



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 32 OF 2020

THE ESTATE OF NGIGI KARANJA

(Represented by

NJOROGE NGIGI KARANJA).....PLAINTIFF

VERSUS

GEOFFREY NGOTHO NJOROGE.....DEFENDANT

RULING

1. The plaintiff and the defendant in the instant suit are cousins. The background to this application is that the plaintiff's father obtained registration of the suit land in his name. The defendant avers that the land solely belonged to their grandfather, and he challenges that registration in the plaintiff's father's name as fraudulent. In brief, the conflict is in respect of land that is said to have belonged to their grandfather and to which each claims a share. The defendant further avers that he and his siblings have been staying on the suit land for 55 years. One of his siblings has sworn an affidavit in opposition to the plaintiff's application. Annexed to the replying affidavits are copies of photographs in support of the defendant's claim of lengthy stay on the suit land.

The Application

2. By a notice of motion dated 17/6/2020 and filed on the same date the plaintiff/applicant sought the following orders against the defendant:

(1) That this court be pleased to issue a mandatory injunction, ordering the respondent/defendant and anybody claiming under him to forthwith move out and remain out of the land comprised in the title No. Trans-Nzoia/Cherangani/84, while pending the hearing and determination of this suit.

(2) The OCPD Trans-Nzoia East Sub-County be directed to ensure that the court order is complied with.

(3) That costs be provided for.

3. The application is brought under Sections 1A, 3, 3A and 63 (C) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules (2010) and Section 19 of the Environment and Land Court Act.

4. The application is supported by the plaintiff's two affidavits sworn on 17/6/2020 and 10/7/2020 respectively. The application is premised on the following grounds: that the estate of the late Ngigi Karanja (his late father) owns Title Number Trans Nzoia /Cherangani/84 (hereinafter referred to as the suit land) that the defendant instituted a claim against the deceased at the Kaplamai Land Disputes Tribunal; which ruled in favour of the defendant and his father by awarding them 8 acres out of the suit land; that though the tribunal award was adopted by judgment of the Magistrate's court in Kitale SPMC Land Case No 28 of 2002, the award and the judgment were both quashed by way of Judicial review in Kitale HC Misc. Civil Application 67 of 2003; however on 20/1/2020 the defendant and a surveyor entered the suit land and excised 8 acres in an apparent attempt to implement the tribunal award and Magistrates court judgment despite there being no decree available for enforcement, the award and judgment having been quashed. The plaintiff avers that by the date of entry by the defendant onto the suit land the decree of 20/1/2003 had been long since overtaken by the timelines in Section 4(4) of the Limitation of Actions Act Cap 22 and that the defendant did not comply with the mandatory provisions of Order 22 rule 18 of the Civil Procedure Rules.

The Response

5. The application is opposed by way of two affidavits of the defendant one dated 9/7/2020 and another one dated 14/7/2020 and a supplementary affidavit of his sister, Miriam Nduta, deponed on 9/7/2020. In those affidavits, it is deponed that the application is fatally

defective; that one Njoroge Kariuki (now deceased and who was the parties' grandfather) had 2 wives named **Jane Wamboi** and **Jane Wamaita**; that Njoroge Kariuki died on **24/12/1970**; that he owned the suit land and another parcel known as **Lari/Magina/224**; that the deceased was survived by 7 children, 5 from the first house and two from the second house; that Ngingi Karanja his son (now deceased) was appointed to be the administrator to Njoroge Kariuki's estate and that he filed two succession causes, in Nairobi and in Kitale; that he obtained Grants in the two succession causes and failed to inform family members of their confirmation; that the first wife of the late Njoroge Kariuki was settled on the suit land while the 2nd wife was settled on **Lari/Magina/224** measuring 7 acres; that all the children of the deceased Njoroge Kariuki were meant to inherit the landed assets in equal shares but instead the plaintiff's father transferred the whole of the suit land to himself; that the defendant and his siblings have been staying on the suit land without any interruption for 55 years and the remains of their mother who died in **1988** were interred on the suit land and that the plaintiff is only intent on disinherit the defendant and his siblings, and that the plaintiff has not established a *prima facie* case.

