



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 33 OF 2018 (O.S.)

JAMES NGARI MAKAMBI.....PLAINTIFF

VERSUS

DOMINIC MUCHIRI MUTHUI.....DEFENDANT

RULING

1. By a notice of motion dated 23rd September 2019, brought under **Order 8 Rule 5, Order 40 Rule 1 of the Civil Procedure Rules and Section 68 of the Land Registration Act, 2012** the Plaintiff sought the following orders:

a) Spent

b) *That the Applicant be granted leave to amend his originating summons in terms of the annexed draft amended originating summons.*

c) *That a temporary injunction do issue against the Defendant/Respondent by himself, his servants, agents, workmen and/or anyone claiming under him from selling, transferring, charging, alienating, leasing, evicting/interfering with the status quo of parcels of land Nos. Evurore/Nguthi/3767, 3768, 3769 and 3770 all resultant subdivisions of original parcel of land No. Evurore/Nguthi/2300.*

d) *That the court do inhibit any dealings with parcels of land Nos. Evurore/Nguthi/3767, 3768, 3769 and 3770 pending hearing and determination of the suit herein.*

e) Spent ...

f) *That costs of the Application be provided for.*

2. The said application was based upon the grounds set out on the face of the application and the supporting affidavit of the Plaintiff sworn on 23rd September 2019. It was contended that the original suit property, that is, *Title No. Evurore/Nguthi/2300* had been sub-divided and registered as four separate parcels; that there was a danger of those parcels being alienated; and that there was a likelihood of the Defendant interfering with the Plaintiff's peaceful occupation of the said parcels.

3. The Defendant filed a replying affidavit sworn on 8th October 2019 in opposition to the said application. The Defendant contended that he bought for value the four parcels which were originally part and parcel of *Title No. Evurore/Nguthi/2300*. It was further contended that the Plaintiff was unlawfully in occupation of the suit properties in violation of a court order made against him in *Embu CMCC No. 81 of 1989* which was granted at the instance of the previous proprietor.

4. The Defendant further contended that the instant application was an abuse of the court process since the Plaintiff filed the suit only after losing in previous legal proceedings. The Defendant denied that the Plaintiff had any crops on the parcels in dispute. It was also contended that the Plaintiff was not deserving of the equitable remedy of injunction since he had not come to court with clean hands. Consequently, the Defendant urged the court to dismiss the said application.

5. When the said application was listed for hearing on 8th October 2019 it was directed that the same be canvassed through written submissions. The parties were granted 21 days each to file and serve their respective submissions. The record shows that the Plaintiff filed his submissions on 11th December 2019 whereas the Defendant filed his on 20th December 2019.

6. The court has considered the Plaintiff's said application, the replying affidavit in opposition thereto as well as the written submissions on record. The court is of the opinion that the following 3 issues arise for determination:

- a) Whether the Plaintiff has made out a case for leave to amend his originating summons.
- b) Whether the Plaintiff has made out a case for the grant of an interlocutory injunction.
- c) Whether the Plaintiff has made out a case for an Order of inhibition.

7. On the 1st issue, the Defendant has not put forward any opposition to the prayer for leave to amend the originating summons. The principles to be considered in granting or refusing an application for leave to amend a pleading were summarized in the case of **Eastern Bakery V Castelino [1958] E.A. 461 at 462** as follows:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there can be no injustice if the other side can be compensated by costs ...”

8. The court is satisfied from the material on record that the leave to amend sought should be granted. There is no doubt that the original suit property i.e. *parcel No. 2300* has since been sub-divided and registered separately. The amendment has been sought well before the hearing. The amendment would thus serve the purpose of determining the real issues in controversy. The court is, therefore, inclined to allow the application for leave to amend the originating summons.

9. The court has considered the material on record on the issue of interlocutory injunction. Although the Plaintiff did not specify that he wanted the injunction pending the hearing and determination of the suit, that is what he must have intended. Accordingly, the court shall consider the application as such. It would appear that the Plaintiff has been in occupation of the suit properties for a considerable period of time. It would further appear that the Plaintiff has been involved in legal proceedings with the previous proprietor in consequence of which an eviction order was issued against him. However, it would appear that the Plaintiff did not comply with that order. It is thus not clear whether the Plaintiff's lengthy occupation has been as of right within the intendment of the law on adverse possession or whether he was merely a contemnor who was in open contempt of court. The court shall not make any definitive conclusion in that respect since that is the function of the trial court. However, the court is not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial within the meaning of the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**. It was his duty to demonstrate that he has a legally protected right in the suit properties which has been threatened with violation by the Defendant in this suit. See **Mrao Vs First American Bank of Kenya Ltd [2003] KLR 125**.

10. The 3rd issue is whether the Plaintiff is entitled to an order of inhibition under **Section 68 of the Land Registration Act, 2012**. The material on record indicates that the Plaintiff is apprehensive that the suit properties might be alienated before the instant suit is heard and concluded. The Plaintiff is therefore seeking preservation of the suit properties pending the hearing and determination of the suit. The court is of the opinion that it has a duty to preserve property which may be in dispute until the dispute is conclusively determined.

11. The upshot of the foregoing is that the court is satisfied that there is merit in the Plaintiff's prayers for leave to amend the originating summons and for an order of inhibition. However, the court finds no merit in the Plaintiff's prayer for an interlocutory injunction. Accordingly, the court makes the following orders for disposal of the notice of motion dated 23rd September 2019:

- a) *The Plaintiff is hereby granted leave to file and serve an amended originating summons within 14 days from the date hereof in default of which the leave shall lapse.*
- b) *The Plaintiff's prayer for a temporary injunction is hereby declined.*
- c) *An order of inhibition to prohibit any dealings with the suit properties is hereby granted in terms of order No. 4 of the said application.*
- d) *Costs of the application shall be in the cause.*

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **16TH DAY** of **JANUARY, 2020**.

In the presence of Ms. Koome holding brief for Ms. Rose Njeru for the Plaintiff and Ms. Mbwiria holding brief for Ms. Muthoni Ndeke for the Defendant.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

16.01.2020