



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 11 OF 2020

EPHANTUS KARIUKI THIGAH.....APPLICANT

VERSUS

MOSES GICOVI NYAGA.....RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 8th May 2020 brought under **Order 40 Rules 1 & 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Applicant sought an order of temporary injunction restraining the Respondent, his agents, servants, family members or anyone claiming through him from transferring, disposing of or interfering with his use of *Title No. Ngandori/Kirigi/13724 (the suit property)* pending the hearing and determination of the suit. He also sought an alternative prayer for maintenance of the *status quo* pending the hearing and determination of the suit.

B. APPLICANT'S CASE

2. The said application was based upon the grounds set out on the face of the motion. The Applicant stated that he has a claim for adverse possession against the Respondent with respect to the suit property. It was his contention that he had been utilizing the suit property since 2004. The application was supported by an affidavit sworn by the Applicant on 8th May 2020 which expounded upon the grounds set out in the notice of motion. He contended that he had developed the suit property by planting tea stems, coffee and napier grass. The Applicant further stated that the Respondent only bought the suit property from the registered owner in 2019 hence his claim for adverse possession was still intact.

C. RESPONDENT'S RESPONSE

3. The Respondent filed a replying affidavit sworn on 20th May 2020 in opposition to the said application. The Respondent stated that he bought the suit property from one Phylis Muthoni Chabari, who is the Applicant's sister, in 2019. He further stated that he approached the Applicant who had mature napier grass thereon and requested him to harvest it. It was his case that the Applicant obliged by harvesting his napier grass whereupon he took possession of the suit property and started farming thereon. The Respondent stated that he was surprised when the Applicant returned to the suit property on 1st May 2020 to harvest napier grass once again. He stated that he reported the matter to the police who upon investigation arrested the Applicant and charged him with a criminal offence in *Embu Criminal Case No. 235 of 2020*.

4. The Respondent denied that the Applicant had been in occupation of the suit property for over 20 years since the Applicant had his own parcel of land nearby where he has always lived. He maintained that he was the one who had been in occupation since January 2020 and that the Applicant only decided to file suit in May 2020 after he was arrested for unlawfully harvesting napier grass from the suit property. He, therefore, asked the court to dismiss the said application and discharge the interim orders in place.

D. DIRECTIONS ON SUBMISSIONS

5. When the said application came up for hearing on 21st May 2020 the Applicant was granted 10 days to file a supplementary affidavit (if need be) and written submissions whereas the Respondent was granted a similar period to file a supplementary affidavit (if need be) and written submissions upon the lapse of the Applicant's period. The record indicates that the Applicant filed his written submissions on 2nd June 2020 whereas the Respondent filed his on 9th June 2020.

E. THE ISSUES FOR DETERMINATION

6. The court has considered the notice of motion dated 8th May 2020, the replying affidavit in opposition thereto, the submissions on record and the entire material on record. The court is of the opinion that the following issues arise for determination in this matter.

a) *Whether the Applicant has satisfied the requirements for the grant of an interim injunction.*

b) *Whether the Applicant has made out a case for an order for maintenance of status quo.*

c) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a) Whether the Applicant should be granted an interim injunction

7. The court has considered the material and submissions on record on this issue. In order to succeed in an application for an injunction the Applicant must satisfy the principles set out in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**. First, an Applicant must demonstrate a *prima facie* case with a probability of success at the trial. Second, he must demonstrate that he shall suffer irreparable harm or damage which cannot be adequately compensated by an award of damages. Third, if the court is in doubt, it shall decide the application on a balance of convenience.

8. The material on record indicates that the suit property originally belonged to one Njeru Thika Karisho (*the deceased*) who had no wife or children, although he had brothers and other relatives. One of his brothers was the Applicant. Although the Applicant claimed that Phylis Muthoni (*Muthoni*) who sold the suit property to the Respondent was a stranger, the material on record indicates that she is a niece of the deceased. The material on record also indicates that the administrator of the estate of the deceased, Faith Wandiri Nthiga, is also a niece of the deceased even though the Applicant does not seem to recognize her as such. It would thus appear that there is a succession dispute amongst some of the relatives of the deceased in consequence whereof the Applicant has filed an application for revocation of grant.

9. The court is not satisfied from the material on record that the Applicant has made out a *prima facie* case with a probability of success at the trial for two reasons. First, although the Applicant may have been cultivating the suit property prior to its sale to the Respondent, there is no indication that his cultivation was adverse to the title of the deceased or Muthoni. Indeed, it is Muthoni who informed the Respondents that the Applicant was the one cultivating the suit property. The court is of the view that the Applicant was merely cultivating the suit property as a relative or family member and not as a trespasser. However, the Applicant shall still have a chance to demonstrate otherwise at the trial.

10. The second reason is that it would appear that the Applicant lost possession of the suit property in January 2020 or thereabouts when the Respondent appears to have taken possession. There is some evidence on record to demonstrate that the Applicant was arrested on 2nd May 2020 when he went to harvest napier grass from the suit property. It is unlikely that the police service would have arrested him for harvesting grass from land of which he was in possession. That points to the possibility that the Respondent had already taken possession of the suit property.

11. The court has noted that the Applicant has exhibited a copy of the statement which the Respondent recorded with the police on the issue of napier grass in both the affidavit in support of the originating summons and the affidavit in support of the application. The court notes that in both cases the statement is incomplete. The Applicant appears to have selectively annexed the first page of the statement whilst excluding the rest. It has been held that an applicant for equitable relief must make a full and faithful disclosure of all material information within his knowledge or possession. See **Owners of Motor Vessel "Lilian S" Vs Caltex Oil (K) Limited [1989] KLR 1**. The Applicant does not appear to be very candid in disclosure of information in this matter. The court has noted from the copy of the letter of the Chief of Ngandori East Location dated 27th November 2013 that both Muthoni and the administrator of the estate of the deceased are nieces of the deceased. It is not clear why the Applicant wanted the court to believe that they are strangers!

12. Since the Applicant has failed to satisfy the court that he has a *prima facie* case with a probability of success, there is no need to consider the other two principles for the grant of an injunction. The Applicant's case has simply failed at the first of the three hurdles. Accordingly, the 1st issue is answered in the negative.

b) Whether the Applicant should be granted a status quo order

13. The court is of the opinion that since the Applicant has failed to demonstrate a *prima facie* case with a probability of success at the trial, there would be no basis for an order of *status quo*. It is also apparent that there is a dispute amongst the parties as to what the current *status quo* on the ground is. Whereas the Applicant contended that he was in possession the Respondent contended otherwise. The court has found on the basis of the material on record that it is the Respondent who is in possession. In those circumstances, the court is of the view that a *status quo* order would not be of any assistance to the Applicant in any event. Accordingly, the 2nd issue is answered in the negative as well.

c) Who shall bear costs of the application

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful party should not be awarded costs of the application. Accordingly, the Respondent shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL ORDER

15. The upshot of the foregoing is that the court finds no merit in the notice of motion dated 8th May 2020 and the same is hereby dismissed with costs to the Respondent. For the avoidance of doubt, the interim orders granted on 9th April 2020 are hereby discharged. It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT EMBU THIS 18TH DAY OF JUNE 2020 VIA ZOOM PLATFORM IN THE PRESENCE OF MS. MUTHONI FOR THE RESPONDENT AND IN THE ABSENCE OF THE APPLICANT.

Y.M. ANGIMA

JUDGE

18.06.2020