



**REPUBLIC OF KENYA**

**IN The ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO E10 OF 2018**

**PETER MATHIGU GICHAMBA.....PLAINTIFF**

**VERSUS**

**GRACE NYAMBURA KAMAU.....DEFENDANT**

**AND**

**BEATRICE GATHONI KAMAU**

**JAMES KIMANI KAMAU**

**(as administrators of the Estate of Alphons Kamau Kimani (deceased).....INTERESED PARTY**

**BY WAY OF COUNTER CLAIM**

**GRACE NYAMBURA KAMAU.....1<sup>ST</sup> PLAINTIFF**

**BEATRICE GATHONI KAMAU**

**JAMES KIMANI KAMAU**

**(as administrators of the Estate of Alphons Kamau Kimani (deceased).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PETER MATHIGU GICHAMBA.....1<sup>ST</sup> DEFENDANT**

**OL'KALOU FARMERS SAVINGS AND CREDIT**

**CO-OPERATIVE SOCIETY LTD.....2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR NYANDARUA/SAMBURU.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling with respect to two applications. The first is the Interested Party’s notice of motion dated 3<sup>rd</sup> March, 2021 brought under **Order 40 Rules 1, 2, & 4 of the Civil Procedure Rules 2010 (the Rules), Section 1A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law** seeking a temporary injunction restraining the Plaintiff from entering or interfering with **Title No. Nyandarua/Gilgil West/391 (the suit property)**; evicting the Interested Party therefrom; demolishing houses and structures thereon; removing the graves thereon or in any way dealing with the suit property pending the hearing and determination of the suit. The Interested Party also sought leave of court to amend her pleadings to include special damages.

2. The second application is the Plaintiff’s notice of motion dated 15<sup>th</sup> March, 2021 brought under **Order 40 Rule 7 of the Rules** seeking the stay, variation or setting aside of the interim injunction granted on 5<sup>th</sup> March, 2021 pending *inter partes* hearing of the Interested Party’s

notice of motion dated 3<sup>rd</sup> March, 2021.

3. The notice of motion dated 3<sup>rd</sup> March, 2021 was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Beatrice Gathoni Kamau on 3<sup>rd</sup> March, 2021. It was contended that the Plaintiff had on 28<sup>th</sup> February, 2021 demolished some of the structures on the suit property where the Interested Party had resided. It was further contended that the Plaintiff had threatened to demolish the remaining structures including the dwelling houses on the suit property.

4. The Interested Party contended that if the houses were demolished or if her family were to be evicted they shall suffer irreparable loss since they had always resided on the suit property and did not have an alternative home. It was further contended her deceased relatives were buried on the suit land. She therefore prayed for an interim injunction pending the hearing and determination of the suit.

5. The Plaintiff's application dated 15<sup>th</sup> March, 2021 was based on the grounds set out on the face of the application and the contents of the supporting affidavit dated 15<sup>th</sup> March, 2021. The Plaintiff contended that he was the registered owner of the suit property having bought it at a public auction in 2004. The Plaintiff contended that the interim orders of 5<sup>th</sup> March, 2021 issued pending the *inter partes* hearing of the notice of motion dated 3<sup>rd</sup> March, 2021 were greatly prejudicial to his constitutional right to own and enjoy property.

6. The Plaintiff further contended that as a land owner he was entitled to protection against grabbers, squatters and other trespassers hence his application should be allowed. The Plaintiff further challenged the *locus standi* of the Interested Party to file the application for an interim injunction and contended that she was not the administrator of the estate of the deceased original Defendant.

7. The Interested Party, on the other hand, contended that the deceased, Alphose Kamau Kimani, had two wives and that she was one of the administrators of his estate hence she had *locus standi* to file and defend suits on behalf of the estate. It was further contended that the purported sale of the suit property to the Plaintiff had been stopped by both an order of the Co-operative Tribunal and the High Court way back in 2003 and 2005 respectively.

8. When the matter came up for *inter partes* hearing, it was directed that both applications be canvassed simultaneously through written submissions. The parties were consequently given timelines within which to file and exchange their submissions. The record shows that the Interested Party filed her submissions on 21<sup>st</sup> June, 2021 whereas the Plaintiff filed his on 14<sup>th</sup> June, 2021.

9. The court has considered the two applications on record, the respective responses thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

**(a) Whether the Interested Party has satisfied the requirement for the grant of an interim injunction.**

**(b) Whether the Interested Party is entitled to leave to amend her counter-claim.**

**(c) Whether the Plaintiff has made out a case for the variation or setting aside of the interim orders made on 5<sup>th</sup> March, 2021.**

**(d) Who shall bear costs of the applications.**

**a) Whether the Interested Party has satisfied the requirement for the grant of an interim injunction**

10. The court has considered the material and submissions on record on the first issue. Whereas the Interested Party submitted that she had satisfied the requirements for the grant of an injunction, the Plaintiff contended otherwise.

11. The Interested Party submitted that the suit property belonged to her late father and that the purported sale to the Plaintiff was unlawful since it was done in contravention of some orders issued by the Co-operative Tribunal and the High Court. She contended that she and her family members have always resided on the suit property and that they had buried their deceased parents and relatives thereon. It was further contended that the Plaintiff action of demolishing some of their houses and attempting to evict them was unlawful since it was not backed by a court order.

