



REPUBLIC OF KENYA

IN THE ELC COURT

AT MOMBASA

ELC. CAUSE NO. 191 (O.S.) OF 2020

KANGWEI CHARO KARISA

SIDI KANGWEI

MARRIAM CHARO BENZI & 65 OTHERS.....PLAINTIFFS/RESPONDENTS

VERSUS

SALIM AHMED HAJI

FATUMA AHMED HAJI

HALIMA AHMED HAJI & 16 OTHERS (Sued in their Capacity as the

Beneficiaries to the Estate of AHMED BIN HAJI BARAWA)...DEFENDANTS/RESPONDENTS

RULING

1. The application for determination is the Notice of Motion dated 5th May, 2021 filed on 6th May, 2021 by the Defendants/Applicants. It is made pursuant to the provisions of Order 40 Rule 1 & 2 of the Civil Procedure Rules, 2010 (Hereinafter referred to as "The CPR"). The Defendants/Applicant is sought for the following orders inter alia:-

(a) Spend

(b) That pending the hearing and determination of this application and suit (Sic) a temporary injunction be hereby issued restraining the Plaintiffs/Respondents whether by themselves, their servants or agents or otherwise howsoever from dealing, leasing, constructing, selling, wasting, damaging, alienating, intruding, developing, sub - dividing, demarcating and/or interfering with the subject property being subdivision 402 Section II Mainland North Measuring Approximately 5.96 acres.

(c) That the County Commander Police Office Mombasa County and Officer Commanding Station do assist and/or provide security and ensure compliance by restraining the Defendants/Respondents from dealing with the property"

(d) That Costs of this application be borne by the Defendants/Respondents.

2. The said Notice of Motion application is supported by the 12 Paragraphed supporting affidavit of one AHMED MAHMOUD AHMED sworn and dated on 5th May, 2021. He is the 4th Defendant/Applicant, bearing the authority to swear and plead on behalf of the other Defendants/Applicants. He deponed that Ahmed Haji Bin Barawa who is now deceased (Hereinafter referred to as "The Deceased" was the legal and registered owner and proprietor of all that parcel of land known as LR. No. 402/Section II/ Mainland North measuring approximately 5.96 acres (Hereinafter referred to as "The suit land").

3. He held that upon the demise, of the deceased, the beneficiaries instituted a succession cause before the Kadhi's Court at Mombasa - Succession case no. 73 of 2010 in order to be allowed to administer and preserve the deceased's estate. He stated that on 18th March 2019 pursuant to a consent order of all the Respondents as beneficiaries before the Kadhi's Court, the 4th Defendant/Applicant was appointed as the legal Administrator of the deceased's estate. He held that the said Defendants/Applicants were the lawful legitimate and equitable owners and/or beneficiaries of the suit land. He deponed that upon the demise of the deceased, unfortunately the original Certificate of ownership got misplaced from its place of safe keeping compelling them to apply for a provisional one. Later on, it was re - issued on 13th August, 2001.

4. The 4th Defendant/Applicant deponed that sometimes in the year 2016, the Plaintiffs/Respondents illegally entered into the suit land and took possession. Indeed the said Plaintiffs/Respondents had commenced and continued with the unlawful dealings which included leasing, construction, selling, sub-division, fencing and demarcating of the suit land. He annexed in the supporting affidavit some copies of photographs to this effect marked as “AMA – 5”.

5. The Defendant/Applicants emphasized that there a dispute of land ownership being in existence, they became apprehensive that the suit property would be damaged as its usage purpose was agricultural and their actions would alleviate the Defendants/Applicants from the property and hence to loss and damage to it. He asserted that the Defendants/Applicants stood to suffer substantial and irreparable prejudice if the Plaintiff/Respondents were not restrained from using the suit property. They prayed for the order sought.

II THE PLAINTIFFS’S/REONDENTS’S CASE.

6. On 22nd June, 2021, the Plaintiffs/Respondents filed an 18 Paragraphed Replying Affidavit sworn by KANGWEI CHARO KARISA. It was dated 22nd June, 2021. Through it, he confirmed that he was the 1st Plaintiff/Respondent herein and duly authorized to by the other plaintiffs to swear on their behalf. He challenged the Notice of Motion Application dated 5.5.2021 for being frivolous, vexatious, incompetent and held that the orders sought were incapable of being granted.

7. The 1st Plaintiff/Respondent deponed that on 22nd January 2021, this court had issued similar interim injunctive orders ast the ones being sought herein, restraining the Defendants/Applicants from dealing with the suit property. He attached a copy of the afore said orders and marked as “KCK - 1. According to the 1st Plaintiff/Applicant the said order had not yet been discharged, varied and/or set aside as required under Order 10 rules (sic) 7 of the C.P.R. neither had there been an application to do so had been filed. Certainly, the orders were still in force they opined.

