REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 346 OF 2015

MUNYI ALFRED KAMURI.....PLAINTIFF/APPLICANT

VERSUS

MARGARET WAMITI JONAH.....1ST DEFENDANT/RESPONDENT

JOHN NJERU KANYARIERI.....2ND DEFENDANT/RESPONDENT

FRANCIS THATHI JONAH.....3RD DEFENDANT/RESPONDENT

NJERU MIKE EDWARDS.....4TH DEFENDANT/RESPONDENT

KANGAITA TEA FACTORY CO. LTD.....5TH DEFENDANT/RESPONDENT

IRUMA CLAN.....INTERESTED PARTY

RULING

1. The application for determination before me is a Notice of Motion dated 1/2/2021 and filed on 8/2/2021. It is expressed to be brought under Sections 1A, 1B, and 3A of Civil Procedure Act (Cap 21), order 8 rule 3, order 40 rule 1 and order 50 rule 1 of Civil Procedure Rules and all enabling provisions of law. The applicant – **MUNYI ALFRED** – is the plaintiff in the suit while the respondents – **MARGARET WAMITI JONAH, JOHN NJERI KANYARIRI, FRANCIS THATHI JONAH, NJERU MIKE EDWARDS,** and **KANGAITA TEA FACTORY COMPANY LIMITED** – are the defendants.

2. The application came with five (5) prayers but prayers 1 and 2 are now moot, having been for consideration at an earlier stage. The prayers for consideration are therefore three (3) – prayers 3, 4, and 5 – and they are as follows:

> *Prayer 3: That pending hearing and determination of the suit herein, an order do issue restraining and prohibiting the defendants/respondents whether by themselves, through agents, servants and/or all claiming under them from dealing in any manner whatsoever, including disposing of any interest and/or transferring and/or interfering with occupation of L.R. No. NTHAWA/RIANDU/ 3174, 3175, 3176, 3177, 3178, 3179, and also 4970, 4971 and 4972 which are resultant subdivisions of L.R. No. NTHAWA/RIANDU/1518.*
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> *Prayer 4: That the amended originating summons dated 21/3/2019 be further amended so as to enjoin the Honourable Attorney General and the annexed further Amended Originating Summons annexed hereto be deemed as duly filed and served.*
>
> *Prayer 5: That the costs of this application be provided for.*

3. The application is anchored on the grounds, interalia, that while this suit is still pending, the 4th respondent transferred parcel No. 4971 to the party intended to be joined in the suit. That the transfer was irregular and unlawful as it violates the doctrine of lis pendens; and that the restraining order sought seeks to preserve the suit lands pending determination of this matter.

4. The application came with a supporting affidavit which amplifys the grounds advanced.

5. The 1st, 2nd 3rd and 4th respondents did not oppose the application. The 5th respondent was the only to oppose and filed a replying affidavit in that regard on 15/3/2021. According to the 5th respondent, the application is, among other things, misconceived, frivolous, and

fatally defective. The applicant was said to be wrong for seeking injunctive orders in respect of several properties yet only one property – parcel No. 4971 – is affected by the transfer complained of. It was deposed that there is no justification for issuing a restraining order in respect of the other parcels of land.

6. Further, the applicant was blamed for failing to disclose to the court that there were earlier suits in which the 5th respondent's rights of use and occupation of the suit lands was confirmed. The 5th respondent denied that the applicant or his family members have been in open and uninterrupted possession of the suit properties as alleged. The applicant's application was said to have fallen short of the threshold necessary for granting restraining orders as spelt out in the case of **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358.** Failing to disclose the existence of earlier suits to the court by the applicant was said to make him a person whose hands are not clean. This means that he is undeserving of favourable consideration by any court of equity.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 18/5/2021. The submissions gave a background of the matter and then emphasized that the transfer of parcel No. 4971 while this matter is still pending was irregular and unlawful. It was submitted that the injunctive order sought is meant to preserve the suit lands.

8. The applicant wondered why the 5th respondent is opposed to the joinder of the party to whom the transfer of parcel No. 4971 was made yet the 5th respondent stands to suffer no prejudice if joinder is allowed. According to the applicant the threshold for granting restraining orders has been met. As regards the allegation that he has come to court with unclean hands, the applicant submitted that he was not party to the other suit that the respondent referred to.

