



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KERICHO

ELC CASE NO. 32 OF 2019(OS)

NORAH KENDUIYWO.....PLAINTIFF /RESPONDENT

VERSUS

CHRISTOPHER KIPLANGAT TERER.....DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 5th July 2021 brought under the provisions of Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rules 1, 2(1), Order 51 Rule 1 of the Civil Procedure Rules, and all enabling provisions of the law in which the Defendant/Applicant seeks temporary injunctive orders restraining the Plaintiff /Respondent either by himself(sic) his agents and/or servants, or otherwise whosoever from building, developing, planting trees, selling or interfering with the Applicant's interest in land parcel registration LR No. Kericho/Itembe/924 and/or in any other manner (sic) pending the hearing and determination of this suit. The Applicant also seeks cost of the application and necessary directions be made.
2. The application was supported on the grounds on the face of it as well as on the affidavit sworn by Christopher Kiplangat Terer the Defendant/Applicant herein on the 5th July 2021.
3. The said application was opposed by the Plaintiff /Respondent's replying affidavit dated the 23rd July 2021 to the effect that it was an abuse of the court process, frivolous, mischievous, lacking in merit, incompetent and was based on falsehoods, brought in bad faith and ought to be dismissed with costs.
4. That although the Applicant/Defendant was the registered proprietor of the suit parcel of land LR No. Kericho/Itembe/924, the Respondent/Plaintiff had been in adverse use and possession of 0.6070 hectares of the said land where she had established her home and had filed an Originating Summons seeking to become entitled of the said piece of land by adverse possession which the Applicant/Defendant has responded.
5. That the application herein was based on unproven facts that the Respondent/Plaintiff had taken occupation of an additional portion of the suit parcel of land and had fenced and planted trees thereto which allegation has not been supported by any evidence whatsoever.
6. That the Applicant/Defendant has failed to establish a prima facie case with a probability of success within the meaning of the principles in the case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358**.
7. **That indeed the Applicant/Defendant has conceded to the fact that the Respondent/Plaintiff is in occupation of the suit land. The photographs herein annexed as CKT-2 did not show whether the alleged constructions were within the portion of the land claimed by the Respondent/Plaintiff or whether the same related to the suit land and should therefore be disregarded.**
8. The Respondent/Plaintiff also deponed that the Applicant had not discharged the onus of proof of any irreparable loss or damages should he ultimately succeed at trial. That further the principles in the **Giella** case supra ordinarily were to be considered where there was a suit or claim by the Applicant pending. In the present circumstance, there was no suit or claim by the Applicant and therefore the Applicant's application was an abuse of the court's precious time was thereof devoid of merit and should be dismissed with costs.
9. On the 13th July 2021, the court directed for the application to be canvassed by way of written submissions wherein by the time I write this ruling, only the Applicant had complied.

The Applicant's submissions

10. The Applicant's application is based on the fact that pursuant to the Respondent's claim for adverse possession of one part of his land, she hived off an additional portion of the land wherein she had now planted trees alongside the new fence to which the Applicant was apprehensive that he will suffer irreparable loss and damage unless the orders sought are granted.

11. The Applicant framed his issues for determination as follows;

- i. Whether the Applicant has satisfied the requirements for issuance of an order of injunction
- ii. Who should bear the costs.

12. On the first issue for determination the Applicant relied on the provisions of Order 40 Rule 1 (sic) to admit that the court was empowered to issue injunctive orders where any property in dispute was in danger of being wasted, damaged or alienated by any party before the hearing and final determination of the suit.

13. That the Applicant was the registered proprietor of the suit land wherein the Respondent had annexed an additional portion, fenced it off and was in the process of erecting a permanent structure on the said portion as was supported by the annexed pictures. The Respondent's action was therefore detrimental to the Applicant's proprietary rights. That should the orders of injunction sought not be granted and he succeeded in defending the Plaintiff's suit, he would be highly prejudiced since his property would have been wrongly wasted and alienated by the Plaintiff/Respondent during the pendency of the suit.

14. That the parameters for granting of an order of injunction were well settled in the celebrated case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358 which he sought to rely upon. He further submitted that having been registered as the proprietor of the suit land on the 14th October 2015, time for the purpose of adverse possession started running from the moment he was dispossessed of his land which was from 2015 up to 2018 when the Applicant wrote a demand letter. The statutory period of 12 years had therefore not elapsed.**

15. That pursuant to the provisions of Section 26 of the Land Registration Act and on the strength of the title alone, the Applicant had established a prima facie case with a high chance of success.

