



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 884 OF 2013

WANYIRI KIHORO.....1ST PLAINTIFF

MUGURE WANYIRI KIHORO.....2ND PLAINTIFF

(Both suing as the administrators of the estate of Dr. Wanjiru Kihoro)

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT

TOWN COUNCIL OF KIKUYU.....2ND DEFENDANT

PRESBYTERIAN CHURCH OF EAST

AFRICA (UTHIRU CHURCH).....3RD DEFENDANT

CHAIRPERSON PCEA UTHIRU CHURCH.....4TH DEFENDANT

RULING

The Notice of Motion before the court is dated 4th April 2014 and is brought by the Plaintiffs under Article 65 and 165 of the Constitution, Sections 24, 25 and 26 of the Land Registration Act and section 3A of the Civil Procedure Act. The Plaintiffs have sought a permanent injunction to restrain the 3rd and 4th Defendants, their agents, servants, followers, employees or otherwise howsoever from entering, remaining, carrying out activities of any kind or otherwise trespassing on parcel comprising title LR No. Dagoretti/Uthiru/T382 (herein after referred to as the suit property) pending the hearing and determination of this suit.

The application is premised on four grounds listed on the face of the application and is supported by the 1st Plaintiff's affidavit sworn on 4th April 2014 and 19th July 2014. The Plaintiffs have averred that they are administrators of the estate of the late **Dr. Wanjiru Kihoro** who was the registered proprietor of the property as evidenced by a title dated 31st March 1983. They have contended that the title remained unchallenged until 2006 when the 2nd and 3rd Defendants registered a restriction and caution against the title which have remained in force despite their efforts to have the same lifted.

It is alleged that the 3rd and 4th Defendants have over time trespassed on the suit premises and have issued threats to the Plaintiffs requiring them to keep off the property and a copy of Star Newspaper Excerpt has been annexed as evidence. It is on this basis that a permanent injunction is being sought to restrain the 3rd and 4th Defendants from further trespassing on the suit property and the Plaintiffs have contended that they are still recognized by law as the legal and equitable owners.

In response, the 4th and 5th Defendants filed a replying affidavit sworn on 7th July 2014 by **Beatrice Wanjiku Mugo**, the Chairperson of PCEA Uthiru Church. The 3rd and 4th Defendants have averred that the application is incompetent and bad in law as the prayers sought are unavailable under the cited provisions and further, that the court lacks jurisdiction to grant the prayers sought without hearing the suit on merits.

While stating that the application seeks summary judgement in a matter where facts are in dispute with several triable issues, the 3rd and 4th Defendants have contended that the application seeks to deprive them their right to adduce oral evidence in rebutting the Plaintiffs' case in contravention of section 19(2) of the Environment and Land Court Act.

The 3rd Defendant denied being a trespasser and averred that they are the rightful owners of the suit property and have been in occupation since 1974. According to the Defendant, there has been inordinate delay and the application is an abuse of the court process.

The application was canvassed by written submissions which were highlighted in court by Counsel for respective parties on 7th November 2014. The Plaintiffs in their submissions dated 22nd September 2014 contended that the Plaintiffs' application was competent since the injunction prayed for was limited to the interlocutory period before judgement. Counsel relied on section 26 of the Land Registration Act and submitted that prima facie evidence of ownership of the suit property had been provided since the Plaintiffs' title was issued on 31st March 1983.

The Plaintiffs submitted that the 3rd and 4th Defendant's green card materially differed with their green card through alteration of material particulars, the Plaintiffs argued that the 3rd and 4th Defendants had committed an offence by uttering a forged instrument and the court was referred to section 103 of the Land Registration Act.

The Plaintiffs urged the Court to grant the injunction and limit the same to terms and conditions the Court deems fit and reliance was placed on the decisions in **Giella -vs- Cassman Brown & Company(1973)EA 358**, **Moses Nthenge Ndivo -vs- Maria Kivinya Ndivo ELC No. 527 of 2011** and **Gitere Kahura Investments Ltd -vs- Sheikh Hassan 7 others**.

The 3rd and 4th Defendants filed submissions dated 3rd October 2014 where they argued that the application was incompetent, misconceived and liable for dismissal since the orders sought were not available at the interlocutory. The Defendants relied on the cases of **Joel K. Yegon & 4 others vs. John Rotich & 4 others HC. Misc. Application no. 995 of 2003**, **Catherine Kasiti Nzuki vs. Lydia Kaseko Parsanka & anor HCCC No. 125 of 2012** and **James Ntoo Ole Ratia vs. Kisima Olesakau** for the submission that a permanent injunction can only issue after a full hearing.

It was submitted that the 3rd and 4th Defendants have been in occupation of the suit premises since 1975 where they have built a permanent church. Counsel averred that any purported purchase by the deceased was subject to overriding interests under sections 28(e) and (h) of the Land Registration Act. The 3rd and 4th Defendants contended that their possessory rights cannot be wished away with since they had made an alternative claim for adverse possession which cannot be determined by affidavit evidence.

The 3rd and 4th Defendants submitted that the Plaintiffs' allegation that they had been asked to keep off the suit premises were not merited since the Plaintiffs have never been in possession, and at any rate the 3rd and 4th Defendant's stated that they were not the authors of the alleged publication and further, that

newspaper articles were not authentic sources of information to be taken at their face value.

In further submission, the 3rd and 4th Defendants argued that the Plaintiffs had departed from their prayers in the application as they sought contempt orders and a qualified order of permanent injunction pending the hearing and determination of the suit. Reliance was placed on the case of **Nzoia Sugar Company Ltd vs. Capital Insurance Brokers Ltd CA No. 86 of 2009** for the submission that parties are bound by their pleadings.

It was further submitted that the order sought was not preservative since it amounted to an eviction which was a final order. Lastly, it was submitted that the principles set out in **Giella -vs- Cassman Brown & Company(1973)EA 358** apply to the grant of interlocutory injunction which was not the case herein.

The issue for determination is whether the Plaintiffs have satisfied the conditions for the grant of the mandatory injunction sought. The 3rd and 4th Defendants have averred that they have been in possession of the suit property since 1975 and have built a permanent church structure on the suit property. The order sought by the Plaintiffs is in effect a mandatory injunction as it seeks to restrain the 3rd and 4th Defendants from entering, remaining, carrying out activities of any kind or otherwise trespassing on the suit premises.

The principles that govern the grant of an interlocutory mandatory injunction are similar to the principles enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A. 358** save that a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases. The Court of Appeal in the case of **Kenya Airports Authority vs. Paul Njogu Mungai & 2 others, Civil Application No. 29 of 1997 (12/97 UR)** cited with approval a passage in Halsbury's Laws of England volume 24 paragraph 948 thus:-

"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

In their counterclaim, the 3rd and 4th Defendants have pleaded that they are entitled to the suit property by way of adverse possession since they have been in open and uninterrupted possession of the suit property since 1974. Evidence must be adduced to prove or disprove this claim during hearing. This is therefore not a clear case which can be decided at once. The case has to be plain and obvious where the Respondent cannot have any probable answer to the Applicant's claim for the court to grant what amounts to a mandatory injunction at an interlocutory stage. The Plaintiff's claim herein is not such as would be described as plain and obvious. The Plaintiffs have also not brought to the Court's attention the existence of any special circumstances that would warrant the grant of a mandatory injunction. The application dated 4th April 2014 therefore fails and is dismissed with costs to the 3rd and 4th Defendants.

Ruling dated, signed and delivered this5th..... day ofFebruary.....
2015

J. M. MUTUNGI

JUDGE

In the Presence of:

...Mr.Kihoro.....for the Plaintiffs

...Mr. Njagi for Kingara.....for the Defendants