



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL CASE NO. 16 OF 2018

JANE WAITHERA.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH KARIUKI MBUTHIA.....1ST DEFENDANT

NATIONAL BANK OF KENYA.....2ND DEFENDANT

GICHURU WA KAMOTHO.....3RD DEFENDANT

KARIUKI NGIGE.....4TH DEFENDANT

ELIZABETH WAMBUI MBUTHIA.....5TH DEFENDANT

FAITH MUTHONI.....6TH DEFENDANT

RULING

1. The applicants have brought this application before the court seeking temporary injunction as set out in the application seeking temporary injunctive orders. The application dated 14th December 2020 sought the following orders:

i. Spent.

ii. Spent.

iii. That pending the hearing and determination of this suit a temporary injunction do issue restraining the respondent by herself, he servants, employees, agents or otherwise howsoever from entering, clearing, cultivating, cutting down trees, sawing and selling timber or carrying out activity whatsoever on L.R. Nyandarua/Kipipiri/5076 registered in the names of the 1st and 3rd applicants and L.R. Nyandarua/ Kipipiri/5077 registered in the names of the 2nd and 4th applicants or any part thereof.

iv. That the Officer Commanding Station, Kipipiri Police Station be ordered to stop the respondent from entering on, clearing, cultivating, cutting down trees, sawing ad selling timber from the said pieces of land, disposing of or carrying out any activity whatsoever on L.R. Nyandarua/Kipipiri/5076 and L.R. Nyandarua/Kipipiri/5077 or any part thereof.

v. Spent.

vi. That costs of this application be provided for.

2. The application was based on the face of the application itself and the supporting affidavit and supplementary affidavit of Josiah Ngigi Kariuki dated 14th December 2020.

APPLICANTS' WRITTEN SUBMISSIONS:

3. The applicants outlined the facts of the case as; the plaintiff is the estranged wife of the 3rd defendant who was the original proprietor of L.R. Nyandarua/Kipipiri/136. The 3rd defendant borrowed a loan from the 2nd defendant but defaulted in repayment of the same. In exercise of its statutory power of sale, the 2nd defendant sold the said parcel of land at a public auction held on 28th October 2019. The 1st defendant was the highest bidder and paid the purchase price.

4. The property was subsequently registered in his name. He subsequently caused the land to be subdivided into two parcels LR. Nyandarua/Kipipiri/5076 (hereinafter parcel 5076) and LR. Nyandarua/Kipipiri/5077 (hereinafter called parcel 5077). He then registered parcel 5076 jointly in his name and that of his spouse, the 5th defendant while parcel 5077 was registered in the joint names of the 4th and 6th defendants. The two titles were issued on 13th November 2012.

5. According to the applicants', while the main suit is still pending, the respondent has illegally entered on the suit pieces of land and commenced cutting down trees and selling timber without color of right and without the consent or permission of the joint registered proprietors hence the present application seeking temporary injunction orders.

6. On the grounds for the applicants relied on the cases of *Giella v Cassman Brown (1973) E.A. 358* as discussed with authority in *East African Development Bank v Hyundai Motors Kenya Limited (2006) eKLR*, *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002 (unreported)* as cited with authority in *Michael Gitere & Another vs Kenya Commercial Bank Limited (2018) eKLR* at paragraph 48.

7. The applicants urged this court to find that they had established a prima facie case which has a probability of success at the trial as they are the registered proprietors and therefore entitled to quiet enjoyment of their properties without interference. They pointed out that the respondent has not controverted this fact hence their application should be allowed. Reliance was placed on *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) eKLR*.

8. On whether the applicants will suffer irreparable damage, they submitted that the respondent had illegally entered the suit pieces of land and interfered with the subject matter by cutting down trees and selling timber without the consent of the applicants who are the registered proprietors. That the trees have taken many years to grow and mature and cutting them down is irreparable which cannot be quantified and compensated in monetary terms. Reliance was placed on *Paul Gitonga Wanjau v Gathuthu Tea Factory Company Ltd & 2 Others (2016) eKLR*.

