



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 2 OF 2020 (O.S.)**

**BENEDICT IRERI NJIRU.....PLAINTIFF**

*VERSUS*

**FRED MOMANYI GICHUKI.....1<sup>ST</sup> DEFENDANT**

**GRACE WANGARI NJERU (sued as personal representative**

**of the estate of SICILIA MUTHONI NDUMA).....2<sup>ND</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. By an originating summons dated 29<sup>th</sup> January 2019 brought under **Section 38** of the **Limitation of Actions Act (Cap. 22)** and **Order 37 Rule 7** of the **Civil Procedure Rules, 2010** (the *Rules*) the Plaintiff sought, *inter alia*, an order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title to the whole of *Title No. Embu/Kithunthiri/2259* (parcel 2259) and *Title No. Embu/Kithunthiri/2260* (parcel 2260) had become extinguished and that he was entitled to be registered as proprietor of both parcels on account of adverse possession. In the alternative, the Plaintiff sought a declaration that the Defendants were holding parcel Nos. 2259 and 2260 in trust for him and that the said trust be terminated.

**B. THE PLAINTIFF'S APPLICATION**

2. Vide a notice of motion dated 20<sup>th</sup> May 2020 brought under **Order 40 Rules 1(a) & 4** of the **Rules, Sections 3A, Sections 3A and 63 (e)** of the **Civil Procedure Act (Cap. 21)** and **all other enabling provisions of the law**, the Plaintiff sought an interim injunction restraining the Defendants from entering, transferring, alienating, or interrupting his occupation of the suit properties pending the hearing and determination of the suit. He also sought an order to restrain his eviction pending the conclusion of the suit.

3. The said application was based upon the grounds set out on the face of the motion and the contents of the Plaintiff's supporting affidavit sworn on 20<sup>th</sup> May 2020 together with the annexures thereto. It was contended that the Defendants had been threatening him with eviction from the suit properties since service of the originating summons upon them. It was stated that the Defendants had engaged a surveyor who had sub-divided the suit properties and erected some beacons thereon including within his compound. The Plaintiff was, therefore, apprehensive that in the absence of protective orders he might be evicted and rendered homeless during the pendency of the suit.

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

4. By a notice of motion dated 25<sup>th</sup> May 2020 brought under **Section 63 (c) & (e)** of the **Civil Procedure Act (Cap. 21)**, **Order 40 Rules 1, 3 & 4** of the **Rules**, and **all enabling provisions of the law**, the 1<sup>st</sup> Defendant sought an interim injunction to restrain the Plaintiff from entering, grazing his cattle, chasing away his servants or in any other manner interfering with parcel No. 2259 pending the hearing and determination of the suit.

5. The said application was based upon the grounds set out on the face of the motion and the contents of the several affidavits all sworn on 25<sup>th</sup> May 2020 and annexures thereto. The 1<sup>st</sup> Defendant contended that the Plaintiff had never been in occupation of parcel 2259 but that he had reliably learnt that he intended to invade the said parcel and graze his cattle thereon to create an impression that he had all along been in occupation thereof. He did not, however, disclose the source of such information as required under **Order 19 Rule 3** of the **Rules**. The 1<sup>st</sup> Defendant further contended that the Plaintiff was only occupying a portion of parcel 2260 and that on or about 22<sup>nd</sup> May 2020 the Plaintiff and his sons had chased away his employees from parcel 2259.

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

6. By a notice of motion dated 19<sup>th</sup> May 2020 expressed to be brought under **Article 40 (2) (a)** of the **Constitution of Kenya 2010, Order 40 Rule 1 & Order 50 Rule 10 of the Rules, Sections 1A & 3A** of the **Civil Procedure Act (Cap. 21)** and **all other enabling provisions of the law**, the 2<sup>nd</sup> Defendant sought an interim injunction to restrain the Plaintiff from constructing any building on parcel 2260 pending the hearing and conclusion of the suit. She also sought an order for the OCS Siakago Police Station to enforce compliance with such order.

7. 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 2<sup>nd</sup> Defendant on 19<sup>th</sup> May 2020 and the annexures thereto. It was contended that the 2<sup>nd</sup> Defendant was the registered proprietor of parcel 2260 and that the Plaintiff had embarked upon construction of a permanent house thereon before the suit could be heard and concluded. She exhibited some photographs in her supporting affidavit depicting some ongoing construction works.

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

8. When the said applications were listed for hearing on 28<sup>th</sup> May 2020 it was directed that all the 3 applications shall be canvassed through written submissions. All concerned parties were granted 14 days to file and exchange further affidavits and submissions and the matter fixed for ruling on 2<sup>nd</sup> July 2020. The interim orders restraining the Plaintiff from undertaking further construction on parcel 2260 were extended until delivery of the ruling. The record shows that the Plaintiff filed his submissions on 26<sup>th</sup> June 2020 but the Defendants' submissions were not on record by the time of preparation of the ruling.

