



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 521 OF 2013

JOSEPH NJIRAINI MURIITHI.....PLAINTIFF

VERSUS

BETH WANJIRA MURIITHI.....1ST DEFENDANT

AGNES WAKUTHII WACHIRA.....2ND DEFENDANT

ANTHONY MBITHI WACHIRA.....3RD DEFENDANT

SUSAN NJERI MUNENE.....4TH DEFENDANT

MARGARET WAKIURU MURATHI.....INTERESTED PARTY

JANE KIRUNDA NJIRAINI.....1ST INTENDED INTERESTED PARTY

BMN (Minor) Sued on behalf

of the mother as next friend).....2ND INTENDED INTERESTED PARTY

SWN (Minor) Sued on behalf

of the mother as next friend).....3RD INTENDED INTERESTED PARTY

RULING

The application coming up for hearing is the Notice of Motion dated 3rd December 2019 seeking the following orders:

(1) Spent.

(2) That this Honourable Court be pleased to grant a temporary injunction against the 3rd and 4th defendants restraining them through themselves, their servants, agents and/or employees from digging trenches, constructing, felling trees or in any other means interfering with the suit properties herein L.R. MUTIRA/KIRUNDA/1476 and L.R. MUTIRA/KIRUNDA/1482 pending the hearing and determination of this application.

(3) That this Honourable Court be pleased to grant a temporary injunction against 3rd and 4th defendants restraining them through themselves, their servants, agents and/or employees from digging trenches, constructing, felling trees or in any other means interfering with the suit properties herein L.R. MUTIRA/KIRUNDA/1476 and L.R. MUTIRA/KIRUNDA/1481 pending the hearing and the determination of this suit.

(4) Costs of the application be provided for.

The application is supported by grounds apparent on the face of the application and the affidavit sworn by applicant the same date. The application is opposed with a replying affidavit sworn by Susan Njeri Munene on 10th December 2019. In his supporting affidavit, the plaintiff/applicant deponed that the 1st and 2nd defendants/respondents who are his biological sisters moved the Kirinyaga Central Division

Land Disputes Tribunal without his knowledge and/or notice and had the tribunal issue them with an order having them registered as proprietors on 4th March 2011. The applicant stated that the 1st and 2nd respondents later had the two parcels of land transferred to the 3rd and 4th defendants. The applicant further deponed that all along, he was the one cultivating the two parcels of land being L.R. MUTIRA/KIRUNDA/1476 and MUTIRA/KIRUNDA/1481 until the 3rd and 4th defendants got registered.

He contends that he ceased cultivating the two parcels of land immediately upon discovery of the fraud and that the land has remained intact ever since. The applicant also deponed that on or about 26th November 2019, the 3rd and 4th defendants moved into the suit land and began felling trees, digging trenches and carrying timber and logs out of the suit land and destroying boundary features thereby causing huge gullies on the suit land.

The application is opposed with a replying affidavit by Susan Njeri Munene, the 4th defendant herein sworn on 10th December 2019. According to the 4th defendant, they purchased the suit properties L.R. No. MUTIRA/KIRUNDA/1476 and 1481 from the 1st and 2nd defendants who by then were the registered owners of the two parcels of land and were in occupation. She stated that immediately they became registered as proprietors, they took possession and started developing the land including constructing a perimeter wall and planting trees. The 4th respondent further stated that in May 2012, the plaintiff filed an application seeking orders that they should not interfere with his occupation and enjoyment of the two parcels of land and that they filed a replying affidavit opposing the application. After hearing the said application, the Court granted an equitable relief restraining them from transferring, charging or leasing the parcels of land but disallowed the prayer for injunction restraining them from interfering with the parcels of land. The 4th respondent stated that the applicant did not appeal against the said orders and that they cannot now be prevented from occupying the land or cutting down the trees which they planted. She stated that they have never interfered with boundary features.

APPLICANT'S SUBMISSIONS

The applicant through the firm of Muriuki Muriithi & Co. Advocates submitted that from the affidavit evidence, he was the registered owner of the two parcels of land as can be seen from the register shown in the green card entry No. 2. He submitted that the proprietorship of the applicant was cancelled by the Central District Land Disputes Tribunal and the titles issued to the 1st and 2nd defendants through impugned orders subject of this suit. He submitted that the Central District Land Disputes Tribunal lacked jurisdiction as donated under **Section 3 (2) of the Land Disputes Tribunal (repealed)**. On that ground, the applicant submitted that he has a prima facie case with high chances of success. The applicant also stated that on the second principle for the grant of an injunction order, he will suffer irreparable injury as he planted trees in 2004 which trees have matured and can be logged and timber extracted. He stated that the acts of the 3rd and 4th defendants cannot be compensated by way of damages. He submitted that the acts of digging trenches, felling trees/logging, cutting away timber, interfering with boundary features are acts meant to waste, damage, alienate and cause the land to lose value which is an injury that is not calculable as it relates to the nature and status of the land. On the third principle for the grant of an injunction, the applicant submitted that the balance of convenience is in favour of the plaintiff/applicant in that he planted the trees on the suit land in 2004 and that the respondents moved into the land on 26th November 2019 and began the acts of destruction. The applicant relied on the following cases:

(1) Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) e K.L.R.

(2) Paul Gitonga Wanjau Vs Gatethi Tea Factory Ltd & 2 others (2016) e K.L.R.

(3) Robert Mugo Vs Eco Bank & another (2019) e K.L.R.

SUBMISSIONS BY 3RD & 4TH RESPONDENTS

The 3rd and 4th respondents through the firm of Maina Kagio & Co. Advocates submitted that 1st and 2nd defendants had obtained the suit parcels of land pursuant to a decree obtained upon adoption of the Land Disputes Tribunal's award and an order of the Court. He stated that the 1st and 2nd defendants were in occupation of the parcels of land which they later sold to the 3rd defendant who is husband to the 4th defendant. The respondents further submitted that in May 2012, the plaintiff filed an application seeking for injunction against the respondents herein not to interfere with the land. That application was dismissed by the Court on 20th December 2012 and the plaintiff did not appeal against the Court's finding.

ANALYSIS AND DECISION

I have considered the affidavit evidence and the pleadings herein. I have also considered the submissions by the counsels and the law. The plaintiff/applicant filed this suit simultaneously with a Notice of Motion under certificate of urgency dated 21st October 2011. In that application, the applicant sought an order to place an inhibition prohibitory order against registration of any transfer, charge, lease or any dealings in the suit properties L.R. No. MUTIRA/KIRUNDA/1476 and 1481 pending the hearing of the said application. The applicant also sought a temporary injunction against the defendants restraining them with his quiet possession, occupation, cultivating and enjoyment of the suit properties pending the hearing and determination of the said application. After the interparties hearing of that application, the Court only granted the first prayer prohibiting any registration of any transfer, charge, lease or any dealing in the two parcels of land by the 3rd and 4th defendants or any other person acting under them until the matter is heard and determined. The second prayer was disallowed. The present application by the applicant is seeking almost similar prayers as the previous application. He has deponed in the supporting affidavit that the respondents have begun felling trees, digging trenches and carrying timber and logs out of the suit land and destroying boundary features. He annexed photographs marked **JM 2**. Upon perusal of those photographs, it is not in dispute that evidence of stumps of cut down trees and logs are shown. There is also evidence of heavy destruction on the photographs. The respondents have not controverted those depositions except mere denials.

In an application for an injunction, a party seeking the Court's discretion must establish the three principles as set down in the celebrated case

of *Giella Vs Cassman Brown Co. Ltd (1973) E.A 358*. These are:

- (1) A prima facie case.**
- (2) Unless the order sought is granted, the applicant will suffer irreparable injury.**
- (3) Where the Court is in doubt, the Court may decide the case on a balance of convenience.**

On the first principle, the applicant is raising a fundamental issue that though he is not the registered proprietor now, he was previously registered as the owner before the 1st and 2nd defendants through some irregular and un-procedural manner moved the Central Land Disputes Tribunal where they were awarded the land contrary to the law. The applicant stated that in awarding the 1st and 2nd defendants his land, the said Land Disputes Tribunal lacked jurisdiction and their decision is therefore null and void. That ground in my view without going into the merit of the claim is a prima facie issue which this Court cannot ignore. It is a jurisdictional issue which falls in the standard of prima facie.

On the second issue, the applicant has deponed under oath that the respondents are cutting down trees which he planted in the year 2004, digging trenches, carrying timber and logs out of the suit land. As I have stated hereinabove, the respondents have not challenged those issues in their replying affidavit. Destruction of trees and digging of trenches is not only afflicting injury and damage to the plaintiff/applicant but the same has detrimental effects to the environment. If the plaintiff/applicant finally succeeds, he will suffer irreparable injury as the clean environment he had envisaged when he planted trees at the time he acquired the property in the year 2004 will have been destroyed. Even if I was to decide this case on third principle, I still find that the balance of convenience tilts in favour of the applicant. Suffice to state that though this Court had disallowed the same prayer for injunction in the earlier application dated 21st October 2011, I find that the grounds being advanced in the present application calls for this Court's power to review its orders issued on 20th December 2012 which I hereby do.

In the upshot, the application dated 3rd December 2019 is merited and the same is allowed as follows:

- (1) A temporary injunction is hereby issued against the 3rd and 4th defendants restraining them by themselves or through their servants, agents and/or employees from digging trenches, constructing, felling trees or in any other means interfering with the suit properties herein L.R. No. MUTIRA/KIRUNDA/1476 and L.R. No. MUTIRA/KIRUNDA/1481 pending the hearing and determination of this suit.***
- (2) The costs of this suit to be costs in the cause.***
- (3) In order to fast track this suit, I direct the parties to take a hearing date in this suit and have it heard and determined within 3 months.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of March, 2020.

.....
E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Mr. Mwangi holding brief for Muriuki Muriithif for Plaintiff
2. Mr. Asiimwe holding brief for Maina Kagio for the 3rd and 4th Defendants
3. Ms Maina holding brief for Mugambi Njeru for the 1st and 2nd Defendants
4. Mbogo – Court clerk

MR. ASIIMWE

I seek to be given a hearing date.

MS MAINA

I do not have diary for Mugambi Njeru.

COURT

By consent of the parties, mention on 18th March 2020 to take a convenient hearing date.

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E.C. CHERONO

ELC JUDGE, KERUGOYA