The Plaintiff's Further Supporting Affidavit

6. The plaintiff's further supporting affidavit was filed on **13th July 2020**. In that affidavit he depones that the matters raised in the defendant's reply had been earlier raised at the tribunal whose award of 8 acres to the defendant's father had been quashed by the High Court. The plaintiff also depones that his father had allowed the defendant to occupy a portion of one acre out of the suit land before the commencement of the tribunal proceedings and that the defendant had admitted this fact before the tribunal. He reiterates that the taking up by the defendant of possession of 8 acres out of the suit land on **30/1/2020** in a purported execution of a decree was illegal since that decree and the award had been quashed by the High Court in **2005**.

The Defendant's Further Replying Affidavit

7. In that affidavit filed on **14/7/2020** the defendant avers that the plaintiff has filed a multiplicity of succession causes.

The Plaintiff's Submissions

8. The plaintiff filed his submissions on **15/7/2020**. He relies on a plethora of cases: **Nairobi Civil Appeal No 121 of 2005 Shariff Abdi Hassan Vs Nadhif Jama Adan**; **Locabail International Finance Ltd Vs Agro Export and Another 1986 1 ALL E.R. 901**; **Kamau Mucuha Vs Ripples Ltd Nbi Civil Appeal No. 186 Of 1992**; **Jaj Power Cash And Carry Ltd Vs Nairobi City Council And 2 Others Civil Appeal No. 111 of 2002** and finally **Ramadhan Makal Lala Angole Vs Lopusikou Korilokamar Kitale ELC Land Case No. 45 of 2014**. He maintains that the estate of Ngigi Karanja is undeniably the registered owner of the suit land and that it is entitled to the rights donated by **Section 26** of the **Land Registration Act** and that the threshold for the grant of an order of mandatory injunction has been attained in the instant application. He maintains that it is dishonest for the defendant to attempt to execute the decree of which he is aware that it was quashed by the High Court and that the defendant and his siblings should not be permitted to retain the position of advantage (possession) that they have illegally obtained. He states that the proceedings before the tribunal were intended to establish a trust and that no other suit based on trust was filed against his father. He avers that the defendants have caused 8 acres to be excised out of the suit land and that he and his siblings have taken possession of the 8 acre portion and are harvesting crops therefrom.

The Defendant's Submissions

9. The defendant filed his submissions on **14/7/2020**. He relied on the case of **Giella Vs Cassman Brown 1973 EA 358** on the 3 well known conditions for the grant of an interlocutory injunction: existence of a *prima facie* case, the risk of irreparable injury that would not be compensated for by way of damages and the court's dependence on the balance of convenience in the event doubts arose as to the first two conditions. He avers that the plaintiff is interested in disinheriting him by appropriating the entire estate of Njoroge Kariuki. He maintains that in the affidavit in support of the petition for letters of administration filed by the plaintiff's father, the survivors and the assets of the late Njoroge Kariuki were all listed, but their interest in the estate was not fully disclosed. He states that evidence of the fact that Njoroge Kariuki acquired the suit land and the land's history has been filed in this case. He states that the injunction order can only be issued once a commissioned survey report has been filed.

Determination

10. I have considered the application and the response as well as the filed submissions.

11. In this court's view, the matter herein goes beyond the issue of seeking of a mere interim injunction which the defendant has confined himself to. The issue is whether a *mandatory injunction* should issue against the defendant and his siblings in the circumstances of this application before the entire suit has been heard.

12. In exploring whether a *mandatory injunction* order may issue, the court's point of departure is what situation obtained before **30/1/2020**, the date of the alleged forcible excision of 8 acres out of the suit land.

13. The plaintiff's case that the suit land was at the material time owned by the estate of his late father of which he was administrator; he had lived on and was in actual possession of the suit land; that an excision of 8 acres in favour of the defendant was conducted on **30/1/2020**; that he has lost the user of the tea crop on the 8 acre portion. The plaintiff's only concession is that Ngigi Karanja had permitted the defendant and his siblings to reside on a portion of the land that measured only **one (1) acre** out of the suit land even before the commencement of the tribunal dispute and that the defendant, while a respondent at the tribunal proceedings, had then admitted that fact.

