



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E072 OF 2021

VIJAY MORJARIA.....PLAINTIFF

-VERSUS-

PROFESSOR ROBERT OBWOCHA.....1ST DEFENDANT

LAND REGISTRAR MACHAKOS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE DIRECTOR SURVEYOR.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1.By a Notice of Motion dated 15th July, 2021, and filed in court on the same date, the Plaintiff/Applicant sought for the following orders;

1) Spent.

2) Spent.

3) That pending the hearing and determination of the main suit, an interlocutory order do issue restraining the 1st Defendant/Respondent, his employees, servants and/or agents and any other person through whom he may act from encroaching, trespassing, evicting, seizing, possessing, erecting fences, erecting structures, transferring, selling, leasing and/or in any way other manner dealing with the Plaintiffs property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District in any way detrimental to the interests of the Plaintiffs.

4)Spent.

5)That pending the hearing and determination of the main suit, an interlocutory order do issue requiring the 1st Defendant/Respondent's, his employees, servants and/or agents forthwith to remove such structures, perimeter fence and foundations that he has erected on the Plaintiff's property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District.

6)That pending the hearing and determination of this Application and main suit, the 2nd and 3rd Defendants/Respondents be restrained from issuing certificate of title to the 1st Defendant/Respondent and any other person in respect to property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District.

7)That pending the hearing and determination of this Application and main suit, the Director of Survey 4th Defendant/Respondent herein and its employees, servants and/or agents be restrained from issuing deed plans and any subsequent subdivided deed plans that arise from the property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District to the 1st Defendant/Respondent herein and any other person.

8)That pending the hearing and determination of this Application and Main Suit, the 1st, 2nd, 3rd, 4th and 5th

Defendants/Respondents, their employees, servants and/or agents herein be restrained from doing anything with the Plaintiffs' property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District in any way detrimental to the interests of the Plaintiffs.

9)Spent.

10)That pending the hearing and determination of this Application and Main Suit, a permanent injunction do issue requiring the 1st Defendant/Respondent, his employees, servants and/or agents forthwith to remove such structures, perimeter fence and foundation that is has erected on the Plaintiff's property know as L.R. No. 20283 situated in Mavoko Municipality in Machakos District.

11)That the OCPD Athi-River Police Station and OCS Mlolongu Police Station to assist in the enforcement of the Court Orders.

12)That the costs of this application be awarded to the Applicant.

2.The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Applicant sworn on 15th July, 2021 in which he has averred that he is the registered owner of the suit property, having acquired it through purchase. He stated that he is in possession of the suit land and has erected temporary structures on it.

3.It is the Applicant's case that on 10th July, 2021 the 1st Respondent encroached on the suit property, claiming ownership of the same. He further asserted that in October 2012, the previous owner of the suit property, namely JINA ENTERPRISES LIMITED had sought for development permission from Mavoko Municipal Council but the same was denied on ground that two persons possessed title documents to the suit property.

4.The Applicant deposed that the Municipal Council of Mavoko sought for clarity on ownership of the suit land from the Commissioner of Lands on who was the genuine holder of the title to the suit land. He deposed that the Commissioner of Lands wrote back and clarified that their records indicated that the suit land is registered in the names of JINA ENTERPRISES LTD, and that the title held by one MACHARIA CHEGE was to be treated as fake.

5.She contended that a search done on 20th December,2019 in respect of the suit property indicated that the Applicant and one HITESH MORJARIA were the registered owners of the suit property. He complained that the continuous interference with his quiet possession of the suit land by the 1st Respondent and other third parties was unconstitutional, unlawful, arbitrary, oppressive and untenable.

6.When this application first came up for hearing on 27th July 2021, Mr. Bosire Advocate appeared for the 1st Defendant/Respondent and sought for leave of 14 days to file a response to the application, which prayer was granted by the court, and the matter fixed for mention on 4th October 2021. On 4th October 2021, Mr. Ongegu Counsel holding brief for Mr. Bosire Advocate for the 1st Defendant, informed the court that though Mr. Bosire had sought for leave to file a response to the application, he had not done so because he had instructions to have the application allowed in terms of prayer 4, so that the matter can proceed to trial. This offer was however declined by Ms Apiyo, Counsel for the Applicant, who stated that as the Respondents had not responded to the Application, all the prayers sought ought to be granted. In the circumstances therefore, the court reserved the matter for ruling, which was fixed for 28th October 2021. However, on 18th October 2021, the 1st Defendant filed a Notice of Motion dated the same day seeking for leave to file a response to the instant application. The 1st Defendant's application was dismissed on 16th November 2021. Therefore, the instant Application is unopposed. Directions were given that the Application be canvassed by written submissions. The Applicant's Counsel filed their submissions on 19th August, 2021. No submissions were filed by the Respondents.

THE APPLICANT'S SUBMISSIONS

7.Counsel submitted that the Applicant had satisfied the principles for grant of injunction set out in **Giella V Cassman Brown [1973] EA 358**. Relying on that case, it was submitted for the Applicant that for a Court to grant Interim Injunctions, the following conditions must be satisfied;

a) The Applicant must demonstrate that they have a *prima facie* case with a probability of success,

b) It must be shown that the Applicant will suffer irreparable loss that may not be compensated by damages if the injunction is not granted and

c) If the Court is in doubt, it will decide the Application on the balance of convenience.

8.On whether the Applicant had established a *prima facie* case with a probability of success, Counsel submitted that the Applicant was the registered owner of the suit land and was in possession of the same since 2012. She contended that the Applicant had acquired the suit property by purchase which is a lawful means and his title has not been challenged in any Court. She relied on the cases of **Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] eKLR 125** and **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** in support of her arguments.

9.On the question as to whether the Applicant stands to suffer irreparable harm should the injunction not be granted, Counsel submitted that the 1st Respondent had commenced construction on the suit property, by putting up a fence on it and therefore the Applicant was

apprehensive that the 1st Respondent may proceed to subdivide the suit property and sell it to unsuspecting third parties, which may deprive the Plaintiff of his property.

10.As regards the question on the balance of convenience, Counsel contended that that since the Applicant is in possession of the suit property since 2012, the balance of convenience tilts in his favour.

11.In addition, Counsel submitted that this Court is a Court of equity, equity follows the law and equity does not come to the aid of a wrongdoer. Invoking the inherent jurisdiction of the Court, Counsel referred the Court to Section 19 of the Environment and Land Court Act, which provides that this Court is enjoined to act expeditiously without undue regard to technicalities of procedure.

12.In conclusion, Counsel urged the Court to allow the Application on grounds that the Applicant had met the principles set out in **Giella v Cassman Brown** (supra).

ANALYSIS AND DETERMINATION

13.I have carefully considered the Application, together with the affidavit in support as well as the Applicant's written submissions. The issue for determination is whether the Applicant is entitled to the orders sought.

14.At this point, I wish to point out that prayers 3, 6, 7, 8, and 11 of the Application have sought for prohibitory injunctions while prayers 5 and 10 have sought for mandatory injunctions. I will first address the question as to whether the Applicant is entitled to prohibitory injunctions sought in prayers 3,6,7,8 and 11. The case of **Giella v Cassman Brown (1973 EA 358)** sets out principles for grant of interlocutory injunctions, as follows;

“The conditions for 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 not normally be 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.”

15. Therefore, as submitted by the Applicant, for an Applicant to be granted an interlocutory injunction, they must prove these three conditions;

a) The Applicant must demonstrate a prima facie case with a probability of success.

b) The Applicant must demonstrate that they will suffer irreparable loss which may not be compensated by an award of damages if the injunction is not granted.

c) Where the Court is in doubt, the Court should decide the Application on the balance of convenience.

16. In **Mrao v First American Bank of Kenya Limited & 2 Others (2003) eKLR**, a *prima facie* case was described as follows;

“a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which, on the material presented to the Court, a Tribunal properly 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.”

17.In dealing with this Interlocutory Application, I am cognizant of the fact that my findings at this point are inconclusive and must await full trial. In **Airland Tours & Travels Limited v National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** the Court stated as follows;

“In an Interlocutory Application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

18.On the question as to whether the Plaintiff has established a *prima facie* case with a probability of success, I note that the Plaintiff claimed to be the registered owner of the suit property. He has attached a copy of the title of the suit land and documents to show that he acquired the same by purchase from JINA ENTERPRISES LIMITED. In addition, he has stated that he is in possession of the suit property. I am therefore satisfied that the Applicant has demonstrated a *prima facie* case with a probability of success.

19.The Plaintiff has stated that the 1st Defendant has encroached on the suit property and began construction on it. He has further stated that the 1st Defendant has already constructed a wall on the suit property. This only means that if he is not restrained from further constructing on the suit property, he may continue with the construction at the detriment of the Plaintiff, where damages may not suffice to compensate the Plaintiff in the event he succeeds. It is my finding therefore that the Applicant may suffer irreparable damage, which may not be sufficiently compensated by an award of damages if the injunction is not granted.

20.On the question of the balance of convenience, the Applicant has stated that he is in possession of the suit land. This assertion has not been controverted by the Respondent. Therefore, the balance of convenience tilts in favour of the Applicant.

21.I therefore find and hold that the Applicant is entitled to grant of prayers 3, 6,7,8 and 11 of the Application.

22.As regards prayers 5 and 10 of the Application, the Applicant sought for Interlocutory Orders requiring the 1st Defendant, his employees, servants and or agents forthwith to remove such structures, perimeter fence and foundations that he has erected on the suit property. These are prayers for mandatory injunction, which are governed by principles beyond those set out in **Giella v Cassman Brown** (supra).

23.It has been decided in numerous cases that a mandatory injunction should only be granted in special and in clearest of cases. A mandatory injunction can only be issued in favour of an Applicant where the Court is satisfied that the Respondent is clearly on the wrong and the ends of justice will be met by granting the mandatory injunction without waiting for the full trial.

24.In the case of **Kenya Breweries Limited & Another v Washington O. Okeyo [2002] eKLR**, the Court of Appeal held that a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but should not normally be granted in the absence of special circumstances; but that if a case is clear and which the Court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.

25.The threshold for grant of mandatory injunctions was also addressed in the case of **Shariff Abdi Hassan v Nadhif Jama Adan [2006] eKLR**, as follows;

“The Courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is *prima facie* established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

26. While a Court may grant a mandatory injunction at an interlocutory stage, it should only do so upon being satisfied that the material placed before it, is so clear as regards the rights of the Applicant that there is no necessity to wait for full trial before granting the orders sought. In the instant case, the Applicant alleges on one hand that he has title to the suit property and on the other hand that the 1st Respondent also claims to have title documents to the suit property. He alleges that the 1st Respondent’s purported title is to be treated as fake.

27.In his Complaint, the Applicant sought, among other prayers, for declarations that he is the *bona fide*, registered and legal owner of the suit property and that issuance of a letter of allotment and title to the 1st Respondent smacks of impropriety, illegality, mistake, fraud and or a corrupt scheme. He also sought for cancellation of the letter of allotment and title issued to the 1st Respondent. Besides, he prayed for a permanent mandatory injunction against the 1st Respondent couched in terms of prayers 5 and 10 of the instant application. Therefore, the question as to who holds a legitimate title to the suit property between the Applicant and the 1st Respondent, is yet to be determined. This means that a trial is necessary before grant of the mandatory orders sought.

28.In view of the fact that both the Applicant and the 1st Respondent claim to be title holders of the suit property, I am not satisfied that there exist special circumstances or that this is a clear case for grant of a mandatory injunction. I therefore decline to grant prayers 5 and 10 of the Application.

29.In view of the foregoing, this court makes the following orders;

a) That pending the hearing and determination of the main suit, an interlocutory order do issue restraining the 1st Defendant/Respondent, his employees, servants and/or agents and any other person through whom he may act from encroaching, trespassing, evicting, seizing, possessing, erecting fences, erecting structures, transferring, selling, leasing and/or in any way other manner dealing with the Plaintiffs property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District in any way detrimental to the interests of the Plaintiffs.

b) That pending the hearing and determination of the main suit, the 2nd and 3rd Defendants/Respondents are restrained from issuing certificate of title to the 1st Defendant/Respondent and any other person in respect to property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District.

c) That pending the hearing and determination of the main suit, the Director of Survey, the 4th Defendant/Respondent herein and its employees, servants and/or agents are restrained from issuing deed plans and any subsequent subdivided deed plans that arise from the property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District to the 1st Defendant/Respondent herein and any other person.

d) That pending the hearing and determination of the Main Suit, the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents, their employees, servants and/or agents herein are restrained from doing anything with the Plaintiffs’ property known as L.R. No. 20283 situated in Mavoko Municipality in Machakos District in any way detrimental to the interests of the Plaintiffs.

e) That the OCPD Athi-River Police Station and OCS Mlolongo Police Station to assist in the enforcement of the Court Orders.

f) That costs of this application shall be in the cause.

30. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH NOVEMBER 2021.

A. NYUKURI

JUDGE.