



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 64 OF 2017

MUTHENGI MUTEMI PLAINTIFF

VERSUS

MUNYOKI KIKUU 1ST DEFENDANT

MUTHUKA MULI 2ND DEFENDANT

RULING

INTRODUCTION

The application before me is the Notice of Motion dated 2nd October, 2017 brought under Order 40 Rule 1 CPR and Section 3 CPA. The applicant is seeking an equitable relief of an injunction to restrain the respondents either by themselves, agents, servants and/or employees from trespassing into, entering, putting up building, undertaking any works or in any other way whatsoever and howsoever interfering with the applicants unsurveyed land situated at Ilioni village, Kathungu Sub-location, Ngalange Location, Tseikuru Sub-county of Kitui County pending the hearing and determination of this application and/or the main suit herein.

In his affidavit in support of that application sworn the same date, the applicant deposed that he is the legal owner of the suit land measuring approximately 5 hectare where he has built a five (5) roomed house, kitchen and store, one single room house and a toilet.

The applicant contends that on 25th January, 2017 the 2nd respondent/defendant sent a notice to his wife to vacate the suit land. He attached the said letter marked MMI. He stated that he acquired the suit land from his sister one Kawele Kinga who herself had bought it from one Mukuru Manzi. The applicant further stated that the suit land was purchased by his brother in law from Mukuru Manzi who passed the right of ownership to his sister who gave it to him. He stated that he has done numerous developments on the suit land. The applicant deposed that on diverse dates in the month of September 2017 the respondent's agents carried out the following unlawful activities in the suit land;

- (a) Closing the paths
- (b) Closing his gates
- (c) Preparing shamba ready for cultivation.
- (d) Chasing away his goats.
- (e) Attempting to evict him.

The applicant further believes that he has a legitimate right over the suit capable of being protected by a court of equity. He attached a Notice to vacate dated 25th January 2017, and proceedings of a decision before the area chief marked MM1 and MM2 respectively. The applicant also attached photographs of the suit land and the destruction done by the respondents.

In a replying affidavit sworn by the 2nd respondent on 24/11/2017, the respondents oppose the application and the averments contained in the supporting affidavit. It is the respondents contention that he is the legal owner of the suit land having inherited from his late father one Muli Nzaoya who passed away in the year 1957 and that he has been in occupation/possession of the same since then and that he has made numerous development thereon including building a permanent house and farming.

The respondent further deposed that on or about the year 2015- 2016 the plaintiff's/applicant's wife one Kithini Syengo approached him to lease/sell her a portion of pasture in the suit land for grazing her livestock. After negotiating he agreed to lease her for two (2) seasons at Kshs.10,000/= The respondent also deposed that she allowed the applicant's wife to build a temporary structure to live in while grazing her

livestock. The respondent averred that sometime on 13/9/2017 the applicant's wife laid claim to the suit land alleging that she bought it from him which allegations are not true and without basis. The respondent argued that the plaintiff/applicant has not shown any legal interest in the suit land to warrant the grant of the injunctive orders being sought.

APPLICANTS SUBMISSION

When the application come up for hearing the parties through their Advocates agreed to dispose the same by way of written submissions. The applicant through the firm of Mulinga Mbaluka & Co. Advocates filed their written submissions on 5th March, 2018 in which they urged this court to find in favour of the applicant. The learned counsel further submitted that the applicant has established a prima facie case with high chances of success at the main trial. The learned counsel also argued that unless the orders being sought are granted he is likely to suffer irreparable loss due to the damage which is continuous as long as the respondent continue encroaching on the suit land doing destructive activities. He cited the following cases in support of the application;

1. In the High Court of Kenya at Nyeri Succession Cause No. 410 of 2015.
2. Stanbic bank Ltd Versus Consumer Federation of Kenya HCCC No. 315/2015 (Nairobi)
3. Hardy Residents Association Versus Andrew Nganga ELC No. 214 of 2013 (Nairobi)

RESPONDENTS SUBMISSIONS

The respondents on the other hand through the firm of Nyamu & Nyamu Company Advocates filed their written submissions on 9th April, 2018 in which they submitted that the applicant has not established the three principles for the grant of injunction orders as set out in the celebrated case of Giella Versus Cassman Brown Ltd (1973) EA 358. In addition, the learned counsel submitted that an injunction over unsurveyed piece of land will go against public interest in that the applicant's right over the unsurveyed piece of land is unascertainable and thus an order for injunction would be in rem. Counsel submitted that the whole public would have been restrained since the land is not demarcated and individual interests not ascertained. He cited the following cases;

SYMON GATUTU KIMAMO & 587 OTHERS VERSUS EAST AFRICAN PORTLAND CEMENT COMPANY LTD- HCCC NO. 333 OF 2011 [2011] eKLR.

The respondent's counsel also submitted that the applicant has not given an undertaking as to the security for damages should the averments contained in the application turn out to be untrue. The learned counsel argued that beside the principles set out in the Giella Case (Supra) these are the other conditions a genuine applicant approaching a court of equity must satisfy. He submitted that the applicant has not demonstrated that he is entitled to the orders being sought and that the application should be dismissed with costs.

ANALYSIS AND DECISION

It is now crystal clear that an applicant seeking injunctive orders must demonstrate to the court he has met the three principles as set out in the celebrated case of Giella Versus Cassman Brown Ltd (1973) 538 (Supra). The courts have also with the passage of time established other conditions for the grant of injunction such as the giving of an undertaking by an applicant to pay damages should the averments contained in the application turn out to be untrue. Applying the principles set out in locus classicus case of Grella Versus Cassman Brown Ltd (1973) 538. I find and hold that the applicant has miserably failed to demonstrate a legitimate interest known in law and which can be protected by a court of equity.

The applicant has not demonstrated a prima case with high chances of success at the main trial. He has not also shown what injury he stands to suffer for which damages will not be an adequate remedy. The applicant in the pleadings has stated that he is the owner of the suit property which is unsurveyed. That argument in my view leads me to one conclusion that the suit property has not been adjudicated and individual interests ascertained. I agree with counsel for the respondent that until such process of adjudication is concluded and individual interest ascertained, it will be an exercise in futility for this court to determine the ownership of the suit property.

For the reasons I have given, this is a suitable case in which the balance of convenience can be applied. In my view, the balance of convenience heavily tilts against the grant of the orders sought. In the upshot, the applicant's application dated 2nd October 2017 be and is hereby dismissed with costs to the respondents.

It is so ordered.

Read, Delivered and Signed in the open court this 15th day of May 2018.

Hon. Justice E. C. Cheron

ELC JUDGE

In the presence of:

1. Court clerk: Ijabo.

2. Applicant/Advocate absent

3. Respondent/Advocate absent