



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC SUIT NO. 41 OF 2019

MARY KERUBO OGOTI.....PLAINTIFF/RESPONDENT

VERSUS

TERESA BITUTU ONDERI.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. The Defendant/Applicant moved this Honourable court by way of a Notice of Motion dated 9th January 2020 seeking the following orders:

1. Spent...

2. THAT the Respondents be restrained either by themselves, their agents, servants, employees, or otherwise howsoever from entering, wasting, trespassing onto, or interfering with the Defendant's peaceful and quiet occupation and possession of all that piece of land known as L.R. NO. NYARIBARI CHACHE/B/B/BOBURIA/6969 pending the hearing and determination of this Application.

3. THAT the Respondents be restrained either by themselves, their agents, servants, employees or otherwise howsoever from entering, wasting, trespassing onto, or interfering with the Defendant's peaceful and quiet occupation and possession of all that piece of land known as L.R. NO. NYARIBARI CHACHE/B/B/BOBURIA/6969 pending the hearing and determination of this Suit.

4. THAT the costs of this application be provided for.

2. The Application is premised on the grounds stated in the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 9th day of January 2020.

The parties canvassed the Application dated 9th January 2020 by way of written submissions.

BACKGROUND

3. It is the Applicant's case that in or about 2005 she met with 2 individuals, namely Stephen Kinara and Josphat Mogere Ogori who offered to sell him a parcel of land. She subsequently did a search on the said parcel of land and discovered that it was registered in the name of Alexina Bosibori Kinara; whom she was informed was the deceased grandmother of the vendor.

4. Thereafter, the Applicant states that she entered into an agreement with one Stephen Kinara Ogori for the purchase of L.R. NO. NYARIBARI CHACHE/B/B/BOBURIA/6939 on 10th August 2007 and the Applicant took occupation of the property in the same year.

5. The Applicant then learnt that there was a dispute between the Respondent and the vendor (Stephen Kinara Ogori) before the Land Dispute Tribunal at Kiogoro Division (Land Dispute Claim No. 04 of 2010) in regards to the suit property, where the Tribunal held in its decision issued on 20th July 2011 that the property belonged to Stephen Kinara Ogori and his mother, Marisela Moraa Ogori.

6. This decision by the Land Dispute Tribunal was subsequently adopted in KISII CMCC Land Dispute Case No. 77 of 2011. The Respondent being dissatisfied by the decision of the Tribunal filed a Petition at the ELC at Kisii vide Petition No.22 of 2014.

7. The learned Judge in the Petition decreed *inter alia* that the adoption by the Kisii Magistrates Court in KISII CMC LAND DISPUTE CASE NO. 77 OF 2011 of the Decision of the Kiogoro Land Disputes Tribunal as a Judgment of the Court and issuance of Decree thereof was null and void. The court further issued an Order that the Land Registrar cancel the title deed of title L.R. NO. NYARIBARI

CHACHE/B/B/BOBURIA/6939 registered in the name of Teresa Bitutu Onderi and restore the name of Mary Kerubo Ogoti to the register in respect of the parcel of land.

8. Following the said decree in Petition No. 22 of 2014 the District Land Registrar restored the name of the Plaintiff/Respondent as the registered proprietor of the suit land.

9. On 26th June 2019, the Plaintiff/Respondent filed a suit against the Defendant/Applicant seeking *inter alia* an eviction order in respect of the suit property. The Defendant/ Applicant put in her Defence and Counterclaim and subsequently filed the present Application seeking injunctive orders.

ISSUE FOR DETERMINATION

10. Having considered the pleadings, Notice of Motion, Affidavits and rival Submissions, the singular issue for determination that emerges is whether the Defendant/Applicant has met the threshold for the grant of injunctive orders.

