



REPUBLIC OF KENYA

IN THE ENRIRONMENT AND LAND COURT AT MERU

ELC (O.S.) E005 OF 2021

NAOMI KATHIRA MUNGANIA.....PLAINTIFF

VERSUS

SCOLA KARUTHU MURIIRA

(Sued as an Administratrix of the

estate of the late LAWRENCE

MURIIRA M'THIRUAINE (Deceased).....1ST DEFENDANT

NEWTON MUTUMA GITONGA.....2ND DEFENDANT

RULING

1. The plaintiff by an application dated **14.6.2021** seeks the defendants be restrained by way of temporary injunction from interfering with **L.N. No. Ntima/Ntakira/2591** and orders of inhibition to issue pending hearing and determination of this matter. The notice of motion is supported by an affidavit sworn on **14.6.2021** by **Naomi Kathira Mungania**.
2. The plaintiff avers the land was registered in the name of the 2nd defendant w.e.f. **14.7.2020** but was initially in the name of his father since **12.10.1992**, who transferred it to him. She alleges to have been in open continuous and in adverse possession of the land since **12.10.1992** hence the resultant transfer was subject to her rights as an adverse possessor. The defendants have issued threats to evict her and hence prays for temporary orders.
3. The 1st defendant opposes the notice of motion through a replying affidavit sworn on **19.8.2021**. First she admits the subject land was initially in the name of the plaintiff's late husband, denies to be a trustee for the plaintiff and categorically states the plaintiff and her family reside on **Parcel No. 2592**. She denies there is any residence on **Parcel No. 2591** except trees. She refers the court to orders of court granted in **Meru HCCC No. 100 of 2020** on **19. 8.2020**.
4. Further the 1st respondent avers the plaintiff has breached the existing court orders by continuing with her trespass to the land. The 1st respondent states an award from the Land District Tribunal exists in which the plaintiff was ordered to move out and take up her husband's land in Ruiru Rwarera area.
5. Thirdly the 1st respondent claims the plaintiff/applicant is forum shopping having lost in the succession cause **No. 110 of 2016** and **Civil Appeal No. 100 of 2019**. The instant suit is therefore a clear attempt of an abuse of the court process.
6. In a supplementary affidavit sworn on **1.10.2021** the plaintiff acknowledges there was an agreement of exchange of two parcels of land, but avers the same was frustrated after discovery that one Lawrence did not have any such land at Ruiru as alleged hence each party was to remain at their initial parcels of land. Unfortunately the plaintiff claims this happened after the 1st defendant had already transferred her late husband's land into his name. Thus in her view the award by the Land District Tribunal was to the effect that the transfer of Ruiru Rwarera land was impossible. The exchange agreement of the parcels could therefore not occur.
7. Further the applicant maintains the fact that in the succession cause the respondent was seeking restraining orders from remaining on the land shows she has been in occupation. The applicant has however admitted she does not have a homestead on the suit land but only undertakes subsistence farming on the said suit land.
8. The basis of the plaintiff's claim is the originating summons dated **6.11.2020** supported by her affidavit sworn on the same date with annexures **marked NKKM "1" a copy of letters of administration, NKM "2" a copy of a search showing the 2nd defendant to be the**

registered owner, NKM “4” a copy of grant in favour of the 1st defendant, NKM “5” (a) & (b) copies of proceedings and an award from PLDA case No. 38 of 2004. She prays for the court to declare her rights of adverse possession on the suit land for an uninterrupted occupation since 1972.

9. The originating summons is opposed through a defendant’s defence dated 2.3.2021. The defendant deny any alleged customary resultant or implied trust, deny any adverse possession rights and lastly aver the plaintiff lost both in the succession case and the P.L.D.A and hence urges the court to dismiss the originating summons with costs.

10. As held in *Giella –vs- Cassman Brown* on grant of injunction, the applicant has to establish a prima facie case with a probability of success. Secondly she must demonstrate she is likely to suffer irreparable loss and damage if the application is not allowed and thirdly the balance of convenience tilts in her favour.

11. Looking at both the plaintiff’s and the defendants pleadings, it comes out clear that there was an agreement for exchange of parcels of land which was signed by the plaintiff’s deceased husband and the defendant’s deceased husband. Whereas the plaintiff’s husband honoured his part, unfortunately he could not take up the one by the 1st defendant since it was never there hence the claim for return of the land which her husband had already surrendered but has now been registered in favour of the 2nd defendant.

12. The records attached to both the supporting and supplementary affidavits are clear the plaintiff has been considered in her demand for the suit land to be re-transferred after the initial agreement was frustrated by the defendant on account of lack of land to exchange with.

13. Given that the plaintiff/applicant has given a consistent trail of events of how the 1st and now 2nd defendant became the registered owner of the suit land, I am of the considered view she has established a prima facie case with a probability of success.

14. Secondly it has not been disputed that there was an injunctive order issued on 19.8.2020 and which the defendants are aware of. I believe the balance of convenience tilts in favour of granting similar orders in this suit.

15. Turning to the issue of irreparable loss and damage, it is evident soon after confirmation of the grant the property exchanged hands in favour of the 2nd defendant ostensibly to defeat the rights and interests claimed by the plaintiff. Therefore to preserve the property till hearing and determination of this suit, **Section 68 and 69** of the **Land Registration Act** gives this court power to issue orders of inhibition.

16. It is therefore my finding that the application dated 14.6.2021 is merited. The same is allowed in terms of prayers 2 and 4. The orders shall only subsist for a period of one year from the date hereof.

17. Parties to comply with **Order 11** and list the originating summons for hearing within 120 days.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 17TH DAY OF NOVEMBER, 2021

In presence of:

No appearance for the parties

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE