



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. CASE NO. 12 OF 2020**

**ROBERT NJIRU NJERU.....PLAINTIFF**

**VERSUS**

**JOSEPH KIMATHI NJAGI.....1<sup>ST</sup> DEFENDANT**

**ESTHER KIRINGA NYAGA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. By a plaint dated 26<sup>th</sup> May 2020 the Plaintiff sought the following reliefs against the Defendants:

- a. That this honourable court be pleased to declare that the acts of the Respondents or their agent is a gross violation of the Plaintiff's constitutional rights under the Constitution.*
- b. That the Respondents decision(s) to conspire not to transfer the land to me is contrary to the laws of the land, amongst which the Constitution of Kenya.*
- c. That this honourable court be pleased to declare that the Respondents' actions are an abuse of due process of the law.*
- d. That this honourable court be pleased to order that the Respondents do pay the Plaintiff general damages for contravention of his rights and for the loss sustained at the time of the wrong.*
- e. That this honourable court be pleased to grant the costs of this petition to the Plaintiff.*

2. The Plaintiff pleaded on or about 7<sup>th</sup> June 2016 he bought a portion of 0.4 ha out of Title No. Gatari/Nembure/88 (the suit property) from the Defendants for a sum of Kshs. 400,000/- which he paid in full. He further pleaded that in breach of the said agreement and his legal and constitutional rights the Defendants had refused to transfer to him the portion of land he had bought hence the suit.

**B. THE PLAINTIFF'S APPLICATION**

3. By a notice of motion dated 26<sup>th</sup> May 2020 presumably brought under **Order 40 Rules 1 & 2** of the **Civil Procedure Rules** the Plaintiff sought the following orders against the Defendants:

*a) Spent*

*b) A permanent injunction restraining the Respondents by themselves, their servants and agents from alienating and/or in any manner and way interfering with the land parcel surveyed and allotted to the first respondent and sold to the applicant pending hearing and determination of this suit.*

*c) A permanent injunction restraining the Respondents by themselves, their servants, or agents from interfering with applicant's occupation of the parcel of land pending hearing and determination of this suit.*

*d) A permanent injunction restraining the Respondents from selling, registering, alienating, entering or in other way dealing with all those parcels of land emanating from the sub-division of land parcel No. Gatari/Nembure 88 pending hearing and determination of this suit.*

e) Such further and other relief be granted to the applicants as this court deems fit.

f) Costs be provided for.

4. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 26<sup>th</sup> May 2020 and the annexures thereto. The Plaintiff contended that it was the 1<sup>st</sup> Defendant who had specifically sold 0.4 ha out of the suit property at a consideration of Kshs.400,000/- and that he had shown him that portion in the presence of the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant had, however, mischievously refused to transfer that portion to the Plaintiff as per the terms of the sale agreement in consequence whereof the Plaintiff had cautioned the entire suit property.

### **C. THE 1<sup>ST</sup> DEFENDANT'S RESPONSE**

5. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 8<sup>th</sup> June 2020 in opposition to the said application. He denied the Plaintiff's claim in its entirety and stated that the Plaintiff was a total stranger whom he had never met. He further stated that the suit property was not registered in his name hence he had no capacity to sell any portion thereof. He further denied having executed the sale agreement exhibited by the Plaintiff and contended that the signature appearing thereon was not his but a forgery. The 1<sup>st</sup> Defendant, therefore, contended that the Plaintiff has not satisfied the legal requirements for the grant of an injunction and prayed for dismissal of the application.

### **D. THE 2<sup>ND</sup> DEFENDANT'S RESPONSE**

6. The 2<sup>nd</sup> Defendant filed a replying affidavit similarly sworn on 8<sup>th</sup> June 2020 in opposition to the Plaintiff's application. She stated that the Plaintiff was a total stranger whom she had never met in her lifetime. She stated that she had never sold any portion of the suit property to the Plaintiff and that the Plaintiff had illegally registered encumbrances against the entire suit property whereas his claim against the 1<sup>st</sup> Defendant was for only 0.4 ha. The 2<sup>nd</sup> Defendant prayed for dismissal of the application and for removal of the encumbrance.

### **E. DIRECTIONS ON SUBMISSIONS**

7. When the said application was listed for *inter partes* hearing on 11<sup>th</sup> June 2020 it was directed that the application shall be canvassed through written submissions. The parties were given 14 days each within which to file and serve their submissions. The record shows that the Plaintiff filed his submissions on 29<sup>th</sup> June 2020 whereas the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed theirs on 8<sup>th</sup> July 2020.

### **F. THE ISSUES FOR DETERMINATION**

8. The court has considered the Plaintiff's notice of motion dated 26<sup>th</sup> May 2020 together with the supporting affidavit and annexures thereto, the Defendants' replying affidavit in opposition thereto, and the respective written submissions of the parties. The court is of the opinion that the following questions arise for determination in this matter:

- a. *Whether the Plaintiff has satisfied the requirements for the grant of the various injunctions sought.*
- b. *Whether the Plaintiff is entitled to any "further" or "other relief" as sought in the application.*
- c. *Who shall bear costs of the application.*

### **G. ANALYSIS AND DETERMINATIONS**

#### **a. Whether the Plaintiff has made out a case for the grant of injunctions**

9. Although the Plaintiff's said application refers to "permanent" injunction as opposed to temporary or interim injunction, he must have meant to refer to a temporary injunction pending the hearing and determination of the suit. A permanent injunction is a final remedy which can only be granted upon conclusion of a suit. The court shall, therefore, consider the application for injunction on the basis of the requirements for the grant of a temporary injunction.

10. The legal requirements for the grant of a temporary or interim injunction were enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358** in the following order:

- a. *An applicant must show a prima facie case with a probability of success.*
- b. *An injunction will not normally be granted unless the applicant might otherwise irreparable injury.*
- c. *When the court is in doubt, it will decide the case on the balance of convenience.*

11. The court has noted from the material on record that the suit property has been the subject of succession proceedings, that is, *Embu High Court Succession Case No. 654 of 2013 In the matter of the Estate of Nyaga Muturi (Deceased)*. The 2<sup>nd</sup> Defendant appears to be the administrator of the estate of the deceased. The grant appears to have been confirmed on 5<sup>th</sup> November 2015 whereby the 1<sup>st</sup> Defendant was entitled to a share of 0.40 ha out of the suit property.

12. The material on record further shows that the Plaintiff may have bought a portion of 0.40 ha out of the suit property from the 1<sup>st</sup> Defendant before distribution of the estate of the deceased as per the certificate of confirmation of grant. There is also no indication on record whether consent of the Land Control Board was sought and obtained under the **Land Control Act (Cap. 302)**. However, the 1<sup>st</sup> Defendant has denied ever selling any portion of the suit property to the Plaintiff claiming that the entire suit property was still registered in the name of the deceased hence he had no capacity to sell it. The 2<sup>nd</sup> Defendant has also outrightly denied selling any portion of the suit property to the Plaintiff. In fact, she asserted that the Plaintiff was a complete stranger to her and that she had never seen him in her lifetime.

13. The 1<sup>st</sup> principle for consideration is whether the Plaintiff has made out a *prima facie* case with a probability of success at the trial in the circumstances of this case. In the case of **Mrao V First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** Bosire J.A. described a *prima facie* case as follows:

**“So what is a *prima facie* case? I would say that in civil cases it is a case in 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 ...**

**... But as I earlier endeavoured to show, and I cited ample authority for it, a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”**

14. The court is not satisfied on the basis of the material on record that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial. The Plaintiff has not demonstrated a violation of his legal rights in relation to the suit property. The suit property was registered in the name of the deceased in the succession case. The only person who could lawfully deal with it under the **Law of Succession Act Cap (Cap. 160)** was the administrator of the estate who is the 2<sup>nd</sup> Defendant in this case. By the Plaintiff’s own admission in his supporting affidavit, he did not deal with the 2<sup>nd</sup> Defendant but he confined his dealings to the 1<sup>st</sup> Defendant who was a beneficiary of the estate of the deceased. It would appear that the Plaintiff was not patient enough to wait for distribution of the estate as per the confirmed grant before purchasing the portion of 0.40 ha which he desired to buy.

15. In the circumstances, the Plaintiff does not appear to have a *prima facie* case against the administrator of the estate of the deceased since the administrator is bound to distribute the estate as per the confirmed grant. The Plaintiff is not one of the heirs or beneficiaries cited in the certificate of confirmation of grant. Accordingly, this court is not inclined to halt or suspend the distribution of the estate of the deceased as per the confirmed grant simply because the Plaintiff has a claim against one of the beneficiaries of the estate.

16. The court has also considered whether the Plaintiff has demonstrated the risk of irreparable loss or damage unless the injunctions sought are granted. The Plaintiff has not pleaded or demonstrated what irreparable loss or injury he may suffer if the injunctions sought are not granted. It has been held that irreparable injury refers to such loss or damage that cannot be adequately compensated by an award of monetary damages. The Plaintiff has pleaded that he bought a portion of the suit property at Kshs.400,000/-. So, the Plaintiff’s claim is clearly quantifiable and its value is known. It was not contended that the portion of 0.40 ha which he bought was so unique or peculiar that an equivalent would not be available within Embu County or the Republic of Kenya. It was not demonstrated that the Plaintiff had any religious, cultural or sentimental attachment to the portion of the suit property he is claiming. Accordingly, the court finds that the Plaintiff has failed to demonstrate that whatever loss or injury he may suffer cannot be adequately compensated by an award of monetary damages.

17. Since the Plaintiff has failed to demonstrate the first two principles for the grant of a temporary injunction, it shall not be necessary to consider the third principle on balance of convenience. Accordingly, the court finds and holds that the Plaintiff has failed to satisfy the legal requirements for the grant of any of the temporary injunctions sought in the application. The 1<sup>st</sup> issue is consequently answered in the negative.

***b) Whether the Plaintiff is entitled to any further other relief***

18. The court has considered the usual remedy of interim injunction which the Plaintiff would have been entitled to pending the hearing and determination of the suit. The court is not aware of any “further” or “other relief” which the Plaintiff might be entitled to. It is doubtful if the Plaintiff would be entitled to any other reliefs whereas he has failed to demonstrate a *prima facie* case with a probability of success at the trial. In any event, the Plaintiff was duty bound to identify with reasonable precision which these other or further reliefs are because they can be considered by the court. Consequently, the 2<sup>nd</sup> issue is answered in the negative as well.

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

19. Although costs of an application 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)**. Accordingly, the successful party should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA. 287**. The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall be awarded costs of the application.

**H. CONCLUSION AND DISPOSAL ORDER**

20. The upshot of the foregoing is that the court finds no merit in the Plaintiff’s notice of motion dated 26<sup>th</sup> May 2020. Accordingly, the same is hereby dismissed in its entirety with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is so decided.

**RULING DATED and SIGNED in Chambers at EMBU this 16<sup>TH</sup> DAY of JULY 2020 and delivered via Microsoft Teams in the**

absence of the parties. The Plaintiff's notice of motion dated 26<sup>th</sup> May 2020 was dismissed with costs.

Y.M. ANGIMA

JUDGE

16.07.2020