



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 132 OF 2017

JAMES MAINA MACHARIA.....PLAINTIFF

VERSUS

**IRENE NJERI MAINA (Suing as Legal Representative of the Estate
of JEREMIAH MURIITHI MACHARIA).....1ST DEFENDANT**

CHARITY WAMBUI MURIITHI.....2ND DEFENDANT

ERICK KINYUA MURIITHI.....3RD DEFENDANT

RICHARD MACHARIA MURIITHI.....4TH DEFENDANT

JACKSON KIHUHIA MURIITHI.....5TH DEFENDANT

RULING

The Applicant vide a Notice of Motion dated 21st July 2020 brought under *Section 3A Civil Procedure Act, Order 40 Rules 1 & 2 Civil Procedure Rules* sought the following orders:-

1. Spent.
2. That a temporary order of injunction do issue restraining the defendant by herself, her servants, agents, relatives and/or anybody else claiming through her from interfering with the plaintiff's occupation of land parcel No. KIINE/RUIRU/29 pending the hearing and determination of this application.
3. That a temporary order of injunction do issue restraining the defendant by herself, her servants, agents, relatives, and/or anybody else claiming through her from interfering with the plaintiff's occupation of land parcel No. KIINE/RUIRU/29 pending the hearing and determination of this suit.
4. An order do issue that the defendant removes the barbed wire fence erected round the plaintiff's compound and in default, the plaintiff do remove the fence at the defendant's costs.
5. Costs of the application be provided for.

The application is premised on the following grounds:-

- a. The plaintiff/applicant filed this case against the defendant/respondent in her capacity as the legal representative of the Estate of Jeremiah Muriithi Macharia, deceased seeking for determination of trust and to receive half share of land parcel No. KIINE/RUIRU/29 measuring about 3.4 acres.
- b. That the plaintiff has all along been in occupation of part of the land.
- c. In a bid to illegally evict the plaintiff from the land, the defendant together with some hired goons erected a barbed wire fence round the plaintiff's compound.

d. To avoid confrontation or acts that may precipitate into a breach of the peace, it's necessary to have Court's intervention so that peace and status quo ante is maintained until the case is heard and determined.

Applicant's Statement of Facts

The plaintiff/applicant in further support of the application filed a supporting affidavit and made the following averments:-

- i. That at the time of land consolidation and adjudication, his brother Muriithi Macharia who was also known as Mugo Macharia got registered as the owner of land parcel No. KIINE/RUIRU/29 measuring 3.4 acres in trust for them. He stated that they were only two sons.
- ii. That they both settled on that land and established their homes and both families have been living on the land to-date.
- iii. That upon the demise of his brother, his daughter one Irene Maina filed a succession cause and was made an administrator, whereby upon registering form RL 19 in the Lands office, she was registered as the owner.
- iv. That he then registered a caution on the land.
- v. That the registration of Irene, if anything, was subject to overriding interests recognized in Section 28 of the Land Registration Act.
- vi. That he could have ventilated his claim in the succession cause but since a claim on trust cannot be determined in a succession matter and therefore filed this case.
- vii. That this case had been certified as ready for hearing and instead of waiting for the Court's determination, the defendant recently came with some hired goons and erected a barbed wire fence round his home compound.
- viii. That the defendant's actions were meant to provoke him and possibly evict him from the land illegally but he restrained himself.
- ix. That there is therefore need to preserve the status quo that was prevailing at the time of filing suit to prevent actions that may precipitate into a breach of the peace.
- x. Copies of the green card for land parcel No. KIINE/RUIRU/29, certificate of official search and copy of photographs are annexed to the supporting affidavit as **JMM 1 2 & 3** respectively.

Respondents Statement of facts

The respondents filed a replying affidavit sworn by the 1st respondent in opposition to the said application and states as follows:-

- i. That they have tried 100% to maintain the status quo on the suit premises as left by their father.
- ii. That the status quo was and still remains that the suit premises is utilized exclusively by his father's family while the plaintiff's house was erected on a small portion of the said land and that the plaintiff's children have forcefully built new structures later.
- iii. That the plaintiff had filed an application for revocation of grant issued to him to succeed their late father in Baricho Succession Cause NO. 466/2016 which has not been heard.
- iv. That there are statements filed by the defendant witnesses stating the nature of the status quo showing that the plaintiff and his family occupy a small portion of the suit premises while the remaining portion is under the exclusive use of their family.
- v. That it is the plaintiff who wanted to disturb the status quo by encroaching on the portion they have been utilizing since childhood and for the sake of peace, they fenced the said land after consulting the Nyumba kumi elders.
- vi. That until the Court decides if any trust exists, the status quo which his late father left should be maintained.
- vii. That the status quo as at the time of filing suit has not been disturbed and that this application is vexatious and misconceived which should be dismissed.
- viii. That if there is any claim, the plaintiff ought to have protested in the succession cause and that unless the confirmed grant is revoked, the plaintiff's claim might be a red herring.
- ix. That he has been advised by their counsel that the High Court has powers to deal with an issue of trust as per a recent judgment by the Court of Appeal in Civil Appeal Case No. 70/2015 (Kisumu) delivered on 21/05/2019.

Legal Analysis

I have considered the affidavit evidence, both in support and in opposition to the Notice of Motion dated 21st July 2020. I have also considered the applicable law. The application herein is seeking temporary injunctive orders. It is trite law that for one to succeed in the grant of injunction orders, he has to establish the three pillars on which rests the foundation of any order of injunction as laid down in the celebrated case of *Giella Vs Cassman Brown Company Ltd (1973) E.A.358*. The three principles are:-

1. An applicant must establish a prima facie case.
2. The applicant must demonstrate that he will suffer irreparable loss unless the orders are granted and
3. Where the Court is in doubt, it may decide the matter on a balance of convenience.

The Court of Appeal introduced another test on whether an application for injunction can be granted in the case of *Cyanamid Co. Vs Ethicom Limited (1975) A A.E.R 504* where three elements were noted to be of great importance namely:-

- i. There must be a serious/fair issue to be tried.
- ii. Damages are not an adequate remedy;
- iii. That balance of convenience lies in favour of granting or refusing the application.

Again in the case of *Paul Gitonga Wanjau Vs Gathuthi Tea Factory Company Ltd & 2 others (2016) e K.L.R*, the Court cited with approval the following passage by *Steven Mason & MC Cathy Tetrant* in an article entitled “**Interlocutory injunctions: Practical considerations**”

“With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R.J.R. Macdonald Vs Canada (Attorney General). Once satisfied that the application is neither vexatious nor frivolous, the motions Judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being “on the basis of common sense and a limited review of the case on the merits. (II) It is usually a brief examination of the facts and law”.

Similarly in the case of *Mrao Ltd Vs First American Bank of Kenya & 2 others (2003) K.L.R 125*, Court of Appeal defined a prima facie case as follows:-

“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”.

I agree with the decisions by the superior Court. The plaintiff/applicant in this suit is seeking a determination of trust in the suit property L.R. No. KIINE/RUIRU/29. Whether the plaintiff will succeed in the claim or not is immaterial in granting of an injunction order provided the Court is satisfied that on the materials presented to it, there exist a right which has apparently been infringed by the opposite party. The defendants in their replying affidavit have admitted in paragraph 7 thereof that they fenced the suit land in consultation with Nyumba kumi elders. The admission by the respondents to have fenced off part of the suit land during the pendency of this suit raises questions into their conduct in this suit. I am therefore satisfied that the applicant has established a prima facie case. Consequently, I find the application dated 21st July 2020 merited and the temporary injunction orders issued in the first instance on 28th July 2020 are hereby confirmed pending the hearing and determination of this suit. It is so ordered. Costs in the cause.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 23rd day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Githaiga holding brief for Mr. Maina Kagio
2. Defendant/Advocate – absent
3. Mbogo – Court clerk