



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 117 OF 2018

MERESA AKELLO TINGO

(Suing as administrator of the estate of

TINGO NYAMATIKO - (Deceased).....APPLICANT

VERSUS

JOHN ITEMBE MUCHERIA.....RESPONDENT

RULING

1. The present ruling is in respect of a Notice of motion dated 23rd September 2020 and filed herein on 25th September 2020 under Order 51 of Civil Procedure Rules, 2010 (The Rules herein) as read with sections 1A and 1B of the Civil Procedure Act Chapter 21 Laws of Kenya (The application herein.) The applicants, Meresa Akello Tingo (suing as administrator of the estate of Tingo Nyamatiko- Deceased) through the firm of Kerario Marwa and Company Advocates has sought the orders infra;-

i. **THAT** pending the hearing of these summons, this honourable court does issue a temporary injunction order restraining the respondent by themselves, their agents, servants and or any other person acting under their instructions from continued trespass on all that portion measuring 13 acres occupied and in use by the applicant on all that land known as **BUKIRA/BUHIRINGERA/167** (*The suit property herein*).

ii. **THAT** costs of this application be provided for.

2. The application is beaoned grounds 1 to 5 stated on it's face which include; that the respondent has unlawfully prevented the applicant from harvesting her sugarcane which is bound to go to waste and suffer irreparable loss if the orders sought in the application are not granted. The application is also anchored on the applicants supporting affidavit of 11 paragraphs sworn on even date to the effect that the respondent should not be allowed to take away the applicant's property rights without the due process of the law.

3. By a 17 paragraphed replying affidavit sworn on 10th February 2021 and duly filed in court on even date, the respondent, John Itembe Mucheria through M/s Abisai and Company Advocates, opposed the application. He deposed, inter alia, that the same should not be allowed as he is likely to be prejudiced thereby and that the same be dismissed with costs. That the application is riddled with lies, misleading, an abuse of court process, anon-starter, incompetent, legally intenable and devoid of merits.

4. The respondent also deposed in part that the applicant has never used or occupied the suit property, LR No Bukira/Buhiringera/167. He denied the applicant's allegations which he termed as unsupported by any photographs.

5. The application was heard by way of written submissions further to this court's orders and directions given on 11th February 2021; see Order 51 Rule 16 of the Rules as read with section 19 (2) of the Environmental and Land Court (ELC) Act, 2015 (2011).

6. Consequently, learned counsel for the applicant filed a two (2) paged submissions dated 30th March 2021 on 12th April 2021 where reference was made to orders sought in the application and the established conditions in the case of **Giella vs Cassman Brown and Company Ltd (1973) eKLR 358**. That the applicant has established the condition for the issuance of interim injunctive orders sought in the application.

7. On the part of the respondent, his counsel filed a three (3) paged submissions dated 19th March 2021 on 22nd March 2021 giving brief facts of the case, framed triple issues for determination which include; whether the applicant has proved trespass onto the suit land and the orders to issue in the circumstances. Counsel discussed the issues to the effect that the applicant has not met the threshold in **Giella case (supra)** and also relied on section 26(1) of the Land Registration Act, 2016 (2012), section 3(1) of the Trespass Act (Cap 294), section 107 of the Evidence Act (Cap 80 Laws of Kenya) and the case of **Colombus Opio Adeti=Vs= Alexander Oyiolo Odongo t/a Alema Services**

Station (2018) Eklr, to reinforce the submissions.

8. I have duly considered the application, the replying affidavit and the rival submissions in their entirety. In that regard, has the applicant attained the threshold as laid down in **Giella case (supra)** for the grant of an injunctive relief sought in the application?

9. Notably, the applicant initiated the instant suit by way of an originating summons dated 10th September 2018 and lodged herein on 24th September 2018 pursuant to Order 37 (7) of the Rules and section 38 of the Limitation of Actions Act chapter 22 Laws of Kenya. She is claiming to have acquired a portion of land measuring approximately thirteen (13) acres, out of the suit property as shown in a copy of an agreement and a copy of the green card marked as “1MAT” and “2MAT” respectively annexed to the applicant’s affidavit in support of the originating summons. She claims to have bought the said portion from the respondent and that she has occupied the same for more than 12 years without any interruption.

10. The originating summons is opposed by the respondent by way of his twenty-eight (28) paragraphed replying affidavit sworn on 20th November 2018 and duly filed in in this court on even date. He termed the allegations in the originating summons false and misleading. That the originating summons is wrongly filed against him and that the applicant is not entitled to the orders sought therein. The respondent also deposed in part that he never sold a portion of the suit property to the applicant who has never stayed thereon.

11. The present application was generated under **section 1A and 1B (supra)** pertaining to overriding objective, among others provisions of the law. The same objective is also stipulated at **section 3 of the Environment and Land Court Act, 2015 (2011)**.

12. **Order 40 of the Civil Procedure Rules (supra)** provides for the conditions under which an injunctive remedy can be granted by a court of law. Furthermore, an injunction is a relief that a court may grant under **Article 23(3) (b) of the Constitution of Kenya, 2010**.

13. In the case of **DPP = vs= Justus Mwendwa Kathenge and another (2016) eKLR**, the said conditions were restated. The court further held that the conditions are meant to curb abuse of temporary orders.

14. The fundamentals about the implications of the interlocutory orders of injunction are settled since the **Giella case (supra)**. In **Nguruman Ltd =vs= Jan Bonde Nielsen and 2 others (2014) eKLR**, the Court of Appeal restated the **Giella case (supra)** and concluded:

“..... We stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits.....” (Emphasis laid)

15. In the instant case, the applicant claims that the respondent has prevented him from harvesting sugar cane, though denied, on the suit property. Quite clearly, he has demonstrated that the actions of the respondent are likely to occasion him loss of income. He has established a prima facie prima facie case against the respondent and the balance of convenience tilts in his favour.

16. This court has the mandate under section 13 (7) (a) of the Environment and Land Court, 2015 (2011) to grant interim preservation orders. Status quo orders are envisaged thereunder as I subscribe to the Court of Appeal decision in the case of **Ogada-vs-Mollin (2009) KLR 620**.

17. In the obtaining scenario, an interim preservation order in the form of status quo over the suit property is merited in lieu of an interlocutory injunction in the manner sought in the application. Therefore, I proceed to determine the application dated 23rd September 2020 and filed herein on 25th September 2020 as hereunder;

a) The parties shall maintain the prevailing status quo over the suit property, LR No.Bukira/Buhiringera/167 occupied and used by the applicant pending the hearing and determination of the suit.

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

18 The suit is hereby set for directions on 19th October 2021 as envisioned in Article 159 (2) (b) and (e) of the Constitution of Kenya, 2010 and section 3 of the Environment and Land Court Act, 2015 (2011).

Orders accordingly

DELIVERED SIGNED AND ISSUED AT HOMA BAY VIA EMAIL AS THE PARTIES DULY NOTIFIED, THIS 21ST DAY OF SEPTEMBER 2021

G. M. A. ONGONDO

JUDGE