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

9. The court has considered the 3 applications on record, the affidavits and annexures in support thereof, and the affidavits in response thereto. The court is of the opinion that the following issues arise for determination herein:

- a) *Whether the Plaintiff is entitled to the interim injunction sought.*
- b) *Whether the 1<sup>st</sup> Defendant is entitled to the interim injunction sought.*
- c) *Whether the 2<sup>nd</sup> Defendant is entitled to the interim injunction sought.*
- d) *Who shall bear costs of the applications.*

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

##### **a) Whether the Plaintiff is entitled to the interim injunction sought**

10. The court has considered the material on record and the Plaintiff's submissions on this issue. The court is aware that the Plaintiff's originating summons for adverse possession is still pending. The main question for consideration with respect to his application is whether he has satisfied the requirements for the grant of an interim injunction as enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**. Whereas the Plaintiff shall be required to prove elements of adverse possession at the trial, he is only required at the interlocutory stage to demonstrate that he has a *prima facie* case with a probability of success at the trial. The court is satisfied on the basis of the material on record that the Plaintiff has been in occupation of the suit properties. There is some evidence on record to demonstrate that he has undertaken some developments on parts of the suit properties and that he has been cultivating portions thereof. The length and extent of such occupation can only be conclusively determined at the trial upon production of evidence. On the contrary, there is nothing on record to demonstrate that the Defendants have made any developments thereon or that they have been utilizing the suit properties for any purpose. However, this being an interlocutory application the court's findings are merely provisional and any of the concerned parties shall be at liberty to demonstrate otherwise at the trial of the suit.

11. The court is further satisfied from the material on record that the Plaintiff shall otherwise suffer irreparable loss or damage should he be evicted before his originating summons for adverse possession is heard and determined. It is evident from the material on record that the Plaintiff has invested in structures, crops and a dam for his sustenance. It shall, therefore, cause a serious disruption to his social and economic life to have him and his family uprooted from the suit properties before his claim for adverse possession is adjudicated upon.

12. Even if the court were to consider the balance of convenience, the same would still tilt in favour of the Plaintiff as the party in possession. The court is of the opinion that it would cause greater hardship to the Plaintiff by denying him protective orders than whatever hardship the Defendants might suffer by granting the orders. The court is thus satisfied that the Plaintiff has made out a case for the grant of an interim injunction.

##### **b) Whether the 1<sup>st</sup> Defendant is entitled to the interim injunction sought**

13. The court has considered the material on record on the 1<sup>st</sup> Defendant's application for an injunction. For the reasons already given, the court is far from satisfied that the 1<sup>st</sup> Defendant has satisfied the requirements for the grant of an interim injunction sought against the Plaintiff. The court is not satisfied that the 1<sup>st</sup> Defendant has made out a *prima facie* case with a probability of success at the trial. As indicated before, the 1<sup>st</sup> Defendant has not demonstrated his alleged possession of parcel 2259 even though he is the current registered proprietor thereof. Apart from the recent erection of beacons there was no demonstration of what activities the 1<sup>st</sup> Defendant has engaged upon on parcel 2259. There is equally no demonstration of what irreparable loss, if any, the 1<sup>st</sup> Defendant might suffer if the injunction sought was denied. Accordingly, the court finds and holds that the 1<sup>st</sup> Defendant has failed to satisfy the requirements for the grant of an interim injunction.

**c) Whether the 2<sup>nd</sup> Defendant is entitled to the interim injunction sought**

14. The court has also considered the material and submissions on record with respect to the 2<sup>nd</sup> Defendant's application for an interim injunction to restrain the Plaintiff from undertaking construction of a permanent house on parcel 2260. The court has noted that the Plaintiff was very evasive in his replying affidavit in response to the 2<sup>nd</sup> Defendant's application. He did not categorically deny that he was undertaking construction as shown in the photographic evidence. He simply stated that there was no evidence to support the allegation of construction and that if there was any ongoing construction then it must have been going on over the years.

15. The court is satisfied on the basis of the evidence on record that the Plaintiff is undertaking construction on parcel 2260 during the pendency of his suit for adverse possession. It would appear that the plaintiff is out to steal a march on the 2<sup>nd</sup> Defendant by undertaking construction in a bid to cement his claim for adverse possession. The court is thus inclined to grant an interim injunction to restrain the Plaintiff from going on with further construction pending the hearing and determination of the suit.

**d) Who shall bear costs of the applications**

16. 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)**. As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA. 287**. The court finds no good reason why the successful litigants should be deprived of their costs. Accordingly, the Plaintiff and the 2<sup>nd</sup> Defendant shall be awarded costs.

**H. CONCLUSION AND DISPOSAL ORDER**

17. The upshot of the foregoing is that the court finds merit in the Plaintiff's and 2<sup>nd</sup> Defendant's applications for interim orders whereas it finds no merit in the 1<sup>st</sup> Defendant's application. Accordingly, the court makes the following orders for disposal of the 3 applications:

a) An order of interim injunction be and is hereby granted restraining the Defendants by themselves, their servants or agents from evicting the Plaintiff, his family members or servants from *Title Nos. Embu/Kithunthiri/2259 and 2260* and from alienating the suit properties pending the hearing and determination of the suit.

b) The Plaintiff is hereby awarded costs of the notice of motion dated 20<sup>th</sup> May 2020 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

c) An order of injunction be and is hereby granted restraining the Plaintiff, by himself, his agents or servants from constructing a building or proceeding with further construction on *Title No. Embu/Kithunthiri/2260* pending the hearing and determination of the suit.

d) The 2<sup>nd</sup> Defendant is awarded costs of the notice of motion dated 19<sup>th</sup> May 2020 to be borne by the Plaintiff.

e) The 1<sup>st</sup> Defendant's notice of motion dated 25<sup>th</sup> May 2020 is hereby dismissed with costs to the Plaintiff.

18. It is so decided.

**RULING DATED** and **SIGNED** in Chambers at **EMBU** this **2<sup>ND</sup> DAY** of **JULY 2020** and **DELIVERED** via Microsoft Teams platform in the presence of Mr. Ndolo holding brief for Mr. Muriithi for the Plaintiff, Mr. Andande for the 2<sup>nd</sup> Defendant and in the absence of the 1<sup>st</sup> Defendant.

**Y.M. ANGIMA**

**JUDGE**

**02.07.2020**