



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

ELC NO. 102 OF 2018

JAMES KIOO NDONGA.....PLAINTIFF/RESPONDENT

VERSUS

SHADRACK MUTHOKA KIOO.....DEFENDANT/APPLICANT

KAKIMU JOINT VENTURE.....THIRD PARTY

RULING

1. Before this court is a Notice of Motion dated 9th of June 2021, brought under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Code and all enabling provisions of the Law. The Applicant sought for the following orders;

1. That a temporary injunction do issue restraining the third party (Kakimu Joint Venture), their agents, servants or anyone acting or claiming through them from entering, trespassing, sub-diving, transferring or in any manner dealing with Title Number Nzau/Ikangavya/650 pending the hearing and the determination of the application herein.

2. That a temporary order of injunction do issue restraining the third party (Kakimu Joint Venture) their agents, servants or any one claiming through them from entering, trespassing, sub-diving, registering or transferring and or in any other manner, dealing with Title Number

Nzau/Ikangavya/650 pending the hearing and determination of the counter claim herein.

3. That any other order that the Court may deem necessary for the ends of justice.

4. That the status quo be maintained.

5. That the Costs of the application be borne by the Plaintiff/Respondent.

2. The Application is premised on the grounds on the face of the Application and on the Applicant's supporting affidavit sworn on the 19th of May 2021. These grounds are:-

a) That the matter is pending before the ELC Court.

b) That the Applicant is the owner and occupier of two acres within title No. Nzai/Ikangavya/650 which he inherited from his father the Plaintiff herein.

c) That it has come to the attention of the Applicant that the third party herein visited the Nzai Land Control Board on the 25th of May 2021 with the intention of transferring the said land to unknown parties.

d) That the said process has been done without the applicant's knowledge and with the aim of depriving him of his rightful property.

e) That the chairman of Nzai Land Control Board advised the applicant to procure a court order **restraining the third party from transferring and or interfering with the land.**

f) That the third party is intent on selling the said land to the loss and detriment of the applicant.

g) That the applicant seeks for injunctive orders to restrain the third party from transferring, sub-dividing, or interfering in any other manner with the registration of land parcel no. Nzau/Ikangavya/650

h) That if an injunction order is not issued the applicant's application and counter claim will be rendered nugatory.

APPLICANT'S CASE

3. The Applicant avers that he is the owner and occupier of two acres of land within land parcel No Nzau/Ikangavya/650 having inherited the same in 2015 from his father the Plaintiff herein. He further averred that after he learnt of the third party's intention to transfer the land to unknown parties, he raised an objection at the Land Control Board's meeting held on 25th of May 2021 where he was advised to obtain a court order to restrain the third party from transferring or interfering with the suit land pending the hearing and determination of the counter claim herein. He contends that the third party intends to sell the suit land which will be to his detriment and that unless an injunction is granted his counter claim and application will be rendered nugatory.

THIRD PARTY'S RESPONSE

4. The third party opposed the application vide the replying affidavit by its chairman Benson Kyalo sworn on the 3rd of July's, 2021. He averred that land parcel No. Nzau/Ikangavya/650 was registered in the name of their company. He further averred that although there was a dispute between the plaintiff and the defendant regarding the two acres of land within the suit property, the company should be allowed to subdivide the land and have the transfer of the two acres held in abeyance until the dispute between the Plaintiff and the Defendant is determined by the court. He contends that the parties do not dispute that the third party is the owner of the suit land and that the applicant had not established a prima facie case.

THE SUBMISSIONS

5. The Application was canvassed by way of written submissions. The Applicant's written submissions were filed on the 26th of October 2021. The applicant submitted that he had established a prima facie case since he had annexed a copy of a map showing the exact location of the two acres that he allegedly occupies. He further submitted that in the event the land was subdivided, he would suffer irreparable damages as he had put up his home where he resides with his family. He argues that the balance of convenience tilts in his favour as he is in occupation of the two acres within the suit land. The applicant relied on the following cases to buttress his submissions:-

a) Giella vs Cassman Brown

b) Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR.

6. The Third Party's through their submissions filed on the 29th of October 2021 argued that the Applicant had not established a prima facie and placed reliance in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others**. It further submitted that the Applicant would not suffer irreparable loss as the two acres that were the subject in dispute in this suit would be held in abeyance until the dispute between the plaintiff and the Applicant herein was determined by the court. To buttress its submissions, reliance was placed in the case of **Pius Kipchirchir Kogo vs Frank Kimei Tenai (2018) eKLR**. It contends that on a balance of convenience, it tilts towards the non-issuance of the order as the applicant had not adduced any evidence that the third party intends to sell the suit property. It placed reliance in the case of **Alwalaa Construction Company vs Synergy Industrial Credit Ltd & Another (2014) e KLR** in support of its submissions.