9. The 5th respondents submissions were filed on 24/6/2021. The 5th respondent also started submissions by giving background. It then reiterated the substance of its replying affidavit and averred that there was inordinate delay in filing the application to set aside orders of the court issued in ELC No. 247 of 2013 at Kerugoya. As long as the orders are in force, the restraining orders sought by the applicant were said not to be grantable as such orders would contradict or affect the order issued in that case. The applicant was said to be aware of the orders in ELC No. 247 of 2013. In the 5th respondents words, the restraining orders sought by the applicant in respect of the suit lands owned by itself **"are in vain, uprocedural and are calculated at denying the respondent justice as they contradict the ruling and permanent orders …"** issued in ELC No. 247 of 2013.

10. I have had a look at the suit as filed. I have also considered the application, the response by the 5th respondent, and the rival submissions. In our jurisdiction, the decided case of **Giela Vs Cassman Brown & Co. Ltd [1973] EA 358** provides the guiding considerations on whether or not to grant temporary restraining orders. But while this remains true, it is also important to appreciate that the court is duty-bound to consider all other relevant circumstances pertinent to the case before it. In **JAN BOLDEN Vs HERMAN PHILLIIPUS STEVA** Mabeya J observed as follows:

> *"I believe that in dealing with an application for an interlocutory injunction, the court is not necessary bound to the three principles in the Giella Vs Cassman Brown case."*
>
> Mabeya J emphasized that the court is at liberty to look at the prevailing circumstances of the case generally and the overriding objective of the law.

11. This is the same spirit that one finds in **KENYA HOTELS LIMITED Vs KENYA COMMERCIAL BANK LTD & another [2004] 1 KLR 80** where the court held, interalia, that an injunction being an equitable remedy, the court may, while remaining guided by the principles in Giela's case, also look at all circumstances including the conduct of the parties.

12. Giela's case itself requires that an applicant for interlocutory restraining orders need to show that he has a prima facie case with a probability of success and, additionally, that he is likely to suffer irreparable harm that can not adequately be compensated in damages. The same case requires that where the court is in doubt regarding these two requirements, then it has to opt for a third one, which is the balance of convenience.

13. It is necessary to bear in mind that the remedy of injunction is a discretionary one. The court balances the irreparability of the harm that the applicant may suffer vis-à-vis the adequacy of damages he may get if injunction is not granted. It also looks at the applicants case and weighs the likelihood or probability of prevailing on the merits.

14. The issue to decide in the application is whether the application has merits. The merits however are not only about restraining orders but about amending the suit as well. I do this bearing in mind the various considerations that I have already mentioned. The applicant's case is founded on adverse possession. He is not alone. He is in it both on his own behalf and on behalf of other people who are beneficiaries of the estate he represents. He is seeking to defeat ownership of several title holders.

15. A look at the entire court record shows that the parcels of land have had several suits running in various courts and all of them related to ownership. It is difficult to tell whether time for adverse possessions has been running for the two decades or so that cases have been running in courts. That is one disadvantage. The other disadvantage is that some of the people seeking to become adverse possessors have court orders in force against them issue in different court matters. The 5th respondent brought out this well. One such case where orders were issued – ELN. No. 247 of 2013 – was at Kerugoya.

16. Given this scenario, I can't confidently say, that the applicant has at this stage demonstrated a prima facie case with a probability of success.

17. Looking at both the applicant's application and submissions, one notices clearly that the applicant did not address the issue of the irreparability of the harm he may suffer and the inadequacy of the damages he may get to repair that harm. The harm must be well

demonstrated. In **NGURUMAN LIMITED Vs JAN BONDE NIELSON & 2 others: CA No. 77 of 2021** the court observed thus:

> *"… the applicant must establish that "he might otherwise" suffer irreparable injury which can not be adequately compensated by damages in absence of an injunction. This is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of injury. Speculative injury will not do; there must be more than unfounded or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial, and demonstrable; injury that can not "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever, will never be adequate remedy."*

18. I think it is clear from all this that is not enough to merely allege that irreparable harm is likely or that damages are inadequate to compensate the harm. One must go further and show the real or actual harm likely to be suffered and the insufficiency of damages as compensation for the harm. The applicant in this matter did not address himself to all this.