16. On the second principle as to whether the Applicant would suffer irreparable loss if the injunction was not granted, it was his contention that being the sole registered owner of the suit parcel of land, it gave him absolute and indefeasible ownership and entitled him to peaceful and quiet possession, occupation and use of the property to the exclusion of any third party. And that even if the Plaintiff/Respondent was in occupation of a portion of the land, the Applicant's proprietary rights in the suit land ought to be protected. That the Plaintiff/Respondent's activities of fencing off, planting trees and constructing a permanent house thereon were clearly prejudicial to the Applicant's rights as the registered owner of the suit land.

17. That the Plaintiff/Respondent would not be prejudiced in any way if the orders as sought were granted since she had her own parcel of land where she could carry out the developments she intended to carry out on the Defendant's and land. That the injunctive orders sought were conservatively in nature and meant to ensure that the property was not destroyed or damaged.

18. That the balance of convenience tilted in favor of the Applicant as the registered owner of the land and it was only just and fair and in the best interest of justice that the status quo of the property which is being threatened by the actions of the Defendant, be maintained.

19. On the second issue for determination it was the Applicant's submissions that costs normally followed an event as provided for under Section 27 of the Civil Procedure Act unless there were exceptional circumstances to depart from the established legal principle. That the application was merited and should be allowed therein with costs.

Determination.

20. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

21. In the present matter, there is no dispute that the Applicant/Defendant herein is the registered proprietor of land parcel LR No. Kericho/Itembe/924, to which the Respondent/Plaintiff has laid claim of adverse possession of 0.6070 hectares thereof.

22. The bone of contention herein is that the Respondent/Plaintiff, apart from the piece of land she had laid claim of adverse possession to, has continued to hive off and annex additional portions of the Applicant/Defendant's land during the pendency of the suit wherein she has proceeded to fence off, and plant trees alongside the new fence.

23. Applying the above principles in the **Giella** case (supra) I shall frame my issues for determination herein. I have considered the present application and the documents adduced in evidence in support thereof vis a vis the Respondent/Plaintiff's Replying affidavit. Looking at the facts of this case as submitted, the Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the Respondent. At this stage, the Court is only required to determine whether the Applicant is deserving of the orders sought. The Court is not required to determine the merit of the case, but by virtue of the title held by the Applicant/Respondent herein to the suit land LR No. Kericho/Itembe/924, I find that he has established a prima facie case as was held in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**.

24. There is no doubt that the present suit was instituted by the Respondent vide her originating summons dated 8th May 2019. Hearing proceeded on the 5th February 20120 wherein further hearing was slated for the 16th February 2020. It was while parties awaited the further hearing that the Applicant/Defendant filed the present application.

25. Since it is not disputed that the Respondent/Plaintiff has been utilizing part of the suit parcel of land, and all that the Applicant seeks is an injunction against her restraining her either by herself, her agents and/or servants, or otherwise whosoever from building, developing, planting trees, selling or interfering with the Applicant's interest so as to preserve the suit land from wasting, pending the determination of the case, I see no harm in ordering that the parties do maintain the status quo pertaining.

26. As I understand it, the orders sought by the Applicant of the Status quo in this respect, is the existing state of affairs where it is intended to also freeze the state of affairs. I have balanced all the factors and circumstances in the instance suit

27. The Applicant has clearly described the state of affairs existing which state of affair has been denied by the Respondent herein, to which that apart from the piece of land the Plaintiff/Respondent has laid claim by way of adverse possession, she has continued to hive off and annex additional portions of the Applicant/Defendant's land, during the pendency of the suit, wherein she has proceeded to fence off, and plant trees alongside the new fence. The Applicant now seeks for orders to preserve the suit land from further activities by the Respondent that may be detrimental to his proprietary rights in the suit land. It is certainly worth pointing out that since the status quo orders assist in case management, the court must always keep an eye on the fundamentals to know the state of affairs being kept in *situ*.

28. The Court of Appeal in the case of **Mugah –v- Kunga [1988] KLR 748**, held that in land matters status quo orders should always be issued for purposes of preserving the subject matter. The court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.

29. With this in mind, and whilst cautioning myself on the preservation of the status quo so as to ensure that no party is prejudiced. I would therefore interfere in a limited manner by clearly defining the status quo herein to the effect that:

- i. An order of status quo is herein issued to be maintained by all the parties in that it must be understood that the Plaintiff /Respondent are still in possession of the portion of land in parcel LR No. Kericho/Itembe/924, land that she was in at the time of filing the Originating Summons.
- ii. There shall not be any further building, developing, planting trees, selling or interfering with parcel registration LR No. Kericho/Itembe/924.
- iii. Such status quo is to be maintained by all parties until the matter is finally heard and determined.
- iv. The cost of the application dated the 5th July 2021 shall be in the cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 21ST DAY OF OCTOBER 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE