



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYAHURURU

ELC (OS) NO. 10 OF 2020

JAMES CHEMUSI EDUNGI.....PLAINTIFF

VERSUS

MARIA TALA CHESEREK.....DEFENDANT

RULING

1. Vide an Application by way of Notice of Motion dated 10th March 2020 brought under Order 50 Rule 1(sic), Order 40 Rule 2 and 3 of the Civil Procedure Rules, Sections 1A, 1B, 3A, of the Civil Procedure Act and all enabling provisions of the Law, the Applicant seeks for interim injunctive orders against the Respondent by herself, agents, servants and/or employees from entering, remaining, ploughing, planting, damaging crops, removing fences, evicting the plaintiff and/or in any other way interfering with the plaintiff's quiet occupation and enjoyment of all that is land parcel No. Laikipia/ Uaso Narok/209. The Applicant also seeks for the Deputy County Commissioner-Nyahururu to ensure compliance of the order, and for costs of the application.
2. On the 10th March 2020 ex-parte orders of status quo were issued pending the hearing and determination of the Application.
3. The Application was subsequently served upon the Respondent as evidenced by the affidavit of service dated 16th March 2020 and filed in Court on the 11th May 2020. There was response by the Respondent.
4. Subsequently, and owing to the covid-19 pandemic, the Court directed that the application be disposed of by way of written submissions. Despite service upon the Respondent, there was no response.
5. The Applicant in his written submissions submitted that he was allocated the suit land No. 167 vide a letter dated 3rd of July 2020 (sic) by the Uasin Narok settlement scheme wherein he had paid the requisite fee wherein the land had been identified to him by a Government Surveyor wherein he had taken possession, erected a fence, constructed a semi-permanent house where he resides with his family todate. That he had also planted trees and was engaged with farming.
6. That the Respondent who now possesses a title deed to the suit land has, with the help of the Deputy County Commissioner issued him with a verbal eviction Notice and had hired goons who had burnt down the vegetation planted by the Applicant with the intent of forcefully evicting him from the said suit land.
7. That the title deed possessed by the Respondent was for parcel No. 209 which had been conveniently entered on the RIM to reflect its physical location on the ground as plot 167 which plot belongs to one Jane Ekulan Achau as per the search certificate annexed to the application.
8. The Applicant's submission was that in deciding whether or not to grant an applicant seeking orders of temporal injunction, the Court should be guided by the principles set out in the celebrated case of **Giella vs Cassman Brown (1973) EA 358**.
9. It was his submission that the Applicant had made out a Prima facie case with a probability of success as was held in **Mr Rao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** to which going by the facts so presented there were issues that ought to be arbitrated upon and determined by the honorable Court.
10. On the second ground as set down in the case of **Giella** (supra) and guided by the Court of appeal decision in the case of **Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] EA 86**, the Applicant submitted that he had been living on the suit parcel of land since the year 2001. That no damages awarded could compensate him being rendered homeless together with his family if he is evicted from the land as he shall have suffered irreparable injury that could not be compensated monetarily.

11. That having been guided by the facts as presented, the Applicant had met the threshold so as to be granted the orders so sought. He also prayed that the interim orders of status quo issued on the 11th March 2020 be vacated and he be granted the orders sought in his application as well as costs.

Determination.

12. I have considered the Application and the submissions herein filed by the Applicant. I have also considered that fact that the Application herein is unopposed. I have also given consideration to the annexures filed herein, consequently the pending issue for determination is whether this Court should grant the Applicant an interim injunction pending the hearing of the suit.

13. The celebrated case of **GIELLA versus CASSMAN BROWN (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian **case of R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried(prima facie case)
- ii. Will the Applicant s suffer irreparable harm if the injunction is not granted;
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

14. On the first issue as to whether the Plaintiff/Applicant s in this matter had made out a prima facie case with a probability of success. I am guided by the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described as follows:

“ 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.”

15. Looking at the facts of this case as submitted, the Court has been moved under a Certificate of Urgency, by the Applicant, to issue temporary injunction against the Respondent. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

16. Has the Applicant herein demonstrated that he has a genuine and arguable case? That Applicant has exhibited a letter of allocation dated the 3rd July 2000 from the ministry of Land allocating him plot No 169 measuring 1.0 hectares and although the said letter of allocation does not supersede a title, yet from the photographs herein annexed there is no doubt that the Applicant herein is in possession and occupation of the suit premises where he constructed his semi-permanent house, planted trees, and engaged in farming since the year 2001 and is therefore claiming the suit land through the doctrine of adverse possession. These facts have not been challenged as there was no response filed by the Respondent.

17. Since it is not disputed that the Applicant has been utilizing the suit parcel of land, by not granting orders of injunction so sought in a situation where the Applicant was in occupation and the Respondent is bent on dealing with the suit land, there could be an eviction at this interlocutory stage which would be premature and would cause irreparable harm to the Applicant who has been utilizing the suit land from the year 2001.

18. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Applicant s claim of adverse possession but the mere fact that he has been in possession of the suit land since 2001 is sufficient to lead the Court to hold that the Applicant has established that he has a prima facie case.

19. On the second issue as to whether the Applicant would suffer irreparable harm if the injunction was not granted, I have seen the pictures herein attached in his application that show that indeed there is activity that has been carried on the suit land in addition to the mature trees growing therein.

20. Based on the above findings, I am convinced that the Applicant has shown that he has beneficial interest in the suit land which is capable of being preserved and/or protected. The balance of convenience therefore tilts in favour of granting an interlocutory injunction as we await the conclusion of this case.

21. Accordingly, the Court grants the Applicant the order of injunction sought, with the result that the Applicant’s Notice of Motion dated 10th March 2020 succeeds with costs at a lower scale since the same was undefended.

Dated and delivered at Nyahururu this 29th day of September 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE