



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CIVIL APPEAL NO. 31 OF 2014

LUISI MUTULU NGUA..... APPLICANT

VERSUS

NICHOLAS MWANZA IKUNGA..... RESPONDENTS

RULING

1. The applicant moved court through a notice of motion application dated 19.8.2014 in which they sought for orders that:
 - The court issues temporary orders restraining the respondent either by themselves or by their agents/servants, relatives and /or whomsoever else as the case may be from interfering with the applicant's occupation, farming and/or use of the applicant land parcel no. Kyangwithya/Misewani/802 pending the hearing and final determination of the application.
 - The court issues orders to make the respondent to compensate the food crops, fruit trees, timber trees and Napier grass he arrogantly destroyed on land parcel no. 802 Kyangwithya/Misewani in June 2014.
2. In the affidavit dated 19.08.2014 he further added inter alia that:

He appealed against the judgement in civil appeal no. 31 of 2014 in the high court

He served the respondent with the memorandum of appeal and despite this the respondent has continued to cut down trees burning charcoal and destroying his crops in the disputed land.

Respondent's case

3. In reply to the application the respondent filed the replying affidavit dated 7.10.2014 where he stated that the property known as **Kyangwithya/Misewani/802** is registered in the name of Ikunga Mukula who is his father. His grandfather was the first occupant of the said parcel in 1991 that passed it on to his father upon his demise in 1951. The mother of the appellant one Kalekye Ngua was allowed by his father to reside temporarily on a small portion in that parcel of land as a squatter. The said kalekye Ngua passed on in July 1972 whilst residing on the portion that was given to her and his father refused to have her buried on his land. However after intervention by the assistant chief and members of his family the family was allowed to bury their mother and they entered into a written agreement granting the request.
4. The agreement dated 19.07.1972 was entered into between the families of Ikunga Mukula and

Kalekye Ngua acknowledging that the deceased had been allocated a portion to settle and cultivate and that they had been further allocated a grave site to bury their mother by Ikunga Mukula for a consideration of KShs.5. Also acknowledging that the land belonged to the children of Ikunga Mukula and were ready to vacate the same if ordered to do so.

The appellant continued living there until 17.08.1986 when his father decided to give him the parcel of land. The appellant, members of her family, on one part and his father, other members of his family and himself on the other part entered into another agreement requiring them to vacate the land on or before 17.08.1989 and upon expiry of the said period, they were at liberty to seek an extension of a further period from himself. The said agreement stated that the appellant had been a tenant at the will of his father.

5. The appellant executed the agreement by appending her left thumb print to the same and was therefore bound and still bound by the terms of that agreement whose legality has never been challenged or questioned in court. Upon expiry of the period the appellant never sought and extension from him and he issued to the appellant an eviction notice dated 17.12.1993 which she refused to heed. He was then prompted to file Civil Suit Number 8 of 1995 for eviction orders against the appellant and her sons. The suit was on 13.08.1996 transferred by consent from the court to the Land Disputes Tribunal for determination.
6. On 26.08.2009 the tribunal sitting in Kitui delivered an award in his favour but the appellant has refused to vacate the portion she was occupying. The appellant has not proven how she was the owner of the parcel of land. The appellant has not in any way satisfied the elements that the court must consider for issuance of injunctions; therefore, the application was misconceived, vexatious and a blatant abuse of the court process and must fail.

Issues for Determination

7. The following are the issues for determination:

- Whether the applicant has rights over the said property
- Whether the restraining order should issue

On the issue of ownership the applicant has stated that they had lived peacefully on the said piece of land until the death of Kalekye Ngua who was her mother. That she had the right to inherit the said property. She has however not attached any documentation to prove ownership. On his part the respondent has disputed the ownership claims by the applicant elaborating how they came to occupy the said land. In his affidavit he has attached a series of documentation to show how the applicant were given a grace period to live on the said land and indeed he has attached a certified search which indicates that the land belonged to Ikunga Mukula since 1984. The search is dated 8.01.2014 and it is for land parcel Kyangwithya/Misewani/802; the suit land.

8. **Section 26.** (1) provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. According to the search the applicant was not the owner of the land. The owner was the respondent's father.
9. The only way the applicant can defeat the proprietary rights is by overriding interests such as spousal rights over matrimonial property, trusts including customary trusts rights of way, rights of water and profits subsisting at the time of first registration under this Act natural rights of light, air, water and support rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies charges for unpaid rates and other funds

which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and any other rights provided under any written law.

10. According to the aforementioned the applicant has only claimed inheritance without showing proof.

“he who alleges must prove” - or “he who asserts, not he who denies must prove” – “ei incumbit probatio qui dicit, non qui negat”.

The issue of peaceful occupation cannot be merited since it has been evidenced that the applicant has on occasion been required vacate the land.

11. On the issue of whether the applicant should be granted the restraining order as prayed the principles in **Giella Vs Cassman Brown & Co. Ltd & Another (1973) E.A 358** come into play. The principles are firstly the applicant must show a *prima facie* case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

In the case of **Mrao v First American Bank of Kenya and Two Others [2003] KLR 125**, a *prima facie* case was described as:-

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case 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.”

12. The court finds no merit in the application. On the Preliminary Objection, the court finds that the same was canvassed or among the application indicated on record to be fixed for hearing. The Respondent can raise it during the hearing of the appeal or seek to strike out the appeal or rather fix and serve a formal Preliminary Objection upon the Appellant.

13. The court thus makes the following orders:

1. The application dated 19.8.2014 is dismissed.
2. Costs in the appeal.

Dated and Delivered at Machakos, this 6th day of March, 2015.

CHARLES KARIUKI

JUDGE