8. The 1st Plaintiff/Respondent stated that the Defendants/Applicants had not demonstrated by way of a ground report arising from a site visit indicating that they were the residents or occupied the suit land. He denied having any knowledge to the photographs annexed and marked as “AMA – 5”. According to him they were strangers to rhe and wondered from where they had been taken from as clearly they were not from the suit land. To him he deponed that there was a likelihood the Defendants/Applicants were claiming ownership to a totally different land away from the suit land.

9. He asserted that they had not just taken possession of the suit land as they had been in occupation of it continuously and un-interruptedly before the year 1963 when the country attained its independence and hence have been on it for more than 12 years – as clearly shown by the two (2) summon letters by the chief dated 16.3.2016 and 8.3.2016.

10. On the contrary, the 1st Plaintiff/Respondent held that it’s the Defendants/Applicants who had never lived on the suit land since 1954 when the deceased as its registered owner died. He stated that the succession cause No. 73 of 2010 was a nullity as no certificate of death had been annexed nor produced during the said succession proceedings.

11. It was the deposition that the Plaintiff/Respondent that they stood to suffer irreparable loss and damage should the Applicant be granted the orders sought as there would be a disruption of family life they being in actual physical possession of the suit land. Further, they asserted that the Defendant/Applicant would not be prejudiced if the application was dismissed as they had never been in actual physical possession of the suit land for over 50 years.

III. THE SUBMISSIONS

A) SUBMISSIONS BY THE DEFENDANTS/APPLICANTS:

12. On 14th July, 2021, the Defendants/ Applicants Advocates and filed written submissions dated 12th July, 2021. From the submissions, the Defendant/Respondent’s advocate reiterated the prayers sought and that they were the beneficiaries to the deceased’s estate who was the legal and proprietor to the suit land and that that the Plaintiffs/Respondents were trespassing and carrying out illegal activities on it as evidenced from the photographs, annexed thereof. They stressed on the need to preserve the property awaiting the hearing and final determination of the main suit filed as an originating summon.

13. The Defendant/Applicant’s Advocate submitted that granting of an injunction by court was it is discretionary and which ought to be exercised judiciously based on how the Law and evidence. The Defendant/Applicant’s advocate laid down as a basis for this and held while granting the inunction orders. It was guided by the principles enshrined in the famous case of *Giella –vs- Cassman Brown* by setting them out. He also relied in the cases of *MRAO Ltd –Vs- First American Bank of Kenya & 2 Others (2014) eKLR* and its holding on the meaning of “Prima Facie” case.

14. Being the beneficiaries to the estate of the deceased and in possession to title to the suit land the Defendant/Applicant advocate argued that the Defendants/Applicants had a registered interest to the land and which ought to be protected from wastage. He further argued that it was trite law that proof of certificate of title was enough evidence one held a good title and interest in land – thus the Defendants/Applicants had “Prima facie” case with a high chance of succeeding.

15. The Defendant/Applicant Advocate challenged the claim of Land adverse possession by the Plaintiff/Respondent to the effect such a claim could not succeed if the person asserting the claim had been in possession with the permission of the owner. He opined that, the Plaintiff/Respondent had the burden of proof to the said claim – as the occupation by the Plaintiffs/Respondents had been sanctioned and permitted by the deceased and had been on condition that they tilled only a portion which they occupied and take care of the remaining portion as caretaker. However, in the year 2016 the Plaintiffs/Applicants who were not family members of the deceased invaded the suit land, subdivided and illegally sold it to some third party.

16. On the principle whether the Defendant/Applicant shall suffer irreparable injury which would not adequately be compensated by an award of damage if the prayers were not granted, the Defendants/Applicants advocate argued that the deceased and his beneficiaries were the registered owners and had enjoyed farm products from it since the year of 1921. When it was registered in the deceased's name. to him, the deceased had employed the 1st Plaintiff/Respondent to till just part of the land and take care of it and deliver the farm produce to the deceased's family in the old town, Mombasa and which the 1st Plaintiff/Respondent would do faithfully until the year 2016 when out of the deceased's advanced age, the Plaintiffs/Respondents who were unknown to him invaded the suit land and purported to be claiming ownership. There was need to restrain them from doing that. While admitting that the 1st Plaintiff/Respondent had injunction orders they held it was wrong for them to be taking advantage of it to cause wastage and damage the land. The Defendant/Applicant's Advocate confirmed and admitted they had no intentions of discharging, varying or setting aside the injunction orders issued by this court on 22nd January, 2021 but only wished to preserve the interest of the Defendants/Applicants in relation to the suit property. Hence they prayed that the Plaintiffs/Respondents be restrained from conducting illegal actions on the suit land and/or in the alternative prayed that an order of status quo be maintained in relation to the suit land.

B. THE SUBMISSIONS BY THE PLAINTIFFS/RESPONDENTS

17. On 19th July, 2021, the Plaintiff/Respondents Advocates the law firm of Messrs. Onyango Onunga Advocates prepared and filed written submissions dated 16th July, 2021. They indicated that the Plaintiffs/Respondents had been in continuous and uninterrupted occupation of the suit land particularly the 1st Plaintiff/Respondent from the year 1963 which were over 12 years. Indeed they were in actual physical possession of the suit land and were ready to invite court for a site visit to ascertain the status on the ground and verify the Defendants/Applicants had never been on the land since the year of 1954 when the deceased passed on.

18. The Advocates for the Plaintiff/Respondent refuted that the photographs annexed and marked were a misrepresentation of the facts on the ground. On the contrary, they held that the said photographs must have been taken from elsewhere and not the suit land. They emphasized that the Plaintiff/Respondent on 22.1.2021 had obtained injunction orders against the Defendants/Applicants and the same had never been discharged, raised or set aside as required by the provision of Order 10 (sic) Rule the law firm of Messrs. Kihoro & Company Advocates prepared 7 of C.P.R. To all this the Advocate for the Plaintiffs/Respondents submitted and urged court to consider whether the Defendant/Applicants had "a Prima facie" case with chances to succeed and whether the Defendant/Applicants would suffer irreparable injury which would not be adequately be compensated by an award of damages.

IV. ANALYSIS AND DETERMINATION

19. I have carefully and critically read all the pleadings, written submissions, the authorities and considered the relevant provisions of the law applicable with reference to the said Notice of Motion application dated 5th May, 2021 by the Defendants/Applicants herein.

In order to arrive at an informed and just decision I have framed the following issues for consideration. These are namely:-

(a) Whether the Defendants/Applicants have met the threshold as set out under Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 to warrant being granted an interlocutory temporary injunction orders in order to preserve the suit land pending the hearing and final determination of the main suit.

(b) Whether the parties herein are entitled the reliefs sought.

(c) Who will bear the costs.

ISSUE NO. 1 - Whether the Defendants/Applicants have met the threshold as set out under Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 to warrant being granted an interlocutory temporary injunction orders in order to preserve the suit land pending the hearing and final determination of the main suit.

Under this sub-heading I must determine whether the Defendants/Applicants are entitled to a temporary injunction orders prayed for. In deciding whether to grant the orders or not it is trite law that I should be guided on well-established principles enunciated in the *Locus Classicus* in the now famous precedent of *GEILLA –VS- CASSMAN BROWN (1973) E.A. Page. 358* Cases be as follows:-

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly an interlocutory injunction will be ne normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

But before proceedings further the fundamental issue to ponder is whether the Defendants/Applicants have made a “Prima facie” case in their case with a probability of success. In the case of *MRAO –VS- FIRST AMERICAM BANK OF KENYA LTD. & 2 OTHERS(2003)eKLR 125* which I noticed was cited by the Defendants/Applicants in the submissions “a Prima facie” case was well described as follows:-

“A prima facie case in a civil application includes but not confined to “a genuine and arguable case”, it is a case which, on material presented to the court a tribunal property 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”

This is a case filed by the Plaintiffs/Respondents under an originating submissions in ELC No. 88 of 2016 seeking land adverse possession to the suit land. But be that as it may, and with great humility, on 8th October, 2020 the said suit was struck out by Court pursuant to a motion moved by a party on grounds that the 1st Plaintiff/Respondent had sued the deceased, a dead person. Subsequently, the Plaintiffs/Applicants on 16.10.2020 re – grouped and re - filed another fresh Originating Summons case but this time round against the Defendants/ Applicants who are the beneficiaries to the estate of the deceased. The Plaintiffs/ Respondents claim to have taken physical possession of the suit land from the year 1956 when the deceased is alleged to have died and have lived on it continuously and uninterruptedly to the year 2016 which is over 12 years as envisaged by Law of Limitation Cap 22 when they started receiving threats from the Defendants/Applicants claiming the rights of ownership to the said suit land. The Plaintiffs/Respondents have disrupted the legal basis of the beneficiaries and have casts queried on how they were able to have obtained the consent orders to administer the deceased’s estate from the Kadhi’s Court on 18th March 2019 yet the Defendants/ Applicants were never in possession of the Certificate of death for the deceased. My advise on that preposition is that the Plaintiffs/Respondents would have to challenge that assertion appropriately before the Kadhi’s Court by way of filing an objection for revocation of the grant and not as the court has no jurisdiction to entertain it. They argued unlike the Defendants/Applicants who had never been on the land, they had even caused some few developments on it and that is how they sought and managed to be granted temporary injunction orders on 22nd January, 2021. They reiterated that the said orders had not been discharged, varied and/or set aside by court as it is envisaged under Order 40 Rule 7 of CPR. They denied the photographs were taken on the suit land.

On the other hand the Defendants/Applicants held that they were are the legal and genuine beneficiaries of the deceased with all the proprietors rights over the estate. Indeed, as stated above, they applied and were granted the consent order by the Kadhi’s Court. According to them the 1st Plaintiff/Respondent was engaged by the deceased to be a caretaker of the suit land and till part of it as a pre-condition, with time he would farm and supply the deceased and his family with farm products. The Defendant/Applicants argued the Plaintiffs/Respondents were not part of the estate. Indeed, they further held that they were holding a provisional certificate of ownership of the suit land, the original one having gotten lost from its place of safe keeping. They were apprehensive the Plaintiffs/Respondents were in the course of damaging, sub-dividing, selling, constructing and wasting the suit property and wished they were restrained and/or at least status quo be maintained in order to preserve the property.

Clearly, the issue of legal ownership between the Plaintiffs/Respondents and Defendants/Applicants is the pith and substance on their matter. It’s the substantive matter and which cannot be determined through in interlocutory stage. But all facts remaining constant at the moment, it is not in dispute by any of the parties in actual fact it’s the Plaintiffs/Respondents who are in actual physical possession on the land; I have also taken cognizance and that its on record there exists a temporary injunction order granted on 22nd January, 2021 in favour of the Plaintiffs/Respondents, to preserve the suit property. It is not provided for that this court should heap up temporary orders one after another. Nay far from it! And that is how the provision of Order 40 rule 7 of C.P.R. comes into play, *inter alia*:-.

7. “Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order”.

I have not seen anywhere from the Notice of Motion application dated 5th May, 2021 nor the pleadings by the Defendants/Applicants graphically providing any challenges nor particular of the dissatisfaction with sufficient reasons of the aforesaid orders to warrant it being reviewed as envisaged by law. As far as the court is concerned the orders are still in force unless otherwise stated. On the contrary, the Defendants/Applicants has admitted the existence of this orders and held:-

“We do not in any way wish to vary or set aside the orders issued by this court on 22nd January, 2021 but wish to preserve the interests of the Application In the alternative we pray that the Court order (sic) status quo be maintained in relation to the subject properties”

I strongly feel the Defendants/Applicant lost such a golden opportunity to have appropriately moved this court seeking the genuine prayers of preservation of the estate. Certainly this is not a procedural technicality but a substantive issue of substantive law. For this reason, I find that the Defendants/Applicants have failed to demonstrate that they have a “Prima facie” case with any probability of success.

Taking that the grounds for granting temporary injunction as set out in the *GIELLA –VS - CASSMAN BROWN case (Supra)* are in sequential pattern and now that the Defendants/Applicant have failed to prove the first grounds, this Honorable Court need not spend more time venturing into the other well-known two (2) grounds. This position was upheld in the Court of Appeal Case of ***“Kenya commercial Finance Co. Ltd. –VS- Afraha Education Society (2001) 1 E.A. 86 as follows:-***

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction isSequential so that the second condition can only be addressed if the first one is satisfied. The same position was upheld in Court of Appeal (Mombasa) No. 8 of 2015 –Hassan Huri –Vs- Abdulrazak Huri Ibrahim”

I need not say more. In light of the foregoing, I hereby specifically make the following orders:-

- (a) The Notice of Motion application dated 5th May, 2021 by the Defendants/Applicants be and is hereby dismissed with costs to the Plaintiffs/ Respondents.
- (b) Unless otherwise stated the parties are directed to strictly adhere with the temporary injunction orders of 22nd January, 2021 issued by Court in order to preserve the suit land pending hearing and final determination of the main suit.
- (c) Parties to fix this suit for mention within the next fourteen (14) days from today for purposes of holding a pre - trial conference

and taking appropriate directions on the Originating Summons as provided for under order 37 Rule 16 and Order 11 of the C.P.R.

IT IS SO ORDERED.

Ruling **Delivered, Dated** and **Signed** in Open Court This **4th** Day of **October, 2021.**

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

M/s. Onyango for the Plaintiff/Applicant.

M/s. Nyambura for the Defendant/Respondent