



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC (OS) CASE NO. 15 OF 2021

BENSON OCHIENG OPIYO.....PLAINTIFF

VERSUS

JOHN OTIENO NYADERO.....DEFENDANT

(Plaintiff's application seeking an interim order of injunction pending the hearing and final determination of the suit: application allowed)

R U L I N G

Introduction

1. By an originating summons dated 29/06/2021, the plaintiff sought to be declared the owner of CENTRAL ALEGO/NYALGUNGA /1715 **(the suit property)** measuring approximately 0.32 Ha by virtue of adverse possession. Together with the originating summons, he filed a motion under certificate of urgency dated 29/06/2021. The motion is the subject of this ruling.

2. The motion was heard *ex parte* on 29/06/2021 and prayers number one and two of the motion were spent. On 29/06/2021, the court directed that the motion be canvassed by way of written submissions and directed the plaintiff to serve the motion together with his written submissions within 10 days. The defendant was given corresponding leave to put in his response and submissions within 10 days upon service by the plaintiff.

Plaintiff's case

3. The plaintiff's motion seeks the following verbatim reliefs against the defendant:

a. Spent

b. Spent

c. That the honourable court be pleased to grant an interim order of injunction restraining the respondent, his servants, agents heirs and assignees and/or any other persons acting on his behalf from interfering, selling, charging, disposing and alienating or interfering with the said parcel CENTRAL ALEGO/NYALGUNGA/1715 measuring approximately 0.32ha until the hearing and final determination of this suit.

d. That costs of this application to (sic) borne by the respondent.

e. That such further and/or other orders be made as the court may deem fit and expedient.

4. The motion is mainly grounded on: (i) the plaintiff's father is buried on the suit property; (ii) the plaintiff's family have lived on the suit property since 1960; (iii) the defendant carried out fraudulent succession proceedings in 2016 in respect of the estate of his late father without disclosing the interests of other family members on the suit property including that of the plaintiff and (iv) the defendant has threatened to evict the plaintiff from the suit property.

5. The motion was supported by the plaintiff's supporting affidavit dated 29/06/2021. The plaintiff contended: (i) the suit property was gifted by the plaintiff's and defendant's grandfather to the plaintiff's father, however, the defendant's father fraudulently registered the suit property in his name, (ii) the defendant took ownership of the suit property upon the death of his father and has threatened to evict the

plaintiff, (iii) the defendant's right to recover the suit property has expired by the effluxion of time, (iv) the plaintiff's occupation on the land has always been open, peaceful and without interruptions, (v) the plaintiff has been in occupation of the suit property at the exclusion of the defendant and the defendant will not be prejudiced if the orders sought are granted.

Defendant's case

6. The defendant has neither filed a response to the motion nor filed written submissions. Though the motion is unopposed, this court is called upon to determine it on its own merits.

Plaintiff's submissions

7. The plaintiff's written submissions dated 19/07/2021 reiterated the averments in the plaintiff's supporting affidavit and set out three issues for determination: (i) the applicant must establish a prima facie case with probability of success (ii) the applicant must show that he stands to suffer irreparable harm which cannot be adequately compensated by an award of damages (iii) if the court is in doubt, then it should decide the matter on a balance of convenience. The plaintiff among other authorities placed reliance on the *locus classicus* case of ***Giella vs Cassman Brown and another (1973) E.A.358***.

Analysis and determination

8. Having considered the motion, supporting affidavit, annexures and written submissions, this court is of the considered view that the only issue falling for determination is whether the plaintiff has met the threshold for the grant of a temporary injunction.

I will proceed to analyze the legal and jurisprudential framework on the issue.

9. The provision of law that clothes this court with jurisdiction to grant a temporary injunction pending the hearing and determination of the suit lies with **Section 63(c) and (e) of the Civil Procedure Act** which provides: -

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed...grant a temporary injunction...make such other interlocutory orders as may appear to the court to be just and convenient.

And **Order 40 Rule 1 of the Civil Procedure Rules** which states: -

“Where in any suit 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...the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

10. The case of *Giella vs Cassman* has long settled the principles that have guided the courts in determining whether or not an applicant has met the threshold to warrant the grant of a temporary injunction pending the hearing and determination of the suit. Has the plaintiff met the threshold? In answering this question, the court has to look at the overriding objective of the law and the circumstances of the case generally.

11. Has the plaintiff established a *prima facie* case with probability of success at the intended trial? The plaintiff contends that his family in succession, have been in possession and occupation of the suit property for a period of over 12 years to the exclusion of the defendant in a manner that is open, peaceful and without interruption and consequently, he is an adverse possessor. However, the defendant has threatened to evict him from the suit property. He contends that he and his immediate family members have built structures on the suit land and some of his relatives are buried there. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR* the Court of Appeal defined a *prima facie* case to mean a genuine and arguable case based on the material presented before the court. Grounded on the plaintiff's contention against the defendant, it is the considered view of this court that the plaintiff's case against the defendant represents a genuine and arguable case and it is the finding of this court that plaintiff has established a *prima facie* with probability of success and has met the threshold of the 1st limb in *Giella vs Cassman*.

12. It is trite law that where an award of compensation would be adequate, an order for temporary injunction should not be granted. It is the plaintiff's contention that he and his family have put up structures on the suit property. He further contends that his father, step mother and step brother are buried on the suit property. Will the plaintiff suffer irreparable harm that will not be compensated by way of damages? African cultures hold gravesites of departed family members with great sentimental value which cannot be replaced by damages or otherwise. The plaintiff has contended that his family have in succession lived on the suit property for over 12 years and his family has always called the suit property home. From the plaintiff's contention, it is quite clear that the family's gravesites and homes cannot be compensated by way of damages and if the temporary injunction is granted, the plaintiff will suffer irreparable loss. It is the finding of this court that the plaintiff has met the 2nd limb of the ingredient set out in *Giella vs Cassman*.

13. Does the balance of convenience tilt in favour of the plaintiff or the defendant? The plaintiff has contended that he has always had possession and occupation of the suit property at the exclusion of the defendant. Damages if any, the defendant may suffer is incomparable to that of the plaintiff. Consequently, it is the finding of this court that the balance of convenience tilts in favour of the plaintiff.

14. I find the plaintiff's motion dated 29/06/2019 merited and ultimately, I make the following disposal orders: -

a. Temporary injunction is granted in terms of prayer 3 of the motion dated 29/06/2021.

b. The plaintiff shall fully comply with the provisions of order 11, of the Civil Procedure Rules, within 21 days of delivery of this ruling and the defendant shall comply with order 11, of the Civil Procedure Rules within 21 days after the period stipulated for compliance by the plaintiff.

c. An affidavit of service to be filed by the plaintiff.

d. Parties shall appear before the Deputy Registrar for pretrial directions on 30/11/2021

e. Costs shall be in the cause.

Ruling delivered by virtual court

DATED, SIGNED AND DELIVERED AT SIAYA THIS 14TH DAY OF OCTOBER 2021

A. Y. KOROSS

JUDGE

In the Presence of:

Mr. Obiero h/b for Mr. Sala for Plaintiff

N/A for defendant

Court Assistant: Sarah Ooro