



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 38 OF 2020

PHOEBE A. MUGO.....PLAINTIFF

VERSUS

ATIENO AMADI.....1ST DEFENDANT

GREAT LAKES UNIVERSITY OF KISUMU.....2ND DEFENDANT

RULING

By a Notice of Motion dated 30th June 2020 **PHOEBE A. MUGO** (the plaintiff herein) seeks the following orders against Prof. **ATIENO ANNE NDEDE AMADI** and **GREAT LAKES UNIVERSITY OF KISUMU** (the 1st and 2nd defendants respectively): -

a. Spent

b. Spent

c. That pending the hearing and determination of this suit, the defendants by themselves or through their agents, servants or assigns be restrained from trespassing upon, constructing, developing, or in any way interfering with the property known as L.R NO 11280/9 (I.R 159219/4) or any part thereof and from harassing, threatening, or in any way causing disharmony to the plaintiff.

d. That the OCS KIBOS POLICE STATION do enforce the orders of this Honourable Court.

e. That the costs of this application be provided for.

The application is based on the grounds set out therein and is also supported by the plaintiff's affidavit.

The gist of the application is that the plaintiff is the registered proprietor of the land parcel **NO L.R 112890 (I.R 159219/4)**, (the suit property) which was originally registered in the names of her late mother **ESTHER NYAMBOK OKULLU** on 5th June 2015. That following the demise of her late mother on 1st November 2015, the plaintiff and her brother **PAUL KING OKULLU** were appointed as the Administrators of her Estate following succession proceedings at **THE PRINCIPAL MAGISTRATE'S COURT BONDO SUCCESSION CAUSE NO 83 OF 2017**. A grant was issued and confirmed on 6th December 2019 through which the suit property was transmitted and registered in her names. During the pendency of the succession process, she visited the suit property only to find that the 2nd Respondent had erected some structures thereon. That she is not aware of any impediment or proceedings in any Court or Tribunal adverse to her ownership of the suit property and the Respondents have hired goons to resist her entry thereon. That unless restrained, the Respondents will persist in the trespass and occasion her irreparable loss and damage. Annexed to the application is a copy of the Certificate of Title in respect to the suit property in the names of **ESTHER NYAMBOK OKULLU** and the Confirmations of Grants in **BONDO PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE NO 83 OF 2017** and **KISUMU HIGH COURT SUCCESSION CAUSE No 365 OF 1999**.

The application is opposed and by a replying affidavit dated 3rd August 2020, the 1st defendant has averred that she is the Vice – Chancellor of the 2nd defendant and that the suit property belongs to the 2nd defendant following a sale agreement entered into between the late **JOHN HENRY OKULLU** father to the plaintiff and the **TROPICAL INSTITUTE OF COMMUNITY HEALTH DEVELOPMENT (TICH)** who are the sponsors of the 2nd defendant. That the late **ESTHER NYAMBOK OKULLU** was aware about the transaction. That by an application dated 3rd November 2006, the late **ESTHER NYAMBOK OKULLU** as the Administrator of the

Estate of the late **JOHN HENRY OKULLU** applied for consent to transfer the suit property to **TICH** which was allowed by the **NYANDO LAND CONTROL BOARD** on 9th November 2006. The transfer was duly executed and on 29th December 2006, the late **HENRY NYAMBOK OKULLU** wrote a letter to **TICH** re – negotiating the price of the suit property and demanded immediate payment of the outstanding amount. Pursuant to the said demand, the 2nd defendant paid to the late **ESTHER NYAMBOK OKULLU** a sum of Kshs. 33,380/= by cheque on 17th January 2007. The executed transfer was lodged for registration but the suit property was not registered in the names of the 2nd defendant for the reason that the original survey Deed Plan was not available. On 13th November 2013, the 1st defendant was informed by one **ELLY OTIENO AGUKO** that the transfer of the suit property had stalled due to the absence of the mother deed plan and that the firm of **OPIYO & ASSOCIATES SURVEYORS** had been engaged to undertake a new survey exercise. That **ESTHER NYAMBOK OKULLU** gave possession of the suit property to **TICH** in 2006. That it was therefore mischievous for the plaintiff to enlist the suit property as part of the Estate of **ESTHER NYAMBOK OKULLU** in the succession proceedings at the **BONDO PRINCIPAL MAGISTRATE’S COURT CASE NO 83 OF 2017** and that amounts to fraud. That the plaintiff has come to Court with soiled hands and is not entitled to an injunction which is an equitable relief. Annexed to the replying affidavit are the following documents: -

1. Certificate of Title to the suit property (annexture AANA – 1).
2. Letter dated 23rd October 2006 from **RACHIER & AMOLLO ADVOCATES** to **TICH** (Annexture AANA – 2).
3. Application for consent of the Land Control Board by **ESTHER NYAMBOK OKULLU** to transfer the suit land to **TICH** (annexture AANA – 3).
4. Consent by the **NYANDO LAND CONTROL BOARD** to transfer the suit land from **ESTHER NYAMBOK OKULLU** to **TICH** (annexture AANA – 4).
5. Executed transfer (annexture AANA – 5).
6. Letter from **C.D ROGO** to **TICH** dated 29th December 2006 renegotiating the purchase price. The letter is copied to **ESTHER NYAMBOK OKULLU** (annexture AANA – 6).
7. CHEQUE PAYMENT VOUCHER for Kshs. 33,380/- drawn by the 2nd defendant in favour of **ESTHER NYAMBOK OKULLU** (annexture AANA – 7).
8. Application form for the registration of the suit property (annexture AANA – 8).
9. Letter dated 19th February 2007 from **RACHIER & AMOLLO ADVOCATES** addressed to **HENRY M. MURWA** of **DIGMAT CONSULTANTS** (annexture AANA – 9).
10. Letter dated 13th November 2013 from the 2nd defendant to **ELLY OTIENO AGUKO** (annexture AANA – 10).

When the application was placed before me on 1st September 2020 during the service week at the **ENVIRONMENT AND LAND COURT KISUMU**, **MR MWAMU** holding brief for **MR ONDUSO** for the plaintiff informed the Court that the parties had agreed to have the same canvassed by way of written submissions and that the plaintiff’s Counsel had already filed his submission. **MR OKOTH** holding brief for **MR KAGO** for the defendants undertook to file his submissions within 14 days. I therefore directed that the ruling would be delivered on 30th September 2020 by way of electronic mail. However, by the time the filed was dispatched to me at the **BUNGOMA ENVIRONMENT AND LAND COURT** for purposes of drafting the ruling, only **MR ONDUSO ADVOCATE** had filed submissions on behalf of the plaintiff. I have therefore not had the privilege of the submission by Counsel for the defendants.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Counsel for the plaintiff.

This application is anchored on the provisions of **Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act** and also the inherent powers of the Court. It seeks the main prayer that a temporary injunction be issued restraining the defendants, through their agents, servants or assigns from trespassing upon, constructing, developing or in any way interfering with the suit property or harassing, threatening or intimidating the plaintiff pending the hearing and determination of this suit.

The principles that guide a Court in considering an application such as this one were set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A. 358** as follows: -

1. The Applicant must establish a prima facie case with a probability of success.
2. A temporary injunction will not be granted unless the Applicant shows that he will suffer irreparable injury cannot otherwise be adequately compensated by an award of damages.
3. If in doubt, the Court will determine the application on the balance of convenience.

A prima facie case was defined in the case of **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL NO 39 OF 2002 [2003 eKLR]** as: -

“..... 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.”

In **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL NO 77 OF 2012** the Court stated thus: -

“The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

The Court went on to add that: -

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.” Emphasis added

In **FILMS ROVER INTERNATIONAL .V. CANNON FILM SALE LTD 1986 3 ALL. E.R 772**, the Court added that while considering such an application, the Court should take the route or course that appears to carry the lower risk of injustice should it turn out to have been **“wrong”**. A temporary injunction is also an equitable remedy and the party seeking it must approach the Court with clean hands.

This Court shall therefore be guided by the above principles, among others, in determining this application. I must at this stage point out that although in his submissions counsel for the plaintiff refers to a supplementary affidavit purportedly filed by the plaintiff herein together with the Judgment in **KISUMU HIGH COURT CIVIL CASE No 18 of 2018**, neither the said supplementary affidavit nor the said Judgment have been filed herein. Therefore, any reference to those two documents is not supported by any evidence.

I shall start by considering whether the plaintiff has shown that she has a prima facie case with a probability of success. In his submissions, Counsel for the plaintiff stated in paragraph twenty (20) that the plaintiff is the registered owner of the suit property as per the copy of title marked **“PAO 1”**. Counsel has then referred to the provisions of **Section 26 of the Land Registration Act** as evidence that the plaintiff is therefore the absolute and indefeasible owner of the suit property which has not been challenged on account of having been obtained through fraud, misrepresentation, illegally, un – procedurally or through a corrupt scheme. While it is true that **Section 26 of the Land Registration Act** provides that a Certificate of Title is evidence of ownership of land, the same provision states that such title is only **“prima facie evidence”** which can be challenged. Most significantly, however, the said Certificate of Title annexed to the plaintiff’s supporting affidavit is marked as annexure **PM 1** and it shows that the registered owner of the suit property is **ESTHER NYAMBOK OKULLU** who is the plaintiff’s late mother. In paragraphs four (4) five (5) and six (6) of the supporting affidavit, the plaintiff avers that following the demise of their mother **ESTHER NYAMBOK OKULLU** on 1st November 2015, she and her brother **PAUL KING OKULLU** were appointed as the Administrators of her Estate and the suit property was transmitted to her on 23rd January 2020. However, it is clear from the replying affidavit of the 1st defendant, and whose contents have not been rebutted, that as far back as 2006, **ESTHER NYAMBOK OKULLU** obtained consent to transfer the suit property to **TICH** the sponsors of the 2nd defendant, duly executed the transfer form and even gave possession to **TICH** for the benefit of the 2nd defendant. This is what is deponed in paragraph seventeen (17) of the replying affidavit by the 1st defendant: -

“That I know of my own knowledge that the late ESTHER NYAMBOK OKULLU gave possession of the suit land to the purchaser TROPICAL INSTITUTE OF COMMUNITY HEALTH DEVELOPMENT (TICH) in 2006 and the same has been utilized for the benefit of the 2nd defendant who has been in possession of the same ever since and the successor of title of the said purchaser.”

As to why the suit property is yet to be registered in the names of **TICH**, this has been explained in the replying affidavit of the 1st defendant at paragraph fourteen (14) as being due to the un – availability of the Original Survey Deed Plan. In view of that un – rebutted evidence, the interest of the defendants in the suit property ought to have been brought to the attention of the Court when the plaintiff and her brother filed the succession proceedings in respect of the Estate of their late mother **ESTHER NYAMBOK OKULLU** in 2017. Given the un – disputed fact that the plaintiff’s mother had as far back as 2006 relinquished her interest in the suit property to **TICH** and even handed over possession to the 2nd defendant, I do not see how the plaintiff can claim that **“she has a right which has been or is threatened with violation”** – **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra).

It is also clear that it is the 2nd defendant, rather than the plaintiff, which is in possession of the suit property. In paragraph twenty-six (26) of the replying affidavit, the 1st defendant has averred as follows: -

“That the 2nd Respondent has been in possession of the suit land since 2006 upon which land it runs a chicken farm and thus injunction (sic) its use and occupation of the suit land before the hearing of the substantive suit herein shall occasion it great losses which cannot be compensated as damages.”

That occupation and possession of the suit land by the 2nd defendant was in fact confirmed by the plaintiff. In paragraph seven (7) of her supporting affidavit, the plaintiff has averred as follows: -

“That during the pendency of the succession proceedings, I visited the property for inspection and discovered that some strange structures had been erected thereon and on enquiry was informed they belonged to the 2nd Respondent.”

The grant of a temporary injunction against the defendants would therefore amount to evicting them from the suit property at an interlocutory stage yet that is one of the remedies sought in the plaint. This Court cannot invoke its discretionary power to grant an interlocutory order whose effect will not only amount to evicting a party in possession but will also amount to granting a final order even before the main suit is canvassed. That is not the purpose sought to be served by such an order.

The plaintiff seeks to restrain the defendants by themselves, their agents, servants or assigns from trespassing upon or developing the suit property. That is an event which has already occurred as confirmed by the plaintiff herself. The Court of Appeal has held that such an injunction cannot be granted where the event has already been over – taken by events – See **ESSO KENYA LTD .V. MARK MAKWATTA C.A CIVIL APPEAL No 69 of 1991** and also **STEPHEN MBUGUA MWAGIRU .V. MUTHAIGA COUNTY CLUB LTD & OTHERS C.A CIVIL APPEAL NO 100 OF 2014 [2018 eKLR]** among other cases.

There is also the likelihood that the plaintiff's suit may in fact be statute barred. The defendants took possession in 2006 and this suit was filed in 2020 some fourteen (14) years later. Whereas at this stage the Court must not examine the merits of the plaintiff's case closely, a matter of Limitation is an issue law that this Court cannot ignore in considering whether the plaintiff has established a prima facie case.

Finally, as I have already stated above, a temporary injunction is an equitable remedy. A Court will not look favourably towards a party who does not approach the Court with clean hands. Since the late **ESTHER NYAMBOK OKULLU** had executed the necessary documents to transfer the suit property to **TICH** and even handed over possession to the defendants, that property could not properly be the subject of the succession proceedings in **BONDO PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No 83 of 2017**.

It is also clear to me that if this Court grants the orders sought, that will amount to issuing a mandatory injunction against the defendants at an interlocutory stage. The law is that such an order can be issued at an interlocutory stage but only in rare cases where there are compelling circumstances – **KENYA BREWERIES LTD & ANOTHER .V. WASHINGTON OKEYO 2002 I.E.A 109**.

This is not one such case.

Taking all that into account, I am not persuaded that the plaintiff has established a prima facie case with a probability of success to warrant the grant of the order of a temporary injunction as prayed. As was held in **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra) the test laid down in **GIELLA .V. CASSMAN BROWN** (supra) have to be considered sequentially. If an Applicant establishes a prima facie case, then that is not enough to grant an order of temporary injunction. The Court must also be satisfied that irreparable injury which cannot adequately be compensated by an award of damages will ensue. However, if a prima facie case is not established, as is the position in this case, *“then irreparable injury and balance of convenience need no consideration.”* In **AMERICAN CYANAMID .V. ETHICON LIMITED 1975 A C 396, LORD DIPLOCK** stated as follows: -

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.”

Having found that the plaintiff has not surmounted the first hurdle of the test laid out in the case of **GIELLA .V. CASSMAN BROWN** (Supra) which is to establish a prima facie case, then I need not consider the issue of irreparable loss that cannot adequately be compensated by an award of damages or even the balance of convenience.

The up – shot of the above is that the plaintiff's Notice of Motion dated 30th June 2020 is devoid of merit and is dismissed.

Costs shall be in the cause.

Boaz N. Olao.

J U D G E

30th September 2020.

Ruling dated and signed at **BUNGOMA** this 30th day of September 2020. The same is delivered by way of electronic mail in keeping with the **COVID – 19** guidelines as was advised to the parties on 1st September 2020.

Boaz N. Olao.

J U D G E

30th September 2020.