14. These matters are not disputed by the defendant whose main defence is that the entire of the suit land belonged to the parties' grandfather and that the plaintiff's father had wrongfully appropriated the same and had it registered in his name; the defendant does not deny receiving the plaintiff's advocate's demand letter dated **4/2/2020** seeking that the defendant do remove himself out of the 8 acre portion. He does not deny the allegation that no application for execution of any decree was made or that the decision in **Kitale SPMCC Land Case No. 28 of**

2002 was quashed alongside the Land Dispute Tribunal's award that precipitated it. The defendant is also not concerned with giving the acreage that he and his siblings occupied before the tribunal proceedings but maintains that he and his siblings are entitled to the suit land as beneficiaries of the estate of Njoroge Kariuki.

15. Notwithstanding the defendant's lack of denial of such vital issues as are outlined above, I have noted that the plaintiff does not dispute that the defendant and his siblings have structures erected on a portion of the suit land. This court's conclusion is that the defendant and his siblings were therefore confined to a small portion of the suit land, hence the need to call a surveyor to carve out a larger portion thereof, in accordance with the decree they relied on. However that decree is said to have been quashed on 20/9/2005 and the plaintiff has availed *prima facie* evidence of the quashing in the form of an annexure comprising the quashing decree in **Kitale HC Misc. 67 of 2002** which is Exhibit "NN6" in his supporting affidavit.

16. In the circumstances of the plaintiff's admission of the defendant's partial occupation, it is doubtful that **Prayer No. 1** for a mandatory injunction can issue in respect of the entire suit land, for it may compel the defendant and his siblings to be evicted from even the small portion they have been occupying before the conclusion of this suit which is seeking a substantive eviction order.

17. However in view of this court's observation that the Land Disputes Tribunal Award and the resultant Magistrate's court decree had been quashed and were not of any effect any more, the defendant appears to have forced his way into extra land beyond his previously occupied territory within the suit title without a valid court order entitling him to do so. From his affidavits it is quite clear that the defendant has an axe to grind with the estate of the plaintiff's father regarding the alleged illegal annexation and registration of the suit land in the latter's name to the exclusion of all other alleged beneficiaries of the estate of his grandfather.

18. In the case of **Kenya breweries ltd & Another -vs- Washington Okeyo (2002) eKLR** the Court of Appeal stated as follows:

"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application"

19. The Court of Appeal also stated as follows in the same case:

Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

20. It is plain to see from the Court of Appeal's position above that a mandatory injunction should be sparingly issued on a motion and the reason is also as clear for as it was stated by the Court of Appeal in **Kamau Mucuha v Ripples Ltd [1993] eKLR**:

"The reason for the rule is plain. Megarry J put it succinctly in a subsequent passage in the Shepherd Homes case as follows:

" if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done and the plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained."

21. In the instant case the plaintiff has also sought a mandatory injunction/eviction order and a permanent injunction as a substantive prayer in the plaint. Since I have already stated that the plaintiff has already admitted the defendant's presence on the land even before the purported formal excision of **8 acres** on **30/1/2020**, the consideration of the grant of a mandatory injunction, perchance any is granted, should be confined to any land that was invaded by the defendant on **30/1/2020** and no more.

22. The said invasion is said to have prejudiced the estate of the late Ngigi Karanja in that the defendant is said to be harvesting crops from the suit land which he was not doing before. In this court's view what the defendant has done is tantamount to forcible entry and occupation notwithstanding that he seems by his replying affidavit to adumbrate some sort of a palpable dispute between the beneficiaries of the estate of Njoroge Kariuki and the estate of Ngigi Karanja.

23. In the circumstances this court is inclined to grant an order of mandatory injunction as sought and for this reason, **Prayer No. (1)** of the application dated **17/6/2020** is hereby granted with the qualification that the mandatory injunction sought shall apply only to the portion of the suit land that the defendant took possession of by virtue of the excision exercise conducted on **30/1/2020**, otherwise the defendant and all claiming under him shall restrain themselves to the portion of land within the suit land which they had been occupying before **30/1/2020**.

24. The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 4th day of September, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE