



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. NO 40 OF 2014
FORMERLY KERUGOYA E.L.C 119 OF 2014

ESTON NJERU MUNYI.....PLAINTIFF

VERSUS

JOSEPH GACHOKI KARANI..... 1st DEFENDANT

JOHN NJERU NJIRU..... 2nd DEFENDANT

ZACHARIA NJAGI NJIRU..... 3rd DEFENDANT

FLORENCE NGITHI MWANIKI..... 4th DEFENDANT

JAMES MURIUKI NGARI..... 5th DEFENDANT

JAMES NJIRU MWANGARIO 6th DEFENDANT

MARY NDIGA MWATATE..... 7th DEFENDANT

VIRGINIA NTHUA NGIRI..... 8th DEFENDANT

JOSPHAT MWANIKI NYAGA..... 9th DEFENDANT

JUSTIN MURIUKI NYAGA..... 10th DEFENDANT

ABRAHAM NJIRU NYAGA..... 11th DEFENDANT

JAMES KARUIGI NYAGA.....12th DEFENDANT

DORCAS MUTURI IRERI.....13th DEFENDANT

ISAAC NJERU KITHAKA.....14th DEFENDANT

ELYSTON MUGAMBI NTHATHAI.....15th DEFENDANT

RULING

INTRODUCTION

By their notice of motion dated 24th June, 2014, counsel for the defendants has applied to this court under **Sections 3(a) of the Civil Procedure Rules** of 2010 for the following orders:

1. An order to maintain the status quo be on land parcels number Mbeti/Gachuriri/2643, 2644, 2655, 2647 and 2648 pending hearing and determination of this suit.
2. An order be made to provide for costs of this application.

The application is opposed by counsel for the plaintiff/respondent.

1st Defendant's Factual Basis:

According to the 1st defendant, he bought the land from Johana Karigi Kabuga. He has admitted that Johana Karigi Kabuga lost his suit in respect of the suit land in the Court of Appeal.

As far as he is concerned, the 1st defendant is now awaiting the verdict of this court to declare as to who is the lawful owner of the parcels of the suit land.

Defendants'/Applicants' Factual Basis:

The 13 defendants have supported their application by an affidavit sworn on 24th June, 2014. In that affidavit, they have stated that the plaintiff as the registered owner of all the parcels of land has filed his suit to have them evicted from the suit parcels of land. According to them, they fear that the plaintiff might start harassing them before the case is finalized. It is for that reason that they have applied to the court for an interim order to maintain the status quo pending the hearing and determination of the suit.

Counsel for the defendants has advanced the following grounds in support of the defendants' application:

1. That all the defendants live and depend on the above mentioned 5 parcels of land together with their families .
2. That the plaintiff will start harassing the defendants even before the case is finalized.
3. That an order to maintain the status quo is necessary to safeguard the defendants and their families on the suit parcels of land.
4. That it is just to allow this application.

14th Defendant's Factual Basis:

The 14th defendant has stated that he lives on his own land being land reference number Gachuriri/1984. According to him, he is not in occupation of the parcels of the suit land, that belongs to the plaintiff.

Finally, he states that he has never interfered with the suit land.

Plaintiff's Factual Basis:

The plaintiff/respondent has opposed the applicant's application on the following grounds:

1. That the application is not properly before the court.

2. That the application is unmeritorious, scandalous, frivolous, vexatious and otherwise an abuse of the court process.
3. That this application does not meet the threshold set out in *Giella v. Cassman Brown Ltd (1973) EA 358*.
4. The defendants have no right to the suit land.
5. That the defendants have not demonstrated either through their pleadings or through their application what interest they have on the suit land.
6. That the defendants have not come to court with clean hands.
7. That this court is being urged to make orders contrary to Section 28 of the Environment and Land Court Act, 2011.

The Applicable Law

The law that governs the issuance of temporary injunctions is set out in *Order 40 (1) of the Civil Procedure Rules of 2010*. The provisions of that order are as follows:

(1) Where in any suit it is proved by affidavit or otherwise -

- a. ***that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***
- b. ***that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,***

court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

In addition to *Order 40 (1) of the Civil Procedure Rules of 2010*, the Court of Appeal has authoritatively interpreted these provisions in *Giella v. Cassman Brown Ltd, supra*. According to that court, an application for the relief of a temporary injunction must meet the following criteria:

1. ***He must show that he has a prima facie case which stands with a probability of success.***
2. ***That if a temporary injunction is not issued, he is likely to suffer irreparable damage which cannot be compensated by way of damages.***
3. ***If the first and second requirements are not met, the court is entitled to decide the issue on a balance of convenience.***

Furthermore, where fraud is an issue in a claim as is the case here, it must be distinctively alleged and must also be distinctively proved as set out in the English case of *Davy v. Garrett (1877) 7Ch.D 473*.

Evaluation of the Facts, the Law and Submissions:

I have carefully considered, the defendants' affidavit's evidence, their submissions and the grounds of opposition by counsel for the plaintiff. It is my considered view that the defendants have not met the threshold that is set out in *Giella v. Cassman Brown Ltd, supra*. It is upon the defendants to produce evidence showing which of their rights have been infringed or threatened to be infringed. Those rights may be legal rights, equitable rights or any other rights recognized by law.

They have failed to demonstrate which of their rights have been infringed or threatened to be

infringed.

I now turn to consider the submissions of counsel for the defendants. According to counsel, the plaintiff wrote a letter dated 14.12.1989 admitting that the suit land belongs to a clan. He also submitted that the issue is not covered by the doctrine of *res judicata*. According to him the Court of Appeal and the High Court never addressed the issue of ownership of the suit parcels of land. The suit was merely dismissed because it was out of time.

The answer to the foregoing issues lies in **Section 7 of the Civil Procedure Act** as read with explanation (4) thereof, which provision relates to the issue of *res judicata*. The issue of the letter in which the plaintiff allegedly admitted that the suit parcels of land belonged to the clan is covered by the doctrine of *res judicata*. The reason for this is that it is an issue that out to have been made a ground of defence or attack in the litigation before the magistrate's court in Siakago and the two superior courts. It therefore follows that this submission is without merit.

Furthermore, counsel submitted that the title deeds of the suit parcels of land should be cancelled as they were obtained contrary to law namely **Section 26, Land Registration Act**. In this regard, it is important to point out that the defendants have merely alleged fraud in the counterclaim without specifying the particulars of the alleged fraud as required by law (*see Davy v. Garrett, supra*).

Finally, counsel has submitted that the defendants have rights in the suit parcels of land on the basis of customary trusts in terms of **Section 28(b) of the Land Registration Act**. It is to be noted that the alleged customary rights have not been pleaded in the counterclaim. This submission also is without merit and is similarly rejected.

It is clear from the affidavit that they are in occupation of the suit land. Other than allegations that they are likely to be harassed by the plaintiff unless a temporary injunction is obtained, they have not demonstrated that they are in danger of being evicted, which is one of the core prayers of the plaintiff in his plaint.

Furthermore, one of the grounds of opposition by the plaintiff is that the matter is *res judicata*. The defendants have merely alleged that they are in occupation of the suit land. Occupation *per se* does not in itself confer upon them legal or equitable rights that warrant being protected temporarily by a temporary injunction. They are not claiming adverse possession and cannot in law do so in view of the plea of *res judicata*. In view of this, the basis of their occupation is weak.

In the circumstances, the defendants have not discharged the burden that is upon them to show that they are entitled to the injunctive relief of a temporary injunction in terms of **Order 40 Civil Procedure Rules of 2010**.

Verdict and Disposal Order:

The applications of all the defendants are hereby dismissed. The costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **4TH** day of **DECEMBER 2014**

In the presence of

Court clerk

Right of Appeal under Order 43 explained to the parties.

J.M. BWONWONGA

JUDGE