



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 73 OF 2019 (O.S)

JOHN MREFU EBOSO (Suing on Behalf of the Estate of MUREFU BONDO(Deceased).....APPLICANT

VERSUS

ADINA SUKA.....RESPONDENT

RULING

1. On 3rd October 2019, the applicant, John Mrefu Eboso through Ms. Abisai and Company Advocates, filed an application by way of a Notice of motion dated 2nd October 2019 pursuant to sections 3,3A and 63 (c) and (e) of the Civil Procedure Act (Cap 21) and Order 40 Rule 1, Order 5 of the Civil Procedure Rules,2010. He is seeking orders that:-

i. Spent

ii. Spent

iii. A temporary order of injunction do issue against the respondent from trespassing, building, fencing, excavating ,cultivating, demolishing and/or erecting structures on LR NO. KANYAMKAGO/KAJULU/138 measuring 9.14 hactares and particularly, the applicant's portion of LR NO. KANYAMKAGO/KAJULU/138 measuring approximately, 3.0 acres until this application is heard and determined.

iv. Costs of this application be provided for.

2. The application is premised on grounds 1 to 18 on it's face, whereby the applicant stated inter alia that the applicant has an overriding interest over three (3) acres of the suit land, LR. NO. KANYAMKAGO/KAJULU/138 onto which the respondent has trespassed and threatened to demolish the applicant's property. The application is further premised on the applicants supporting affidavit with annexed documents marked as "JME-1 to JME-5b" which include a copy of a Limited Grant of Administration Ad litem (JME-1) copy of register of the suit land (JME-3), photographs of the suit land (JME-4) and a copy of death certificate of Murefu Bondo (deceased) who was the father of the applicant (JME-5(a) and (b).

3. Briefly, the applicant complains that he is a son of Murefu Bondo, (deceased) who purchased the suit land from the defendant (respondent) in the year 1978 as shown in a copy of sale agreement marked as "**JME-2(a) and 2(b)**". That the deceased died before transfer of the same to his name. That the applicant took letters of administration in respect of the estate of the deceased. That the respondent has trespassed and threatened to destroy the property of the applicant on the suit land which the applicant has occupied and possessed continuously without interruption for a period in excess of 40 years.

4. In his 14 –paragraphed replying affidavit sworn on 21st October 2020, the respondent opposed the application. He deposed inter alia that he is the registered proprietor of the suit land measuring 9.14 hectares in area as shown in a copy of title deed marked as "AS1" annexed to the affidavit. That he sold only one (1) acre and not 3.0 acres of the suit land to the deceased at a sum of kshs. 50,000/= being the purchase price thereof. That the deceased paid him a down payment of kshs. 4,000/= leaving a balance of kshs. 46,000/= unpaid to date.

5. The defendant further deposed that he did not transfer the suit land to the deceased owing to the fact that the latter failed to complete payment of the purchase price. That the deceased and the plaintiff did not possess the suit land as the deceased moved out of the land in 1990s and removed his entire property including the alleged trees therefrom.

6. On 3rd December 2019, this court directed that the application be argued by way of written submissions. Accordingly, the parties complied with the directions by the applicant's submissions dated 23rd December 2019 filed on 7th January 2020 and the respondent's

submissions dated 28th January 2020 filed on 29th January 2020 respectively.

7. I have thoroughly considered the entire application, the replying affidavit and rival submissions including authorities cited therein. So, has the applicant satisfied the threshold laid down in the case of **Giella –vs- Cassman Brown and Company Limited (1973) EA 358** for this court to grant the orders sought in the application?

8. In **Nguruman Ltd –vs- Jan Bonde Nielsen and 2 others (2014) eKLR**, the Court of Appeal restated that in an interlocutory injunction application, the applicant has to satisfy the following triple requirements:-

a) Establish his or has case only at a prima facie level

b) Demonstrate irreparable injury if a temporary injunction is not granted and

c) Ally any doubts as to (b) hereinabove by showing that the balance of convenience is in his or her favour.

9. The court further stated that :-

*“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially; see *Kenya Commercial Finance Company Ltd –vs- Afraha Education Society (2001) Volume 1 EA 86.*” (Emphasis added)*

10. In **Mrao Limited –vs- First American Bank of Kenya Ltd and 2 others (2003) KLR 125**, a definition for “**Prima facie**” case in Civil cases was given by the Court of Appeal. Accordingly, I subscribe to the said pronouncement.

11. Notably, the plaintiff generated the instant suit by way of an originating summons dated 30th September 2019 for adverse possession over the suit land. **Section 30 of the Registered Land Act Chapter 300 Laws of Kenya (the Repealed Act)** and section 28 (h) of the **Land Registration Act, 2016 (2012)** come into play. I also note all the documents annexed to the application and those annexed to the replying affidavit herein.

12. **Section 13 (7) (a) of the Environment and Land Court Act 2015 (2011)** stipulates that this court is empowered to grant interim preservation orders including injunctive reliefs. On 14th October 2019, this court granted an interim preservation order in the form of maintenance of status quo in respect of the suit land.

13. In the case of **Ogada –vs- Mollin (2009) KLR 620 at 635 paragraph 35**, the Court of Appeal held thus:-

“The doctrine of lis pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until after the final determination of the suit or until the suit in any other manner terminated (Emphasis laid)

14. In the case of **Musa Angira Angira –vs- ICDC (2015) eKLR**, Mutungi J, held that an order for the maintenance of the obtaining status quo in lieu of an injunction in the terms sought, may be granted by court. I find the reasoning of my learned senior brother very sound and I hereby endorse the same without any reservation.

15. The orders sought in this application are within the discretion of this court and targeted at attaining the ends of justice. I am of the considered view that the orders merited in the obtaining circumstances are the orders granted on 14th October 2019 rather than the interim orders sought in the instant application.

16. Accordingly, the instant application mounted by way of notice of motion dated be and is hereby determined in the following terms:-

(a) The parties shall maintain the status quo over the suit land as ordered by this court on 14th October 2019 in lieu of the interim injunction sought herein pending the hearing and determination of this suit.

(b) Costs of the application be in the cause.

17. It is so ordered.

DATED, SIGNED and DELIVERED at MIGORI this 3rd day of March 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Ms. Okota learned counsel for the applicant

Respondent in person

Court Assistant – Tom Maurice