



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. OS E005 OF 2021

SYLVANUS WAMBURA KERESE.....PLAINTIFF/APPLICANT

VERSUS

SUSAN MENGE NYAMOHANGA.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of motion dated 26th January 2021 and duly filed on 29th January 2021 commenced pursuant to Sections 3, 3A and 63 (c) and (e) of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 40 Rule 1 and Order 51 of the Civil Procedure Rules, 2010 (The application herein), one SLYVANUS WAMBURA KERESE (the applicant herein) through the firm of M/S Abisai and Company Advocates, is seeking the following orders :-

i. **Spent**

ii. **Spent**

iii. A temporary order of injunction to issue against the respondent from selling, transferring, building, fencing, excavating, demolishing and or erecting structures on LR No. Bugumbe/Mabera/914 measuring approximately 1.70 hectares pending determination of this case.

iv. An order of status quo be issued to protect the interests of the applicant herein pending the hearing and determination of the suit.

v. Costs of this application be provided for.

2. The gravamen of the application is a 23- paragraphed supporting affidavit sworn on even date by the applicant and documents marked as "SWK1" to "SWK 9" which include; a copy of the register of the parent land, LR No. Bugumbe/Mabera/130 (SWK1), a copy of the register of the suit land, LR NO. Bugumbe/Mabera/914 being a subdivision of the parent land (SWK5) and photographs of the developments on the said sub division (SWK 9) and annexed to the affidavit. The application is also beacons on grounds (a) to (q) stated on it's face which include; that the respondent is the current registered owner of the suit land, LR No. Bugumbe/Mabera/914 and that she now threatens to evict the applicant from the suit land which legally belongs to the applicant.

3. In summary, the lamentations of applicant are that he is the son of Wankio Matiko (Deceased-1) who owned the parent land. That upon the death of deceased-1, his estate devolved to his eldest son, Nyamohanga Kerasi Matiko (Deceased-2) who was the husband of the respondent, Susan Menge Nyamohanga. That Deceased-1 had subdivided the parent land into LR numbers Bugumbe/Mabera/912,913,915,916 and the suit land. That the respondent obtained letters of administration in Migori Chief Magistrate's court Succession Cause No. 258 of 2018 and transferred LR No. Bugumbe/Mabera/912 and the suit land in her name and she has asserted ownership of them. That the respondent has threatened to evict the applicant from the suit land which he has possessed and occupied openly, quietly and continuously hence acquired it by way of prescription.

4. In a 22- paragraphed replying affidavit sworn on 11th Mach 2021 and filed in court on 15th March 2021, the respondent through M/s Kerario Marwa and Company Advocates, opposed the application. She deposed, inter alia, that the applicant has never lived on the suit land as alleged by him and he is out to mislead the court. That Deceased 1 gave the applicant LR No, Bugumbe/Mabera/915 which he has even charged to Barclays Bank Ltd to obtain a loan of Ksh 700,000. That deceased 1 gave deceased 2 the suit land and the applicant is threatening the respondent and that he is interfering with the suit land.

5. The application was argued by way of written submissions pursuant to the orders and directions of this court given on 9th June 2021; **see Orders 51 Rule 16 of the Civil Procedure Rules,2010 and Practice Directions number 33 of the Environment and Land Court (ELC**

herein) Practice directions,2014.

6. Accordingly, learned counsel for the applicant filed submissions of five (5) pages dated 18th June 2021 and filed on 28th June 2021 giving brief facts of the matter and framed three issues for determination including whether the respondent intends to interfere with the stay of the applicant on the suit land. Reference therein was made to **Giella-vs- Cassman Brown Company Ltd (1973) EA 358 and Mrao Ltd-vs-1st American Bank of Kenya Ltd and 2 others (2003) eKLR 125, among other authorities**. Counsel urged the court to allow the application.

7. The respondent's counsel filed two (2) paged submission dated 13th July 2021 on 15th JULY 2021. Counsel cited **Giella case** (supra) and frame framed three issues for determination namely conditions for the grant of temporary injunctive relief sought in the application. Counsel urged the court to disallow the application as it has not met the requisite threshold.

8. I have duly considered the application, the replying affidavit and rival submissions including all the authorities relied upon therein. So, has the **application attained the threshold for the grant of orders sought therein?**

9. The conditions including likely injury to applicant, duration and costs under Order 40 Rule 2 of the Civil Procedure Rules, 2010, are meant to curb abuse of temporary injunctions; see **DPP-vs-Justus Mwendwa Kathenge (2016) eKLR**.

10. The temporary injunction sought in the application is an equitable remedy. It is within the flexibility and discretion of the court to grant the interlocutory injunction remedy; see **Central Bank of Kenya and another=vs= Uhuru Highway Development Ltd and 4 others (1998) eKLR**.

11. As such, the applicant has to demonstrate, inter alia, a prima facie case against the respondent; see **Mrao Ltd-vs-First American Bank of Kenya Ltd and 2 others (2003) eKLR**.

12. It is established law that the jurisdiction to issues injunctive relief vests in the probability of irreparable injury, inadequacy of damages and prevention of yhe multiplicity of suits; see **Nguruman Ltd-vs-Jan Bonde Nielsen (2014) eKLR**.

13. Furthermore, I subscribe to the decision in **Ogada-vs-Mollin (2009) KLR 620** as regards **lis pendens doctrine (status quo orders)** to preserve the suit property until the suit is determined or terminated.

14. In the present application, the applicant has established a prima facie case with triable issues as noted in **Paul Gitonga Wanjau =vs= Githuthi Tea Factory Company and others (2016) eKLR**. That he is likely to suffer irreparable damage as held in **Tritex Industries Ltd and 3 others =vs= National Housing Corporation and another (2014) eKLR**.

15. This court has the mandate under Section 13 (7) (a) ELC Act to grant preservation orders. The same does not exclude a status quo order sought in the application.

16. To that end, I find the application meritorious. I am of the considered view that the merited order in lieu of interlocutory injunction as sought in the application, is the maintenance of the obtaining status quo over the suit land until this suit is heard and determined; see **Musa Angira Angira-vs-Industrial and Commercial Development Corporation (2015) eKLR** and this court's decision in **Meresa Akello (suing as administrator of the estate of Tingo Nyamatiko-Deceased-vs- John Itembe Mucheria (2021) eKLR**.

17. Accordingly, the application dated 26th January 2021 and filed herein on 29th January 2021 be and is hereby determined in terms of an order of status quo over the suit land as stated in paragraph 1 (iv) hereinabove. In particular, pending the hearing and determination of the suit-

- a) The respondent shall not evict the applicant from the suit land,
- b) The respondent shall not sell, charge, lease, dispose of or part with any portion of the suit land,
- c) The parties shall not erect permanent structures on the suit land,
- d) Costs of the application be in the cause.

DELIVERED, DATED and SIGNED at HOMA BAY via email pursuant to Article 7 (3) (b) of the Constitution of Kenya, 2010 and the parties were duly notified, this 29th day of September 2021

G.M.A. ONGONDO

JUDGE