



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. EO16 OF 2021(OS).

WILSON KIBUNA KUNGUPLAINTIFF/RESPONDENT

VS

HELLEN WAMBUI CHEGE..... DEFENDANT/APPLICANT

STEPHEN MUGUTI CHEGEDEFENDANT/APPLICANT

RULING

1. On the 30/6/2021 the Applicants filed a notice of Motion seeking the following orders;

a) Spent

b) That pending the hearing and determination of this application the Plaintiff/ Respondent or his servants or agents be prohibited from occupying or dealing with Land Parcel No. LOC 5/ GITURA/516.

c) That the Plaintiff/Respondent be prohibited from occupying or dealing in any other way with suit land LOC 5/ GITURA/ 516 pending the hearing of the main suit.

d) That the cost of this application be in the cause.

2. The application is premised on four grounds and the dispositions by the 2nd Applicant. It is their contention that the Plaintiff has without any color of right trespassed into their deceased father's land and constructed thereon. The Applicant depones that his sisters have been cultivating on the demised land. That the Applicant is apprehensive that the Respondent may occupy the recently constructed house which may defeat justice. That the foregoing will deprive him of the ancestral land despite lodging a complaint with the area chief.

3. In response to the application, the Respondent avers that the Applicant has no locus as he has not obtained a grant. In response to ownership and occupation, he contends that he has been in occupation of the suit land for a period of over 20 years. That he bought the land from CHRISTOPHER NDUNGU and occupied it since then. That he has been planting on the land since purchase and the construction thereon has proceeded without any interruption. By dint of occupying the land for a period of over 12 years he has acquired adverse possession.

4. It is the Applicants' submission that the Respondent's objection against the Applicants' locus is misconceived. That the Respondent instituted the suit against the Applicant well aware that they lacked capacity. Be that as it may, that they have obtained a limited grant. It is his submission that the 1st Applicant is not mentally stable and cannot be sued. That having obtained letters of administration ad litem, the 2nd Applicant has locus to defend the suit. In the end submitted that the preliminary objection be dismissed.

5. The Respondent submitted that the Applicant has no capacity to file the application as he has no locus. That he has not taken out any letters with respect to his deceased father's estate. He invited the Court to the reasoning in **Najengo vs Serwangen 1974** and the **Troustick International Case**.

6. The Respondent instituted the suit against the Applicants for adverse possession. The Applicant filed a notice of motion seeking injunction and parties were directed on 26/07/2021 to file submissions. Parties elected to submit on the issue the Applicants' locus to file the application and not on the submissions.

7. Before delving into the issue of injunction, it is relevant to consider the issue of locus. The Respondent in his response depones that the 2nd Applicant has no locus to file the application. The 2nd Applicant became a party to the suit through the originating summons as instituted by the Respondent. The Respondent cannot feign ignorance of this fact at this point.

8. It is well settled in the case **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)** [2016] eKLR that:

“The issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. *Locus standi* relates mainly to the legal capacity of a party. The impact of a party in a suit without *locus standi* can be equated to that of Court acting without jurisdiction since it all amounts to *null and void proceedings*. It is also worth-noting that the issue of *locus standi* becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

9. The land in dispute is registered in the name CHEGE MUGUTI who is said to be deceased. The correct party to sue would be the personal representative. Attached to the Applicant’s submission is a copy of a limited grant ad litem where the Applicant was appointed the personal representative. To this end, he has the locus to defend the suit and to institute the instant application. Relevant in the Applicant’s submission is the revelation that the 1st Defendant is mentally challenged. There has been provided no evidence as to the veracity of this averment. This Court cannot discharge its mind on this allegation since it has not been procedurally moved.

10. On whether an injunction should be granted, the principles applicable were well settled in **Giella v Cassman Brown Co. Ltd 1973 E.A. 358** to wit;

- a. The Applicant has to make out the existence of a prima facie case with a probability of success.
- b. The Applicant must demonstrate that he/she will suffer substantial loss.
- c. Balance of convenience.

11. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others**[2003] eKLR defined prima facie case as;

“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”.

12. Similarly, in the case of **Nguruman Limited Nguruman Limited v Jan Bonde Nielsen & 2 others** [2014] eKLR Nairobi Civ App’ **No 77 of 2012** the Court defined Prima Facie case as;

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

13. It is the Applicants’ contention that their deceased father was the registered owner of the land and has attached a copy of official search to demonstrate so. While he attached photographs to demonstrate that the crops belong to his sister, the Respondent avers that he planted them. The Respondent seems to affirm the land belonged to CHEGE MUGUTI, the Applicant’s father. What remains unclear and will be determined at the hearing are the circumstances that lead the Respondent to undertake constructions thereon.

14. On whether they will suffer irreparable harm if the application is not granted, the Applicant is mandated to demonstrate the loss he/she will suffer, such loss should be so great that no amount of damages can compensate. The Applicant depones that there is an imminent danger on the ancestral land as it is being constructed on by a stranger. In **Noormohammed Jan Mohammed...Vs...Kassam Ali Virji (1953) 20 LRK 8** the Court held that to *justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition*. The immediate danger contemplated by the Applicant is that the quick construction by the Respondent may attract third parties and deprive them of their ancestral land.

15. The Applicant has not led any evidence to demonstrate that Respondent will likely attract third parties. The apprehension of the Applicant is based on the assumption that the cost of land in the area is on the rise and the Respondent may use it to his advantage. Undoubtedly, an ancestral land has such great sentimental value to an individual and it is only fair that it be guarded. However, the Applicant ought to have demonstrated whether they have been living thereon or not. At the point the Respondent begun undertaking construction, he ought to have moved the Court with speed to secure their interest, he was indolent. He has only been jolted into action by the suit; I do not see any imminent danger.

16. Order 40 Rule 1(a) and (b) of the Civil Procedure Rules, obligates this Court to issue an injunction if *it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or wrongfully sold in execution of a decree*. To my satisfaction, this has not been done. If any the damage and loss can be quantified and the Applicant be compensated.

17. The application is without merit. It is dismissed with no orders as to costs.

18. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 14TH DAY OF SEPTEMBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff/Respondent: Absent

Wanyoike for the 1st & 2nd Defendants

Court Assistant: Alex/Kuiyaki