



REPUBLIC OF KENYA

IN THE E.L.C. COURT OF KENYA

AT GARISSA

E.L.C. NO. 9 OF 2019

MOHAMED HAJIR MURSAL.....1ST APPLICANT/PLAINTIFF

AMINA ALI NOOR.....2ND APPLICANT/PLAINTIFF

HASSAN HAJIR MURSAL.....3RD APPLICANT/PLAINTIFF

VERSUS

GULLED HAJIR MURSAL.....RESPONDENT

RULING

1. By Notice of Motion dated 26th September, 2019 and brought under Articles 22, 23, 40 & 47 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Orders 40 Rule 1, 2 & 7 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the Applicant seeks the following orders:

1) Spent

2) **THAT** an interim injunction do issue restraining the Defendant/Respondent whether by themselves, their servants, employees, hirelings or agents or others from claiming through or under them from invading, entering upon, occupying, alienating, transferring, leasing, mortgaging, evicting or in any way interfering with the land belonging to the Plaintiffs/Applicants as beneficial owners of plot number Garissa Block 4/3 or in any way whatsoever from interfering with the Plaintiff/Applicant's property rights accruing on said land pending the hearing and determination of this application.

3) **THAT** an interim injunction do issue restraining the Defendant/Respondent whether by themselves, their servants, employees, hirelings or agents or others from claiming through or under them from invading, entering upon, occupying, alienating, transferring leasing, mortgaging, evicting the applicants or in any way interfering with the land belonging to the Plaintiffs/Applicants as beneficial owners of plot number Garissa Block 4/3 or in any way whatsoever from interfering with the Plaintiff/Applicants Property rights accruing on said land pending the hearing and determination of the main suit.

4) **THAT** the court declares that the judgment of the kadhis court in succession cause No. 42 of 2017 is null and void as the kadhis court does not have any jurisdiction on land matters.

5) **THAT** the OCS Garissa Police Station be directed to enforce the courts order above and provide necessary security to avert invasion of the Plaintiff/Applicant Land.

6) **THAT** cost of this Application be in the cause.

2. The application is supported by the affidavit sworn by Hassan Hajir Mursal the 2nd Plaintiff/Applicant on behalf of the Applicants and it is dated 26th September, 2019.

3. In response to the application, the Respondent filed a Replying Affidavit sworn by the Respondent Gulled Hajir Mursal dated 30th January, 2020. The Application came up for hearing on 27th February, 2020, when parties agreed to have the matter determined based on affidavit evidence.

APPLICANTS' CASE

4. The applicants allege that they are the beneficial owners of Plot No. GSA/53 located in Garissa Ndogo measuring 0.08 hectares or thereabout, By virtue of being the wife and children of the deceased registered owner of the property, one Hajir Mursal Hujale who died in the year 2011.
5. They contend that the Respondent filed a petition before the Kadhis Court for the sharing of the estate of their deceased father, however, in regard to the subject property, they allege that there was a dispute in respect to its ownership. And that the parties in the petition before the Kadhis Court including the respondent reached a consent to have the property shared equally among the children of their deceased father. They allege that the decision was reached without the involvement of the 3rd Applicant who at the time was admitted in hospital and was not aware of the case.
6. Additionally, they allege that the Kadhi failed to consider the 2nd Applicant assertions that the subject property did not belong to the deceased, but instead invoked the principle of constructive trust.
7. It is the applicant's case that pursuant to the Kadhis decision, the Respondent went ahead and valued the property and applied to have the whole property sold as one unit and thereafter applied for the eviction of the applicants from the property. The alleged warrant is dated 30th August, 2019, which warrant they allege is erroneous on the face of it as it relates to a different property GSA/1385 and not the subject Plot. No 53 in which the applicants reside in.
8. Further, the applicants contend that the decision of the Kadhis court is ultra vires as it was made without jurisdiction, arguing that the kadhis court jurisdiction is limited to matters of succession, marriage and divorce and therefore did not have the jurisdiction to deal with the ownership dispute in respect to the subject property.
9. Furthermore, the applicants allege that the purported sharing of the subject property infringed the provisions of the Law of Succession Act as it was done without the appointment of an administrator.
10. In sum, it is the applicants case that if this court does not intervene in the circumstances, the respondents armed with the kadhis court directions are on the verge of violently evicting them from the property and they are bound to suffer irreparable damage rendering them destitute as they have nowhere else to go.
11. The respondent vide his replying affidavit opposed the application raising several issues. He averred that the applicants have not approached the court in good faith and urged the court not to entertain the instant application. He reiterated that the matter filed before the Kadhis Court was competently filed and arbitrated, as it related to succession and therefore the Environment and Land Court in the circumstances lacks the jurisdiction to entertain the suit as there was no dispute concerning the ownership of the subject property.
12. Additionally, the respondent averred that the applicants ought to have challenged the Kadhis Court decision by filing an appeal to the High Court, instead of filing the instant suit and therefore the matter is res judicata, and that the applicant's action herein is intended to delay the resolution of the dispute.
13. Further, the respondent avers that the applicants have not demonstrated ownership of the subject property and have therefore failed to establish a prima facie case with probability of success, they have failed to demonstrate that they would suffer irreparable loss and instead urged the court to consider the balance of convenience in the circumstances.
14. In sum, the respondent avers that the applicants have not demonstrated the three principles above for consideration in the issuance of injunctive relief and urged the court to dismiss the instant application with costs.

DETERMINATION

15. I have considered the application, the supporting affidavit and the respondent response. In an application for an interlocutory injunction, the applicant must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a prima facie case with a probability of success. Even if a prima facie case is established, an injunction would not to issue if damages can adequately compensate him. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience.
16. In **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal held that all the three Giella conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if prima facie case is not established, then irreparable injury and balance of convenience need no consideration.
17. From the material placed before the court, it is apparent to me that the applicants are related to the alleged owner of the subject property as they are children and wife of the deceased alleged owner and that they are in occupation of the subject property, a fact not contested by the Respondent. The applicants seem to contest the ownership of the subject property alleging that the Kadhis Court erroneously considered it part of the estate of the deceased. The respondent on the other hand is challenging the court jurisdiction contending that the applicants ought to have filed an appeal of the kadhis court decision to the High Court.
18. At this stage, I am only required to determine as to whether the applicants have met the threshold for the grant of temporary injunction. I find that the applicants have established a prima facie case, in view of the fact that they are entitled to inherit from the estate of the deceased registered owner of the subject property and secondly, that the applicants would suffer irreparable loss as they have been in occupation of the subject property and therefore the balance of convenience lies in their favour pending the hearing and determination of the suit. I do not think that damages would be an adequate remedy to them.

19. The issue of jurisdiction of the Kadhis court to determine Land issues and the respondent's contestation that the applicants ought to have filed an appeal to the High Court and not filing the instant suit are issues capable of determining the suit and in my view are the main issues for determination in the main suit, and therefore the court at this stage will not delve into the same, but only consider if the applicants have met the conditions set out in Giella –vs- Cassman Brown & Co. Ltd case above.

20. Having carefully considered the applicants issues as raised herein and the respondent response and submissions, it is my finding that the applicants have raised a prima facie case warranting this court to issue the orders sought. The applicants stand the risk of suffering irreparable loss if the Respondent are allowed to go ahead and evict them from the property.

In view of the foregoing, I make the following orders:

a) I grant a temporary injunction restraining the Defendant/Respondent whether by themselves, their servants, employees, hirelings or agents or others from claiming through or under them from invading, entering upon, occupying, alienating, transferring leasing, mortgaging, evicting the applicants or in any way interfering with the land belonging to the Plaintiffs/Applicants as beneficial owners of plot number Garissa Block 4/3 or in any way whatsoever from interfering with the Plaintiff/Applicants Property rights accruing on the said land pending the hearing and determination of the main suit.

b) Costs of the application are awarded to the plaintiff/Applicant in any event.

It is so ordered.

Read, delivered and signed in the Open Court this 22nd day of July, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Nura holding brief Farouk.
2. Respondent in person; present
3. Court Assistant: Fardowsa.