12. The Plaintiff, on the other hand, submitted that he was the registered proprietor of the suit property hence he was entitled to immediate possession thereof. The Plaintiff further contended that the sale of the suit property to him cannot be successfully challenged since he was an innocent purchaser for value without notice of any defect in title.

13. The court is aware that it is not required at this interlocutory stage to determine the rights of the parties conclusively. It is not required to make any definitive finding on whether or not the sale of the suit property was irregular or unlawful. It is not required to pronounce itself on whether or not the Plaintiff was an innocent purchaser without notice of defect in title. That is the function of the trial court upon hearing and analyzing the evidence of the parties.

14. The court is, however, satisfied on the basis of the material on record that the Interested Party has made out a *prima facie* case with a probability of success at the trial as set out in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358**. There is material on record to demonstrate that the suit property originally belonged to the deceased and that the sale to the Plaintiff was challenged before the High Court. There is also evidence to show that the Interested Party and her family members have all along been in occupation of the suit property. There is also some evidence on record that the Plaintiff invaded the suit property and demolished some structures without the sanction of any court order.

15. The court has further considered the material on record against the second principle for the grant of an injunction. The Interested Party contended that she has been in occupation of the suit property and that she has always resided thereon with her family members. She contended that if they were to be evicted from the suit property, she and her family members would be rendered homeless. The court is satisfied on the basis of the material on record that the Interested Party shall suffer irreparable loss or damage which cannot be adequately compensated by an award of damages.

16. Even if the court were to consider the balance of convenience, the same appears to tilt in favour of the Interested Party who is in possession. It is evident from the pleadings that the Plaintiff filed suit primarily to obtain possession of the suit property. The court is of the opinion that the Interested Party and her family would suffer greater hardship if the injunction were denied than the Plaintiff would suffer by the granting of the injunction. The court is consequently, inclined to grant the interim injunction sought.

**(b) Whether the Interested Party is entitled to leave to amend her counter-claim**

17. The court has noted that none of the parties submitted on the issue of leave to amend. The court is of the opinion that parties should be freely allowed to amend their pleadings for the purpose of determination of the real issues in controversy. See **Eastern Bakery v Castellino [1958] EA 461**. Accordingly, the Interested Party is hereby granted leave to amend her counter claim to include special damages.

**(c) Whether the Plaintiff has made out a case for the variation or setting aside of the interim orders made on 5<sup>th</sup> March, 2021**

18. A perusal of the Plaintiff's application dated 3<sup>rd</sup> March, 2021 and submissions in support thereof reveals that the main reason why he applied for variation or setting aside is that he is the registered proprietor of the suit property. He considered the interim injunction prejudicial to his constitutional right to own and enjoy property as he wished. He did not contend that the interim order was obtained through fraud or concealment of material facts. He did not contend that there was a material change of circumstances between 5<sup>th</sup> March, 2021 when the interim order was made and 15<sup>th</sup> March 2021 when he applied for discharge.

19. The factors to be borne in mind in such application were considered in the case of **Robert Nyangaresi Onwonga ( Suing as administrators of the estate of Zakayo Ondara Nyandoro) v Mark Nyabayo Ratemo [ 2016] eKLR** as follows:

**“ ... Order 40 Rule 7 in my view would only come into play if there has been a fundamental change of circumstances at the time the application is being made vis- a - vis the time when the order was made. Order 40 rule 7 will also be applicable where an injunction is granted ex-parte particularly where the injunction was obtained without full disclosure of all material facts...”**

20. The court is far from satisfied that the Plaintiff has demonstrated the criteria for variation or setting aside of the interim injunction made on 5<sup>th</sup> March, 2021. Accordingly, the court finds no merit in the Plaintiff's application for variation or setting aside of the interim order hence it is not inclined to allow the same.

**(d) who shall bear costs of the applications**

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. Accordingly, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the application. Accordingly, the Interested Party shall be awarded costs of the two applications.

22. The upshot of the foregoing is that the court finds merit in the Interested Party's notice of motion dated 3<sup>rd</sup> March, 2021 whereas it finds no merit in the Plaintiff's notice of motion dated 15<sup>th</sup> March, 2021. Accordingly, the court makes the following orders for disposal of the two applications:

**(a) An interim injunction is hereby granted restraining the Plaintiff from entering, interfering with, evicting the Defendants and the Interested Party, demolishing houses and structures, removing graves or in any other manner from dealing with Title No. Nyandarua/Gilgil West/391 pending the hearing and determination of the suit.**

**(b) The Interested Party is hereby granted leave to amend the counter-claim to include special damages within 14 days from today.**

**(c) The Plaintiff's notice of motion dated 15<sup>th</sup> March, 2021 is hereby dismissed.**

**(d) The Plaintiff shall bear costs of the notice of motion dated 3<sup>rd</sup> March, 2021 and the notice of motion dated 15<sup>th</sup> March, 2021**

Orders accordingly.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

No appearance for the Plaintiff

No appearance for the Defendants

No appearance for the Interested Party

CA- Carol

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**Y. M. ANGIMA**

**JUDGE**