9. It was the applicants urged the court to make a determination that the balance of convenience in this matter tilts to their favour and therefore grant the temporary injunctive order as they had proven the grounds set out for granting injunctive orders.

10. The applicants 'asserted that the injunction orders sought are merited to preserve the suit land and maintain status quo on the suit pieces of land pending the full hearing and determination of the main suit. Reliance was placed on *Hutchings Biemer Ltd v Barclays Bank of Kenya Ltd & 2 Others (2006) eKLR*.

RESPONDENT'S WRITTEN SUBMISSIONS:

11. The respondent replied to the application vide the replying affidavit dated 13th January 2021.

12. The respondent vide her ground of objection dated 19th January 2021, objected to the application on grounds that she had been in occupation and possession of the land since the early 1960s where she has a permanent residence and has been in cultivation of the land since those years, a fact in actual knowledge of the applicants which they have deliberately chosen to conceal to the court to mislead.

13. She averred that the trees in issue were planted and taken care of by herself with no input from the applicants and belong to her and that she does not intend to use them for commercial gain but for repairs for her residence.

14. She asserted that the court cannot be asked to issue orders whose effect will be to evict the respondent from the land which she has occupied for decades and decide the case before hearing of the same on merits.

ANALYSIS AND DETERMINATION:

15. Having considered the application by the applicants and the grounds thereof as well as the supporting affidavit, supplementary affidavit and annexures and the responses by the Respondent and the respective together with the written submissions, the sole issue for determination herein is whether the plaintiff/applicant has made out a case for the granting of orders of temporary injunction.

16. As quoted by the applicants, the conditions for consideration further in granting an injunction is now well settled in the case of *Giella vs Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction: -

"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."

17. The circumstances for consideration before granting a temporary injunction under *Order 40 Rule 1 Of The Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts.

18. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others. (2003) KLR 125* a prima facie case was defined as: -

"A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

19. In the present application, the applicants' main contention is that the respondent has illegally entered on the suit pieces of land and commenced cutting down trees and selling timber without color of right and without the consent or permission of the joint registered proprietors.

20. Weighing all the relevant matters and considering the parties' interests in the present case, I find that the applicants have not proven on a balance of probabilities that they indeed planted the trees in the suit properties. They have not adduced any credible evidence to prove the same. I note that the respondent contended that she has been living in the suit properties since 1960s and had planted the trees herself without the applicants input, a fact I find to be true.

21. The applicants pray that pending the hearing and determination of this suit a temporary injunction do issue restraining the respondent by herself, her servants, employees, agents or otherwise howsoever from entering, clearing, cultivating, cutting down trees, sawing and selling timber or carrying out activity whatsoever on LR. Nyandarua/Kipipiri/5076 registered in the names of the 1st and 3rd applicants and LR. Nyandarua/ Kipipiri/5077 registered in the names of the 2nd and 4th applicants or any part thereof.

22. It is clear that they not only seek to have the respondent barred from cutting down trees, sawing and selling timber but they also want her barred from entering the suit properties yet she lives there.

23. Nonetheless, if the orders are granted as prayed it will be tantamount to evicting the respondent and not just restraining her from cutting and selling the trees. Injunctions are not meant to be punitive to a party to a proceeding. As to any loss which may be occasioned if this application is not granted the applicant knows clearly the value of the trees he claims to have planted and can be compensated for the same.

24. In the circumstances, I am far from persuaded that the Applicants' have a good reason to warrant the issuance of the injunctive orders as sought. In the premises, there would be no need to consider the question as to whether the Plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts. The court while issuing injunctive orders should not do so at the prejudice of any parties; the court ought to balance the rights of the disputing parties.

25. In the premises, the application is without merit and Thus the court makes the orders;

i. The instant application is hereby dismissed with order that costs in the main cause.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 6TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE