green card relied on by the Respondent on the face of it bore words to the effect that it originated from the complainant and that the original register was missing.

13. The 1st Applicant attached copies of official searches obtained from the land registry that showed that the property had been subdivided and that the suit properties existed.

14. She further deponed that the subdivisions were done with the approval of the Respondent who endorsed his signature on the mutation form.

15. It was the Applicant's contention that the issues of fraud or illegality raised by the Respondent in the Replying Affidavit cannot be determined or addressed at the interlocutory stage.

16. The 1st Applicant contended that a failure by this court to grant the orders sought in the application would be tantamount to cancelling the titles in favor of the 2nd Defendants, albeit prematurely.

17. The court directed that the application be canvassed by way of written submissions. The Applicants filed their written submissions on 18th March 2021 while the Respondent filed his submissions on 21st April, 2021.

ISSUES FOR DETERMINATION

18. Having considered the Notice of Motion, rival affidavits and documents attached thereto as well as the written submissions filed by both parties, the sole issue of determination is whether the application meets the threshold for the grant of a temporary injunction.

ANALYSIS AND DETERMINATION

19. The conditions for granting an injunction were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court held that a party seeking an injunction must satisfy the following conditions-

"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

I will now evaluate whether the Applicants have met the 3 conditions in the Giella case.

Prima facie case

20. In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal stated that:

"With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 stated thus,

"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."

21. Further in the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR**, the court stated that:

"In Habib Bank Ag Zurich V. Eugene Marion Yakub, CA No. 43 Of 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

22. In the instant application, the Applicants have demonstrated in their supporting and Supplementary Affidavits and also in all documents annexed thereto that they are the registered proprietors of the suit properties. They have also demonstrated through photographs that they are

in occupation of the suit properties. Further they have shown by way of photographic evidence that the Respondent has trespassed into the suit properties since he has ploughed all of them and denied them access to their houses. The Respondent on his part has not denied trespassing into the suit property but he has challenged the existence of the suit properties alleging that the same were acquired illegally.

23. From the material placed before the court, I am persuaded that the Applicants have established a *prima facie* case with a probability of success. This is because the Applicants have clearly demonstrated that the suit properties are registered in their names and that they occupy the same. The issue of illegality of the titles to the suit properties raised by the Respondent is a serious issue that can only be determined during the hearing of the suit and not at this interlocutory stage.

Irreparable loss

24. As I have hereinabove observed, the Applicants have demonstrated that they are the registered owners of the suit properties and are in occupation of the same. Further the Applicants have by way photographic evidence demonstrated the level of trespass by the Respondent who has not denied the same.

25. It is therefore clear that if this court fails to issue a temporary injunction against the Respondent pending the hearing and determination of this suit as prayed for by the Applicants, the Applicants will not be able to access their houses standing on the suit properties. The Applicants are entitled to the enjoyment of their properties whose titles cannot be cancelled at this interlocutory stage. Failure to grant interlocutory injunction, will render the suit filed by the Applicants nugatory and cause irreparable loss to the Applicants which loss cannot be adequately compensated by damages.

Balance of convenience

26. The Applicants having satisfied the first two conditions for the grant of an injunction, it goes without saying that the balance of convenience lies in their favour. This is because the Applicants are likely to suffer more given that the Respondent has trespassed into their properties, denied them access to their homes and is currently ploughing their land. These activities place the Applicants in a precarious situation to an extent that it is only just that this court allows their application.

27. I have considered the application, the submissions and relevant authorities and find that the Applicants have met the threshold for grant of temporary injunction.

28. Consequently, I allow the application and order as follows;

i. A temporary order of injunction is hereby issued restraining the Defendant/Respondent from entering, encroaching into, cultivating or in any way interfering with, threatening to forcefully enter upon, fence or in any other manner deal with the land Parcels No. **WANJARE/BOGIAKUMU/7891 & 7892** pending the hearing and determination of this suit.

ii. The costs of this application shall be in the cause.

Dated, signed and delivered at Kisii this 30th day of September, 2021.

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J.M ONYANGO

JUDGE