19. Further, it was incumbent upon the applicant to give an undertaking to pay damages. In **GATI Vs BARCLAYS BANK (K) LTD [2001] KLR 525,** the court held, inter alia, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given, an injunction can not issue.

20. The application itself also has its shortcomings. The parcel that was transferred – parcel No. 4971 – has a new owner. The restraining orders as sought are meant to apply to the existing parties. The new owner is not yet a party. The applicant is only seeking to join the new party to the suit. He has not sought restraining orders against this party. What this in effect means is that even if the orders are granted, they will not apply to parcel No. 4971. In my view, it was an error or mistake on the part of the applicant to formulate his restraining orders in such a way that they seem meant to apply to the transferor instead of the transferee.

21. But this is not the only problem. It is clear that the restraining orders as sought are meant to apply to several, other land parcels including those said to be owned by 5th respondent. I think this is done because the applicant fears that there is a possibility that the other parcels may be transferred. It is clear however that the applicant has no information – or at least he has not shown any – that the other parcels may also be transferred or sold.

22. Granting of injunctive orders is never based on possibilities. It is always based on probabilities. A probability is always higher and stronger than a possibility. When one talks of a probability, one is talking of something whose chance of happening is more likely than not. In other words, there is a reasonable certainty that what is sought to be restrained may take place. To demonstrate a probability therefore, some reasonable and credible information needs to be made available to show that what is sought to be restrained is likely to happen. A possibility on the other hand is different. In terms of certainty, it is much lower and one does not need to show any information or evidence that something is possible. The applicant needed to raise the need for a restraining order in respect of the other parcels from a mere possibility to probability. He didn't do that.

23. When all is considered therefore, the need for issuing a restraining order has not been sufficiently demonstrated. I therefore decline to issue a restraining order in this matter and the prayer for restraining order is hereby dismissed.

24. I now turn to the prayer for amendment. The applicant complained that the 5th respondent has unjustifiably opposed this prayer. I don't understand the 5th respondent to have launched a serious opposition to this prayer. The 5th respondent spent most of energy and time opposing the restraining order.

25. The amendment sought in this matter relates to joinder of parties. Joinder is meant to allow the court to effectively and completely adjudicate and settle all questions involved in a suit. Joinder of parties is governed by Order 1 of the Civil Procedure Rules. It should be allowed in all situation where parties are seeking rights or reliefs that arise out of the same acts or transactions.

26. The court has a wide discretion to allow amendment in order to determine the real questions or issues in a dispute. The amendment can be sought at any stage but within a reasonable time provided costs can compensate the other side.

27. But amendments can NOT be allowed to change the character of the suit. It should logically flow from the existing or original suit. In all cases amendment should be sought in good faith and the court will not allow amendment if it appears aimed at abusing the court process. And it may amount to abuse of the court process if the proposed amendment is immaterial, useless, or merely technical.

28. In this matter itself, the need for joinder and amendment arise from the fact that the 4th respondent transferred land parcel No. 4971 to a new party. He did so during the pendency of this matter in court. If joinder and amendment are not allowed in this suit, then that would amount to frustrating the applicants claim in respect of the transferred land parcel. That would be unfair to the applicant. In my view, the need for joinder and amendment in this matter is self-evident.

29. The applicant is not seeking to change the character of the suit. The joinder and amendment sought are necessary for effectual adjudication of the matter. It is infact the respondent's side that occasioned the need for joinder and amendment.

30. I therefore allow the prayer for amendment and joinder (prayer 4). The court was asked to make an order for cost (prayer 5). I order that each side should bear its own costs.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **25TH DAY** of **OCTOBER 2021.**

In the presence of M/s Njenga for Kinyua Mureithi for plaintiff and in the absence of the defendants and the interested party.

Court assistant: Leadys

A.K. KANIARU

JUDGE

25.10.2021