



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 19 OF 2019

KENNETH NJERU NYAGA.....PLAINTIFF

VERSUS

SAMMY GICHOVI.....1ST DEFENDANT

WILFRED GICOVI NYAGAH.....2ND DEFENDANT

ELIAS NJIRU M'MBUI.....3RD DEFENDANT

COLLINS THAGANA.....4TH DEFENDANT

LINCOLN GITHAKA.....5TH DEFENDANT

ROSELILLIAN MBERE JOSEPH.....6TH DEFENDANT

JACINTA MUTHONI MUCANGI.....7TH DEFENDANT

AND

JOSEPH NYAGA MURUABUI.....APPLICANT/INTERESTED PARTY

RULING

A. INTRODUCTION

1. By a notice of motion dated 20th August 2020 brought under **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 40 Rules 1 & 4, Order 51 of the Civil Procedure Rules, Section 180 of the Energy Act No. 1 of 2019 and all enabling provisions of the law**, the Applicant sought the following orders:

- a) *This application be certified urgent and service of the same be dispensed with in the 1st instance.*
- b) *This honourable court be pleased to set aside and or vacate in totality the interim orders issued on 24th July 2020 in favour of the 7th Defendant/Respondent.*
- c) *This honourable court issues a permanent injunction restraining the Respondents either by themselves, their servants, employees or agents, or any other persons or group of persons whosoever from abusing the court order issued on 24th July 2020 and from cutting down more trees which trees are the property of the Applicant/Interested Party in the suit property Ngandori/Kirigi/8476.*
- d) *The Applicant/Interested Party hereby be enjoined in ELC No. 19 of 2019 (Embu) as an interested party for purposes of protecting his interest in Ngandori/Kirigi/8476.*
- e) *The Respondents herein be ordered to compensate the Applicant/Interested Party for the value of the trees cut down contrary to the purport of the interim orders dated 24th July 2020 which value is to be assessed by the Kenya Forest Service.*
- f) *The costs of this application be provided for.*

B. THE APPLICANT'S CASE

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on 20th August 2020. The Applicant contended that he was the absolute owner of *Title No. Ngandori/Kirigi/8476 (the suit property)* and that the 1st – 6th Defendants were his children who were residing on the suit property. The 7th Defendant (also a relative) was also said to be residing on a position of the suit property with his permission. It was contended that the 1st and 7th Defendants had obtained a court order on 24th July 2020 to cut down some trees overhanging some electricity cables on the suit property but they had proceeded to maliciously cut down more trees than were necessary. It was further contended that the said court order was unnecessary since it was the sole responsibility of Kenya Power & Lighting Company (KPLC) under the law to trim or cut down trees overhanging power lines.

C. THE DEFENDANTS' RESPONSE

3. The 1st Defendant filed a replying affidavit sworn on 1st September 2020 in opposition to the said application. It was contended that the instant application was unnecessary and a total waste of the court's time since the orders sought to be vacated had already become spent. The 1st Defendant further contended that the Defendants had lawfully executed the court order of 24th July 2020 under the supervision of the OCS of Manyatta Police Station whereby they cut down only 5 trees and pruned 2 others overhanging the power lines on the suit property. They further stated that since then the Defendants had never embarked on cutting or pruning any more trees. The rest of the response to the application alluded to internal family disputes which have no direct bearing on the instant application.

D. DIRECTIONS ON SUBMISSIONS

4. When the said application was listed for hearing on 9th September 2020 it was directed that the same shall be canvassed through written submissions. The Applicant was granted 14 days to file and serve his written submissions whereas the Defendants were granted 14 days upon the lapse of the Applicant's period to file and serve theirs. The record shows that the Applicant filed his written submissions on or about 29th September 2020 whereas the Defendants filed theirs on or about 12th October 2020.

E. THE ISSUES FOR DETERMINATION

5. The court has considered the Applicant's notice of motion dated 20th August 2020 together with the supporting affidavit and annexures thereto, the replying affidavit in opposition thereto and the submissions on record. The court is of the opinion that the following issues arise for determination:

- a) *Whether Applicant should be joined in the suit as an Interested Party.*
- b) *Whether the court order dated 24th July 2020 should be vacated or set aside.*
- c) *Whether the Applicant is entitled to a permanent injunction to restrain the Defendants from abusing the court order dated 24th July 2020.*
- d) *Whether the Applicant is entitled to compensation for the trees which were cut down by the Defendants.*
- e) *Who shall bear costs of the suit.*

F. ANALYSIS AND DETERMINATIONS

a) Whether the Applicant is entitled to be joined as an Interested Party in the suit.

