



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 36 OF 2019 (OS)**

**WILSON KAJUKI M'ERINGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARTIN GITONGA MUGAA (Sued as the legal representative of**

**MUGA MUGAMBI – DECEASED.....DEFENDANT/RESPONDENT**

**RULING**

1. The notice of motion filed on 17.7.2019 is brought pursuant to the following provisions of law: Section 1A, 1B, 3, 3A, 18 of Civil Procedure Act, Order 40 Rules 1 and 2 of Civil Procedure Rules, Section 68 of the Land Registration Act and all the other enabling provisions of the law. The plaintiff/applicant is seeking for an order of injunction restraining the defendant by himself, agents, servants or employees from entering, interfering, damaging the plaintiff's property on L.R No. Kiegoi/Kinyanka/813 (the suit land) or interfering with the plaintiff's possession thereof until the application and the suit are heard and determined. The applicant is also seeking for an order of inhibition in respect of the suit land as well as the transfer of Maua CMC ELC case Number 95 of 2019 to this court for purposes of consolidation, hearing and determination together with this suit.

2. The grounds in support of the application are set out on the face of the said application and in the supporting affidavit of the applicant. The applicant avers he bought the suit land Kiegoi/Kinyanka/813 43 years ago but the land was not transferred to him. He has possession of this land which he has fully developed. He contends that defendant filed the Maua case No. 95 of 2019 through falsehoods and concealment of material facts.

3. The applicant has availed annexure "WKM 1" amongst other documents which shows that he was issued with an eviction notice by the defendant.

4. The respondent has opposed this application vide his replying affidavit filed in court on 24.9.2019, where he contends that the suit land was registered in the name of his late father who died on 10.4.2005 when respondent was underage. When respondent became of age, he took possession of the suit land and started cultivating the same.

5. The respondent denies that his father ever sold the suit land to plaintiff at any one time. He has filed the Maua case No. ELC 5 of 2019 where he obtained injunctive orders against the applicant. On this point respondent has availed his exhibit 5 which is an order issued in the Maua case that "**status quo to be maintained to the effect that possession of the applicant in respect of Kiegoi Kinyanka/813 shall not be interfered with**". These orders were granted on 28.5 2019 a day after the application was filed.

6. The applicant in the present suit (defendant in the Maua case) filed this application on 17.7.2019, whereby he obtained interim orders of injunction and inhibition in terms of prayer 2 and 4 of the application at the ex parte stage on 24.9.2019, when this court gave a date for hearing on 31.10.2019. Thereafter, the respondent filed an application dated and filed on 29.10.2019 seeking a review or discharge of the interim orders of 24.9.2019 as well as a temporary stay of the implementation of the said orders. The court listed the application of the respondent for hearing on 31.10.2019, the same date that the application of 17.7.2019 was scheduled for hearing. Come 31.10.2019 and there was no appearance for defendant and his advocate, hence the application dated 29.10.2019 was dismissed.

7. The issue for determination is whether to grant the prayer for injunction and inhibition pending the hearing of the suit and whether to transfer the Maua matter to this court.

**Injunction and Inhibition**

8. The tests for granting injunction are well settled as set out in the celebrated case of **Giella vs Cassman Brown & Co. (1973) 358**. Firstly the applicant must demonstrate that he has a prima facie case with reasonable probability of success upon trial, that if injunction is not granted, he would stand to suffer irreparable harm which cannot adequately be compensated by an award of damages and finally the court has to consider the balance of convenience of the parties and the nature of injury – see **Samuel Kamiri Crispah vs John Njeru Kahihu**

9. In the present case, it is not in dispute that the suit land is in the name of Muga Mugambi, the deceased father of the defendant herein. The issue of who is occupying the land appears to be contentious considering that defendant has obtained injunction orders against plaintiff herein in the Maua suit. Both parties accuse each other of having invaded or attempted to trespass on the suit land. The plaintiff contends in his affidavit that it was in December 2018 when the defendant started claiming the land. Defendant on the other hand avers in his replying affidavit that it was March of 2018 when plaintiff demanded that he (defendant moves out of the suit land of which defendant reported matter to the chief. He contends that after the chief's meeting plaintiff did not step on the suit land, but was advised to file court case.

10. Having regard to all the material presented before me, I find that there are tell tale signs that plaintiff is the one who has been on the suit land. The first document I have considered is defendant's annexure exhibit 3, the chief's letter of 17.3.2018 mentioned in paragraph 18 of his replying affidavit. The contents of the said letter are as follows:

***"This is to certify and confirm that the above mentioned parties had their case in my office on 17/3/2018 whereby complainant wanted the defendant to vacate from his deceased father's land. After long discussion the defendant said that he had purchased that piece of land from the deceased. I asked him to bring supporting document but unfortunately he did not have anything to produce. He said that he will give the complainant the said land because it is registered under his father's name but he will seek help in the Njirincheke council of elders. I asked him to bring even a witness but he was unable to bring anybody. I advised both parties to file the case in court of law.."***

11. It is clear that defendant herein was the one who had complained to the chief and he wanted Wilson Kajuki to vacate the land which means that plaintiff was the one on the suit land as at 17/3/18.

12. The other documents have considered is the letter dated 18/12/18 availed by plaintiff as annexure WKMI. In that letter the firm of Maitai Rimita advocates is issuing a notice demand letter to the plaintiff herein under instructions from their client – **Martin Gitonga**, for the plaintiff to vacate the suit land. Defendant is mute in so far as the contents of this letter are concerned. It follows that even by December 2018, plaintiff was still on the suit land.

13. In light of the foregoing, I am inclined to find that plaintiff has met the criteria set out in the case of **Giella VS Cassman Brown (Supra)**.

#### **Transfer of Maua case no.95 of 2019**

14. It is not in dispute that defendant did file the Maua suit on 27/5/19. Section II of the civil procedure Act provides that **"Every suit shall be instituted in the court of the lower grade competent to try it....."**. There is hence nothing wrong in the steps taken by the defendant in filing the suit at Maua court. However, a problem arises in that plaintiff too has a right to seek redress in a court of law whereby his claim is within the jurisdiction of this court as it is based on the principle of Adverse possession. There is bound to be a conflict, if the cases are conducted in different forums. This conflict has already manifested itself in that the Maua court has issued an injunction in favour of the defendant herein while this court has issued an injunction in favour of the plaintiff.

15. In order to determine both claims harmoniously, it is necessary for the Maua suit to be transferred to this court for consolidation and determination with the present matter.

#### **16. Final orders:-**

**1) An order of injunction is hereby issued restraining the defendant, or his servant and or agents from any kind of dealings in respect of parcel No. Kiegoi/Kinyanka/813 or interfering with plaintiff's possession thereof until this suit is heard and determined or until further orders are given by the court.**

**2) Any orders of injunction issued in the Maua case no. 95 of 2019 are hereby stayed.**

**3) The order of inhibition issued on 24.9.19 is hereby confirmed until the suit is heard and determined or until further orders are given by the court.**

**4) An order is hereby issued for the transfer of Maua CMC ELC NO.95 of 2019 to be registered as a new Meru ELC matter, of which the said file is to be consolidated with Meru ELC 36 of 2019.**

**5) The costs of this application shall abide the outcome of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22<sup>ND</sup> JANUARY, 2020 IN THE PRESENCE OF:-**

C/A: Kananu

Gikonyo for plaintiff

John Muthomi for defendant

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**