ANALYSIS AND DETERMINATION

7. I have carefully considered the application, the affidavits and the written submissions by both parties herein and I find that the issue for determination is whether the Applicant has met the threshold for grant of an injunction. The principles applicable in an application for an injunction were laid down in the case of **Giella Vs Cassman Brown & Co Ltd 1973 EA 358** where the court held that in order to qualify for an injunction.

ü First the applicant must show a prima facie case with a probability of success.

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

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

8. The first issue for determination is whether the Plaintiff has established has a *prima facie* case with a probability of success.

9. In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR** the Court of Appeal described the meaning of a *prima facie* case and stated 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.”

10. The applicant averred that he is the owner and occupier of two acres within land parcel number Nzai/Ikangavya/650. He annexed a map SMK1 to demonstrate the location of the two acres within the suit land. The third party argued that it was the registered owner of the suit land. It is evident from the certificate of title annexed in the plaintiff's list of documents that land parcel NO Nzai/Ikangavya/650 is registered in the name of Kakimu Joint Venture the third party herein. The Applicant in his **statement of defence stated that the plaintiff herein had sold the land to the third party herein. He did not dispute the fact that the third party was the registered owner of the suit land. It is therefore evident that the third party is the registered owner of land parcel No Nzai/Ikangavya/650.**

11. It is not in dispute that the defendant/applicant occupies two acres within the suit land. It is apparent from the pleadings that there is a dispute between the plaintiff/respondent and the defendant/applicant revolving around the ownership of the two acres with the suit land. I have looked at the amended plaint and I find that the dispute pitting the Applicant and the Plaintiff revolves around the exchange of the two acres within the suit land with Email Plot No 838.

12. The third party in its replying affidavit admits that it is aware of the said dispute between the Defendant/Applicant and the plaintiff herein. The third party argued that they want to sub divide the land and have the transfer of the two acres that is in contention held in abeyance until the dispute between the applicant and the plaintiff herein is determined by the court.

13. Although the Applicant is not the registered owner of the suit land, it is clear from the pleadings filed herein that he is in occupation of the two acres within the suit land. The plaintiff has sought for an order of eviction from the suit land in his amended plaint which confirms that indeed the Applicant is in possession of the two acres of land within the suit land. Having found that the applicant **is in occupation of the two acres within the suit land, I find that he has established a prima face case with a probability of success to the extent of the two acres that he occupies within the suit land.**

14. On whether the Applicant will suffer irreparable loss which cannot be adequately compensated by damages, the applicant must establish that he will suffer irreparable loss if an order for injunction is not granted.

15. Irreparable loss was described in the case of **Paul Gitonga Wanjau Vs Gathuthi Tea Factory CO. Ltd & 2 Others Nyeri HCC NO. 28 of 2015** as simply injury or harm that cannot be compensated by damages and would be continuous.

16. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

17. The applicant submitted that he was in physical occupation of two acres within the suit land and that he was apprehensive that the third party would sell the land and thus suffer irreparable damages. On the other hand, the third party submitted that it wanted to sub divide the suit land and have the transfer of the two acres held in abeyance pending the determination of the dispute between the applicant and the Plaintiff herein. The third party admitted that it went to the Land Control board to seek for consent to sub divide the land into three portions and not to sell the land. The Applicant having demonstrated that he is in occupation of the **two acres within the suit land, and the third party having confirmed that it intends to sub divide the suit land, I find that the applicant has established that he is likely to suffer irreparable loss which cannot be adequately compensated by way of damages if the two acres within the suit land are sub divided.**

18. The Applicant submitted that the balance of convenience was in his favour as he was in occupation of the land. The third party submitted that the plaintiff had a duty to demonstrate that the third party intends to sell or transfer the suit land to third parties. I find that balance of convenience tilts in favour the Applicant/defendant as he is in occupation of the 2 acres within the suit land.

19. I have considered the application, the submissions by the parties and the decisions annexed thereto and I find that the applicant has met the threshold for the grant of a temporary injunction. Accordingly, the application dated 9th of June 2021 is allowed in the following terms:-

a) The third party is at liberty to sub-divide the land parcel No Nzai/Ikangavya/650 except for the 2 acres currently occupied by the defendant/applicant pending the hearing and determination of this suit.

b) The Cost of the application be in the cause.

c) Parties to comply with Order 11 within the next 30 days.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY THIS 15TH DAY OF DECEMBER 2021 VIRTUALLY.

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HON. T. MURIGI

JUDGE

IN THE PRECENCE OF: -

Court clerk – Kwemboi

Mr. Kithuka – for the Plaintiff and Third Party

Ms. Kemunto holding brief for Mr Munyasya for the Defendant/Applicant