6. The court has considered the material on record on this issue. The Applicant contended that he was the registered proprietor of the suit property hence he intended to protect his proprietary interests in the suit. He exhibited a copy of a title deed issued to him on 31st July 2008. The Defendants did not dispute that he was the owner of the suit property even though the 1st Defendant opposed his joinder in the suit. The Plaintiff and the Defendants all appear to be children of the Applicant except the 7th Defendant who appears to be his daughter-in-law. They appeared to be fighting over their father's property during his lifetime and without having him joined as a party. Accordingly, the court is satisfied that the Applicant has an identifiable stake and legal interest in the suit property and is consequently inclined to grant his prayer for joinder.

b) Whether the court order dated 24th July 2020 should be set aside or vacated

7. The Applicant sought this order on the basis that the 1st and 7th Defendants had cut down more trees than were necessary in executing the said court order. The Applicant was also apprehensive that the Defendants might maliciously cut down more trees on the basis of the said order.

8. The Applicant did not specify in his application how many trees were cut down by the 1st and 7th Defendants. He was simply concerned that they were more than necessary. The 1st Defendant, on the other hand, swore that only 5 trees were cut and 2 pruned in execution of the court order. He exhibited a copy of a contract agreement with a service provider showing that he had only contracted and paid for those trees. The Applicant did not file any further affidavit or other evidence to discount the contract exhibited by the 1st Defendant.

9. The court has also noted that there is no evidence on record to demonstrate that they have cut down any more trees after execution of the court order on 18th August 2020. There was equally no evidence to demonstrate that they intended to cut down or prune more trees in the near future. The court is further of the opinion that the court order of 24th July 2020 is already spent having been executed on 18th August 2020. It cannot, therefore, be the basis of future action. The fact that the Defendants executed the court order in the absence of KPLC cannot justify a setting aside. Accordingly, the court finds that the Applicant has failed to make a case for setting aside of those orders. It would be futile to set aside orders which are already spent.

c) Whether the Applicant is entitled to a permanent injunction to restrain the Defendants from abusing the court order of 24th July 2020

10. The court has already dealt with the issue of the operative force of the order made on 24th July 2020. It was an event-bound order which expired upon execution. Even if the said order was still in force the court would not be inclined to grant an injunction to restrain the Defendants from abusing it whereas there is no evidence of such abuse. There is also no evidence on record to demonstrate that the Defendants are intending, or have threatened, to cut down more trees on the suit property. The Applicant's fear or mere apprehension cannot be a basis for granting an injunction. The court is, therefore, of the opinion that the Applicant has failed to make a case for the granting of the injunction sought as per the principles enunciated in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**.

d) Whether the Applicant is entitled to compensation for the trees which were cut down

11. The court has considered the material and submissions on record on this issue. The Applicant has adopted a most unusual manner in pursuing his claim for compensation. To date, the Applicant has not filed any pleadings in this matter. In fact, he is being admitted into the proceedings as an Interested Party by virtue of this ruling. The court is of the opinion that he cannot ventilate his claim for compensation and award of damages through an interlocutory application in order to obtain a judgement when he has no valid pleadings on record and before his claim is heard and determined in the manner provided for in the **Civil Procedure Act (Cap. 21)** and the **Civil Procedure Rules**. Accordingly, the court finds the claim for compensation premature and incompetent.

e) Who shall bear costs of the application

12. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Since all the parties herein are close relatives the court is of the opinion that costs of the application should be in the cause.

G. SUMMARY

13. In summary, the court makes the following findings on the issues for determination herein:

- a) The Applicant is entitled to be joined as an Interested Party since he has demonstrated a legal interest in the suit property.
- b) The Applicant has failed to demonstrate a case for setting aside or vacation of the court orders made on 24th July 2020.
- c) The Applicant is not entitled to a permanent injunction to restrain the Defendants from purportedly abusing the court order made on 24th July 2020 and from cutting down trees on the suit property.
- d) The Applicant's prayer for compensation in the instant application is premature and incompetent.
- e) Costs of the application shall be in the cause.

H. CONCLUSION AND DISPOSAL ORDER

14. The upshot of the foregoing is that the court is satisfied that the Applicant is only entitled to be joined in the suit as an Interested Party. However, the court finds no merit in the rest of the prayers. Accordingly, the court makes the following orders for disposal of the Applicant's notice of motion dated 20th August 2020:

- a) The prayer for joinder of the Applicant as an Interested Party in the suit is hereby granted.
- b) The rest of the prayers are hereby declined.
- c) Costs of the application shall be in the cause.

It is so decided.

RULING DATED and SIGNED in Chambers at EMBU this 15TH DAY of OCTOBER 2020 and delivered via Microsoft Teams platform in the presence of Mr. Omondi for both the Plaintiff & Applicant/Interested Party and Ms. Waceke Thindigua for the Defendants.

Y.M. ANGIMA

JUDGE

15.10.2020