



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ORIGINATING SUMMONS NO E002 OF 2021
IN THE MATTER OF: SECTIONS 37 & 38 OF THE
LIMITATIONS OF ACTIONS ACT CAP 22 OF LAWS OF KENYA
AND
IN THE MATTER OF: THE LAND REGISTRATION ACT NO I OF 2012 (AS AMENDED)
AND
IN THE MATTER OF: ORDER 37 RULES 1 & 7 OF THE CIVIL PROCEDURE RULES 2010
BETWEEN
LEONIDA NYABOKE NYAGAKA.....APPLICANT
VERSUS
VICTORA BOSIBORI MOGIRE.....RESPONDENT
RULING

INTRODUCTION

1. The Applicant herein filed a Notice of Motion application under Certificate of Urgency, dated the 22nd of March, 2021 in which she sought the following orders:

- a) That pending the hearing and final determination of this application, the Honorable Court be pleased to issue an order of interim injunction restraining the Respondent by herself, her family members, agents, servants, assignees, legal representatives or any other person(s) whatsoever acting under her instructions directly or indirectly from entering onto a portion of land measuring by 65ft wide by 330 feet long forming part of land parcel title Number **WEST KITUTU/BOGUSERO/2138** registered in the name of the Respondent (hereinafter referred to as "***the suit property***") and evicting the Applicant and/or her family members there from and/or demolishing the Applicant's developments thereon or doing any other thing whatsoever which is meant to intimidate or affect the Applicant or her family members in any way or interfering with her peaceful occupation, possession and/or user of the said portion of land.
- b) That pending the hearing and final determination of this suit, the Honorable Court be pleased to issue an order of temporary injunction restraining the Respondent by herself, her family members, servants, agents, assignees, legal representatives and/or any other person(s) whatsoever acting under her direct or indirect instructions from interfering in any way or manner whatsoever with the peaceful occupation, possession and user of the suit property and/or evicting the Applicant from it.
- c) Costs of the Application be provided for

2. The application is premised on the grounds stated in the Notice of Motion and the Applicant's supporting affidavit sworn on the 22nd March 2021. In the said affidavit she has averred that she is the wife of the late Sam Rwenyi, (now deceased). She further deponed that in or about the year 1981, her husband purchased for her a portion of land measuring approximately 65 feet wide by 30 feet which forms part of the suit property from the late Mogire Onchiri. Her husband then built her a home on the suit property in the year 1981.

3. She alleges that one of her daughters who passed away was buried on the subject suit portion. It is her further contention that Mogire Onchiri died before sub- dividing and transferring the suit property and to her.

4. The Applicant contends that she has lived on the said portion of the suit property since the year 1981. However, sometimes in the year 2021, the DCI from Nyanchwa Police Station called her and informed her that the Respondent had reported that she was illegally occupying, and cultivating part of her land and that she wanted her to be evicted and or charged in Court for the offence of forceful detainer.

5. The Applicant further deponed that upon visiting the DCI and explaining her long occupation of the portion of the suit property, the DCI advised her to obtain an order of Court, lest she be arrested following the Respondent's claim which then necessitated the filing of this suit.

6. In response to the application, the Respondent filed a Replying Affidavit dated the 12th of April, 2021 wherein she controverted the averments by the Applicant. The Respondent in her Affidavit averred that Mogire Onchiri, was a stranger to her as her late husband was called Yuvinalis Mogire Onsase. The Respondent further averred that the suit property was initially registered in the name of her late husband and the same had subsequently been transferred to her name upon his demise.

7. It was the Respondent's further averment that the Applicant is a daughter-in-law to her brother-in-law and the pictures annexed to her Supporting Affidavit depict a homestead and a fence which they share and has no connection with the suit property. Further, that the Applicant deponed that she occupies a parcel land that was allocated to her by the Respondent's brother-in-law.

8. It was the Respondent's contention that the suit property was not purchased by the Applicant's husband. She attached a Statutory declaration sworn by her late husband in which he averred that he never purchased the said portion.

9. It was also the contention of the Respondent that the Applicant has not occupied the aforesaid portion for a period of 40 years as alleged. That the Applicant only started laying a claim to the subject portion sometime in 2020.

10. In response to the averments' by the Respondent, the Applicant filed a Supplementary Affidavit sworn on 29th April 2021. In the said Affidavit she deponed that her husband's name was recorded in land register as Mogire Onchiri and therefore the Respondent was lying that the late Mogire Onchiri was not her husband.

11. She conceded that the suit property was currently registered in the name of the Respondent. She however maintained that she had occupied a portion of the suit property as hereinabove described peacefully and without interruption for a period of 40 years.

12. She averred that her husband had at one time held a discussion on the issue of the transfer with the late Mogire Onchiri, but the transfer could not be effected because her late husband had not fulfilled the conditions given to him by the late Mogire Onchiri.

13. She deponed that during her 40 year occupation of the said portion of the suit property, she had buried two of her children thereon and that she had made immense development on the land.

14. She claimed that her husband's affidavit in which he denies that he purchased the suit property from the late Onchiri was full of falsehoods because her husband had attempted to chase her away in 2017 and 2018 together with her three children because he wanted to sell the same to third parties. She went on to explain that she reported the matter to the area Chief and Nyakoe Police station. The Chief intervened in the matter and that is why she has remained on a portion of the suit property.

15. The Applicant deponed that from 2018 several people including Surveyors have been visiting the suit property and she has established that her husband intends to sell the suit property to them. She averred that she had on several occasions been threatened by her husband and strange people and she was forced to report to Mosochi Police station.

16. The court directed that the application be canvassed by way of written submissions. The Applicant filed her written submissions on 25th May 2021 while the Respondent filed hers on 4th June, 2021.

ISSUES FOR DETERMINATION

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

ANALYSIS AND DETERMINATION

18. The conditions the court must consider in granting an injunction were settled in the celebrated case of **Giella v Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself as follows: -

"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."

19. The first hurdle for an Applicant is to establish that he/she has a *prima facie* case before an order of injunction can be issued.

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.”

20. Further, in the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR**, the court further expounded and 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.”

21. The same caution was repeated in **National Bank Of Kenya V. Duncan Owour Shakali & Another, CA NO. 9 of 1997** when Omolo JA stated:

“The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

22. It is important to state that the Applicant in his bid to demonstrate that he has established a prima facie case, must make full candid disclosure of all material facts in order to benefit from the equitable relief of an injunction as was held in the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another [1990] K.L.R 557** where Bosire J held that:-

“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

23. In this instant application, the Applicant has given an elaborate background in her Supporting Affidavit and Supplementary Affidavit and annexed photographic evidence to show that she is in occupation of the portion of the suit property. She has also demonstrated the developments she has undertaken on the said portion of property. It is also clear that the Applicant’s averments have not been sufficiently controverted by the Respondent. I therefore find that the Applicant has established a prima facie case with a probability of success.

24. The 2nd hurdle is that the Applicant must surmount is to establish that she will suffer irreparable loss if an order of injunction is not issued.

25. In **Halsbury’s Laws of England [Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352]**. it is stated that :-

*“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question” In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is “irreparable harm”? **Robert Sharpe, in “Injunctions and Specific Performance,” [Robert Sharpe, Injunctions and Specific Performance, loose-leaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that “irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.”***

26. From the applicant’s affidavits and annexures, it is evident that the Applicant is in occupation of a portion of the suit property which is the subject of this application. It is therefore evident that if the Respondent is not restrained from interfering with the Applicant’s occupation of the suit property, the Applicant is likely to suffer irreparable harm.

27. It is also on record that the Applicant has on several occasions been threatened with eviction by her husband who appears to be working in cohorts with the Respondent. The Applicant has averred that since 2017 several people including Surveyors have been visiting the suit property on claims that her husband intends to sell the property to them. She also averred that she has on several occasions been threatened by her husband and strange people and she was forced to report to Mosoch Police station. I take note that the said averments by the Applicant have not been controverted by the Respondent.

28. I have considered the application, the submissions and relevant authorities and I am of the view that the Applicant has met the threshold for grant of a temporary injunction.

29. The upshot is that the application is merited and I grant it and make the following orders:

(a) A temporary injunction is hereby granted restraining the Respondent by herself, her family members, servants, agents, assignees, legal representatives or any other person(s) whatsoever acting under her direct or indirect instructions from interfering in any manner whatsoever with the peaceful occupation, possession and user of a portion of land measuring 65 feet by 330 feet forming part of all that land known as WEST KITUTU/BOGUSERO/2138 and/or evicting the Applicant therefrom pending the hearing and determination of the suit herein.

(b) The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF SEPTEMBER, 2021.

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J.M ONYANGO

JUDGE