ANALYSIS AND DETERMINATION

11. The purpose of a temporary injunction is to preserve the property in dispute pending the disposal of the suit.

In order for the court to exercise its discretion in granting injunctive relief, the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

Whether the Plaintiff has demonstrated that she has a prima facie case with a probability of success

12. In tackling the first and most crucial hurdle, the Applicant submits that Petition No. 22 of 2014 only considered the issue of the Land Dispute Tribunal’s jurisdiction and failed to address the issue of ownership of the suit property.

13. It is also the Applicant’s submission that there was no Eviction Order issued in Petition No. 22 of 2014. She claims that they have been in occupation of the suit property since she bought it.

The Applicant further submits that the fact that she is in occupation of the suit property means that there is a prima facie case with probability of success and that she was a *bonafide* purchaser of the suit property for value without notice.

14. The Applicant relied on the case of **Robert Mugo Wa Karanja vs Eco bank (Kenya) Limited & Another (2019) eKLR** where the court quoted the case of **Mrao Ltd vs First American Bank of Kenya and 2 Others (2003) KLR 125** where it was held that:

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

15. The Applicant submits that their right to ownership of property is under threat and further buttresses her submissions by stating that she has been in occupation of the suit property since 2007 and thus if she is evicted from the land, her quiet possession thereof will be interfered with prior to the hearing and determination of the suit.

16. In his submissions, the Respondent emphasized the need for the Applicant to establish a *prima facie* case. He associated himself with the sentiments of the Court of Appeal in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others [2014] eKLR** where the court opined thus:

“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 wish 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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 or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

17. It is the Respondent’s submissions that from the evidence before the court the Applicant has not demonstrated a prima facie case with a probability of success and thus does not qualify for interlocutory injunctive orders

18. I am first and foremost tasked with establishing whether the first hurdle has been properly tackled by the Applicant.

Prima facie is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an

arguable case” have been adopted to describe the burden imposed on the Applicant to demonstrate the existence of a *prima facie* case.

19. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one 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”

20. It is well established that the conditions laid out in the **Giella** (Supra) case are to be applied as separate, distinct, and logical hurdles which the Applicant is expected to surmount sequentially.

21. In the case of **Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol. I EA 86** the court opined thus:

“If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without hurdles in between.”

22. Applying the above principle in the instant Application, I therefore pose the question, has the Applicant convincingly established a prima facie case with probability of success?

A thorough scrutiny of the Applicants Submissions, Notice of Motion together with the Supporting Affidavit and the attached documents thereon indicates that the Applicant made an agreement with one Stephen Kinara Ogori for the purchase of L.R. NO. NYARIBARI CHACHE/B/B/BOBURIA/6939 on 10th August 2007 and made part payment for the property. As I have earlier highlighted in this ruling, a dispute crystallized between Stephen Kinara Ogori and the Respondent herein.

23. The dispute over the ownership of the property was canvassed before the Tribunal and thereafter the ELC at Kisii in Petition No. 22 of 2014 where the court ordered *inter alia*, that the suit property be registered in the name of the Respondent. The conundrum is that the suit property is currently registered in the Respondent’s name and occupied by the Applicant.

24. Without delving deep into the merits of the main suit, I am alive to the provisions of Section 26 of the Land Registration Act which 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... and the title of that proprietor shall not be subject to challenge, except:-

a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

b. *Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

25. The Applicant has failed to place any evidence before me to demonstrate that they are the proprietors of the suit property. By her own averments, she only made part payment for the suit land and proceeded to take occupation of the land. Mere occupation of the land does not equate to ownership. Consequently, I find that the Applicant has failed to establish a prima facie case with a probability of success.

26. The Applicant having stumbled at the first hurdle, I see no need of analyzing and considering the other two principles necessary for one to be granted an injunctive order.

27. The upshot of the above is that I find the Application dated 9th January 2019 to be devoid of any merit and I hereby order that the same be dismissed.

The costs of the Application shall be in the cause.

Dated, signed and delivered at Kisii via video link this 22nd day of September, 2020.

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J. M. ONYANGO

JUDGE