



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO 5 OF 2019

AGNES MORAA GICHANA.....PLAINTIFF/APPLICANT

VERSUS

GRACE MORAA MOGOI.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. What is before me is the Plaintiff's Notice of Motion dated 14.6.2018 seeking the following orders:

a) Spent

b) Spent

c) A temporary injunction be issued restraining the Defendant/ Respondent by herself, her father (Francis Nyagaka Onchoka), her servants, agents and/or any other persons claiming on her behalf from entering, alienating, committing any act of waste on land parcel number NYANSIONGO SETTLEMENT SCHEME /887 and/or otherwise howsoever interfering with the suit land pending the hearing and determination of this suit.

d) The officer in charge Matutu Police Station and/or Commander of Administration Police, Borabu Sub- County be directed to ensure compliance with the orders of this court.

e) The honourable court be pleased to enjoin Francis Nyagaka Onchoka as the 2nd Defendant herein.

f) The costs of this application be provided for.

BACKGROUND

2. The application is based on grounds stated on the face of the Notice of Motion and the supporting affidavit of Agnes Moraa Gichana sworn on the 14th day of June 2018. It is opposed through the Replying Affidavit of Grace Moraa Mogoi sworn on the 27th August 2018.

3. Before delving into the merits of the application, it is necessary to give a brief background of this case. The Plaintiff/Applicant is the wife of one Charles Gichana Angwenyi who was the registered owner of land parcel number NYANSIONGO SETTLEMENT SCHEME/107 measuring 19.5 acres. The said Charles Angwenyi acquired the suit property from the Settlement Fund Trustees. The Applicant avers that she was given the property by her husband as a gift in 1966 and she has been residing and using the land since then. Sometime in the year 2000, she learnt that her husband intended to sell a portion of the suit property measuring 5.5 acres to the Respondent's husband one Peter Mogoi without her consent. The Applicant then lodged a caution over the suit property at the Nyamira Land Registry.

4. When the Applicant's husband learnt that she had lodged a caution over the suit property, he instituted a case for removal of the caution and sub-division of the land at the Borabu Land Disputes Tribunal vide Borabu Land Disputes Tribunal Case No. 9 of 2001. The Tribunal issued an award for the removal of the caution. The decision of the Tribunal was adopted as a judgment of the court by Keroka Magistrate's court. The Applicant who was aggrieved by the said decision applied to have the decision of the Tribunal quashed vide Kisii HC Misc Application No. 12 of 2001. The High Court rendered its decision on 4th July, 2002 quashing the Tribunal's decision. In the meantime, while the case was still pending, the Applicant's husband applied for sub-division and the Land Registrar, Nyamira sub-divided the suit property into 10 parcels of land including land parcel no. NYANSIONGO SETTLEMENT SCHEME/887 which was transferred to the Respondent's

husband. The remaining 14.5 acres is occupied by the Applicant. Following the court's decision, the Land Registrar, Nyamira cancelled the 9 titles that had been created out of land parcel No. 107 but left parcel no. NYANSIONGO SETTLEMENT SCHEME/887 which is registered in the name of Peter Mogoi thereby creating a situation of double registration.

5. The said Peter Mogoi died in March 2010 and despite the fact that the Applicant obtained an order of injunction to restrain the Respondent from burying him on land parcel No. NYANSIONGO SETTLEMENT SCHEME/887, the Respondent and her step father Francis Nyagaka Onchoka went ahead and buried him on the suit property. The Applicant subsequently filed contempt proceedings against the Respondent and the said Francis Nyagaka Onchoka and they were found guilty and convicted of contempt of court. Francis Nyagaka Onchoka was fined Kshs. 10,000 in default 2 months imprisonment while warrants of arrest were issued against the Respondent. The said warrants have never been executed and the Respondent has refused to surrender the title in respect of land parcel No. 887 for cancellation as ordered by the Land Registrar.

6. Following the High Court's decision quashing the award of the Tribunal, the Applicant authorized her son Japheth Ogamba to take possession of land parcel no. 887 but the Respondent filed Kisii High Court Petition No. 3 of 2014 against the said Japheth Ogamba claiming that he had trespassed on the suit property.

7. In dismissing the petition, Mutungi J observed that in view of the High Court's order quashing the decision of the Land Dispute's Tribunal, the root of the title held by the Respondent's husband had been faulted and therefore the Petitioner's right to the suit property had not crystallized as to deserve protection. The court also held that the Respondent had no locus standi as she had not taken out letters of administration in respect of her late husband's estate.

8. In the instant application, the Applicant alleges that on 30th May 2018, Francis Nyagaka Onchoka went to the suit property with a group of youth, fenced off large portion of the land and cut down some trees and started carrying out some construction.

9. The application is strenuously resisted by the Respondent who contends that her late husband purchased the suit property measuring 5.5 acres from the Applicant's husband and she has been in occupation thereof since the year 2000. She argues that the Applicant has no title to the suit property and even if all the resultant titles from land parcel no. NYANSIONGO SETTLEMENT SCHEME/107 were cancelled the property would revert to the original owner Charles Gichana Angwenyi who has never revoked the sale agreement between himself and the Respondent's late husband. He attended the burial of the Respondent's husband and handed the title deed to her step father for onward transmission to the Respondent. It is her contention that the High Court order quashing the Tribunal's decision did not invalidate the sale agreement between the Respondent's late husband and the Applicant's husband.

10. The Respondent maintains that the Applicant has no right to the suit property as it was registered in her husband's name before he sold it to the Respondent's husband and put him in possession. She contends that after her husband's death she obtained a Grant of letters of administration in 2014, after which she had the suit property registered in her name and that of her children. She argues that since she is the one in occupation of the suit property the question of trespass does not arise and the Applicant will not suffer any loss or damage if the orders sought are not granted.

11. It is the Respondent's contention that at the time the Applicant filed this suit, she sued the Respondent in her personal capacity as the Applicant had not yet obtained a Grant of letters of administration in respect of her late husband's estate and therefore the suit is a non-starter. The Respondent further contends that the reliefs sought in the Complaint have been overtaken by events and it is not possible to grant the temporary injunction sought.

12. The Respondent denies any knowledge of contempt proceedings taken out by the Applicant against the Applicant's husband and the Nyamira Land Registrar and states that the Applicant is guilty of non-disclosure.

ISSUES FOR DETERMINATION

13. Having considered the Notice of Motion, rival affidavits and pleadings herein the following issues fall for determination:

- i. Whether the Applicant has met the conditions for grant of a temporary injunction.
- ii. Whether Francis Nyagaka Onchoka should be enjoined in the suit as the 2nd Defendant.

ANALYSIS AND DETERMINATION

14. The principles for grant of temporary injunctions are now well settled. In order for the court to exercise its discretion in granting injunctive relief the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the Applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

15. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Whether the Applicant has established a prima facie case with a probability of success.

16. The Applicant's contention is that she was given land parcel No. NYANSIONGO SETTLEMENT SCHEME/107 by her husband as a gift. The said parcel of land is however not registered in her name. In an affidavit sworn by Charles Gichana Angwenyi, the Applicant's husband on 25.6.2010 annexed to the Respondent's affidavit, he depones that she has no proprietary interest in the suit property. The Applicant is banking on the fact that she objected to the sale of a portion of land parcel No. 107 by lodging a caution on the said title and the High Court agreed with her by quashing the decision of the Land Disputes Tribunal, which had purported to remove the said caution. Ideally the title ought to have reverted to the Applicant's husband but by the time the court rendered its decision, he had sold a portion of the land measuring 5.5 acres to the Respondent's late husband. The said portion which is known as NYANSIONGO SETTLEMENT SCHEME/887 was eventually transferred to the Respondent in her capacity as the Administrator of the estate of her late husband and she has been in occupation thereof since the year 2000.

17. The Applicant is also relying on the decision in Constitutional Petition No. 4 of 2013. In the said case the Respondent sued the Applicant's son for trespass and the court held that that the Respondent had no right to the suit property as she had not taken out letters of administration in respect of her late husband's estate, coupled with the fact that the root of her title had been faulted. However, it is not in dispute that the suit property has never been registered in the Applicant's name. Moreover, her husband who sold parcel number 887 to the Respondent's late husband is still alive and he has never revoked the sale of the suit property to the Respondent.

18. The only prayer in the original Plaint filed by the Plaintiff is for injunction to stop the Defendant from burying the remains of her late husband or otherwise interfering with land parcel number NYANSIONGO SETTLEMENT SCHEME/107 or any of the resultant parcels. The burial took place ten years ago, in 2010 and the suit had never been fixed for hearing. In the premises, I am not persuaded that the Applicant has established a prima facie case with a probability of success.

19. Furthermore, the Applicant has not demonstrated what loss she stands to suffer if the orders sought are not granted as she was not in possession of the portion of the suit property that was sold to the Respondent's late husband. On the other hand, the Respondent has been in occupation of the suit property since the year 2000. Granting an injunction at this stage would amount to issuing final orders without determining suit on the merits. In view of the foregoing, it is my finding that the Applicant has not met the conditions for a temporary injunction.

20. The second limb of the application is for leave to enjoin one Francis Nyagaka Onchoka as a 2nd Defendant.

The application is brought under Order 1 Rule 10 of the civil Procedure Rules which states as follows:

“Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit”

Sub-rule 2 provides that

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to be just, order that the name of the party improperly joined, whether as Plaintiff or Defendant be struck out and the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”

21. I have perused the Draft amended Plaint and what is clear is that the Applicant seeks not just to add a new party but to add a new cause of action which does not arise out of the same facts as the original suit. Whereas in the original suit, the Applicant sought to restrain the Respondent from burying her late husband on the suit property, she now seeks to introduce a suit for eviction and damages for trespass, ten years after the suit was filed. Moreover, the Applicant has not stated that the suit was filed in the name of a wrong person, either by mistake or otherwise.

22. As was stated in the case of the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others (2014) eKLR**, one of the principles that the court should consider in granting an application for amendment of pleadings is that the proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised. The amendment should also not cause undue prejudice the other side.

23. Even though the court has a wide discretion to grant an application to amend pleadings so as to add a new party, the discretion should be exercised judiciously and within settled principles. The court must also consider the overriding objective of the Civil Procedure Act which is to facilitate a just expeditious, proportionate and affordable resolution of disputes. Considering that this suit was filed in 2010, the amendment which being sought ten years down the line and which has nothing to do with the original suit is not justified. For the foregoing reasons, I decline to exercise my discretion in favour of the Applicant.

The upshot is that I find no merit in the application and I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kisii via zoom this 20th day of May, 2020.

J.M ONYANGO

JUDGE