



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 13 OF 2018

WILFRED MUTEMBEI..... APPLICANT

VERSUS

ANDRINA NKUENE NJIRU..... 1ST RESPONDENT

PHINEAS MUGAMBI GICHURU..... 2ND RESPONDENT

COOPERATIVE BANK OF KENYA LIMITED.... 3RD RESPONDENT

RULING

1. Before me is a notice of motion dated 30/4/2020 brought under Order 40 Rule 1, 2 and 3, Order 1 Rule 3 of the Civil Procedure Rules and Section 3, 3A of the Civil Procedure Act, where the applicant is seeking an order of temporary injunction restraining the respondents from selling alienating and/or disposing off land parcel NO. IGOJI/KIANJOGU/497 pending hearing and determination of the suit, and that the bank be enjoined in this suit as a defendant. The applicant has also sought for costs of the application.

2. The application is premised on the grounds on the face of it and on the supporting affidavit of Wilfred Mutembei who averred that he filed this suit claiming to have obtained the suit land by way of adverse possession having lived and occupied the suit land for a period of 12 years. He has lived therein with his family and constructed permanent houses and planted tea bushes.

3. That on 30/4/2020, he was given papers by auctioneers who informed him that the land was to be sold on 5/5/2020 because the 2nd respondent had failed to repay his loan. The original proprietor of the suit land Andrina had secretly sold the land to the other defendant Phineas while the suit was pending in court. Phineas, after realizing that he could not obtain the land as plaintiff was in occupation of the same, charged the title with the bank and refused to pay the loan as he had nothing to lose. In the circumstances, he desires that the bank be enjoined in these proceedings and it be restrained from dealing with the suit land.

4. The respondent/ proposed 3rd defendant (the Co-operative bank) opposed the application vide the replying affidavit of Edwin Njeru, a business banker of the 1st respondent dated 9.6.2020. A summary of the contents thereof are that the applicant was well aware that Andrina Nkuene filed a succession cause touching on the suit land in the year 2000 in respect to the estate of the deceased Njiru Kanginda. The current suit was filed in the year 2003, 3 years after the succession cause was filed. Pursuant to the succession cause, the suit land was vested to Andrina Nkuene the widow of the deceased who later transferred it to Phineas Mugambi.

5. The applicant having been aware that the suit land had been transferred, he failed to take measures to protect his interest in the suit land. The process of transferring the land to Phineas was therefore proper, hence it was not true that the bank failed to exercise proper due diligence.

6. The applicant has additionally not been keen to prosecute this case since year 2003.

7. On 6/5/2020 the court gave directions that the application be heard vide written submissions. The applicant in his submissions argued that once a person has obtained land by way of adverse possession or under the limitation of actions act, it does not matter whether the proprietor sells it to third parties. That the bank failed to conduct due diligence by issuing the loan without visiting the suit land.

8. The bank is being identified as the 1st respondent, which is a distortion of the record since the said bank is not even a party as at now. At best, the bank should be identified as the 3rd respondent.

9. The bank has argued that the 2nd respondent has a valid title deed to the suit land and the process which he acquired the land does not fall under the exceptions of section 26 (a) (b) of the Land Registration Act.

10. On whether the applicant has met the threshold for injunctive relief, the bank argued that the applicant has not demonstrated an infringed right. His claim is that of adverse possession but he did not take tangible steps to enforce his rights, hence no prima facie case has been made. On irreparable harm, it was contended that the applicant can adequately be compensated by an award for damages. On the aspect of balance of convenience, it was argued that there is no dispute that the 2nd respondent is in default in servicing a facility and that the loan amount keeps attracting interest and therefore it is convenient that the bank be allowed to realize the security.

11. In support of its arguments, the bank cited the following cases; **Ibrahim Mungara Kamau v. Francis Ndegwa Mwangi (2014) eKLR, Lawrence P. Mukiri & Others v. AG & 4 Others (2017) eKLR, Giella v. Cassman Brown (1973) EA 358, Mrao Ltd v. First American Bank of Kenya, Bii v. Kenya Commercial Bank Ltd. (2001) KLR 458, Jane Wambui Weru v. Overseas Private Inv. Corp & 3 Others (2012) eKLR.**

Determination

12. There are two issues for determination; **whether the injunctive orders are warranted and whether the Co-operative bank should be enjoined in these proceedings.**

Injunction

13. Order 40 Rule 1 of the Civil Procedure Rules grants the court discretion to issue temporary injunction orders where a property in dispute is in danger of being alienated, damaged, wasted, removed, sold and/or being disposed. As usual, the said discretion must be exercised judiciously. The Court will also take into account that at this interlocutory stage, the court is not called upon to decide the disputed issues with finality. All that the court is supposed to determine now is whether the Applicants are deserving of the injunctive orders sought based on the usual criteria which was laid down in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358**. These criterias are:

a) The Applicant must establish that he has a prima facie case with probability of success.

b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c) When the Court is in doubt, to decide the case on a balance of convenience.

14. In the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, the court described prima-facie case as follows:-

“In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

15. It is the applicant's case that he has obtained the suit land by way of adverse possession having lived and occupied the suit land for a period of 12 years. It has been alleged by the respondents that after a valid succession cause, Andriana Nkuene transferred the suit land herein to Phineas Mugambi who took out a credit facility with the 1st respondent and used the suit land as security. It is my view therefore that the applicant herein has proved a prima facie case as his interest in the suit land are likely to be infringed. On irreparable loss it is the applicant's contention that he has lived on the suit land with his family and that if the injunction is not granted they would be evicted. Thus the balance of convenience also tilts in favour of the person who is allegedly utilizing the land.

16. In light of the above I find that the applicant has satisfied the requirement for the grant of an injunction order.

Joinder

17. **Order 1 rule 3 of the Civil Procedure Rules** provides as follows;

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

18. The bank has given a lengthy account of its involvement in the suit land, where it offered a loan facility to Phineas using the suitland as security. It appears that this was done during the subsistence of the suit hence there is no way the applicant could have brought the bank on board at the initial stages. In the circumstances, the prayer for joinder is merited.

19. As stated earlier, the applicant should not mix up the respondents who now should be identified as follows; Andrina Nkuene as 1st defendant, Phineas Mugambi as 2nd defendant and Co-operative bank as 3rd defendant.

Final orders

The application dated 30.4.2020 is allowed. The 3rd defendant (Co-operative bank) is to file and serve its defence within a period of 14 days. Costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 24.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE