



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO 389 OF 2013

HITESHKUMAR MERAT GOSRANI.....1ST PLAINTIFF

NILESHABHAI RAVJUBHAI PATEL.....2ND PLAINTIFF

VERSUS

DISMAS NYAKUNDI MAGEKA.....1ST DEFENDANT

SALOME GESARE ONCHARI.....2ND DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the 1st Defendant's Notice of Motion dated 3rd June 2020 in which he seeks an order of injunction to restrain the Plaintiffs from trespassing upon the disputed portion of the suit property, by planting blue gum trees and/or doing any activities to change the texture of the suit property pending the hearing and determination of the suit herein. The application is premised on the grounds set forth in the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 3rd June 2020.

2. In his affidavit, the Applicant depones that the land in dispute belongs to his late mother who was sued as the 1st Plaintiff. He further depones that the Plaintiffs have started planting blue gum trees on the disputed portion before the case is heard. He avers that the Plaintiffs' actions are unlawful and if they are allowed to continue, they will interfere with the Applicant's land and he will suffer irreparable loss.

3. The application is opposed by the Plaintiffs through the Replying Affidavit of Nileshabhai Ravjibhai Patel (2nd Plaintiff) sworn on his own behalf and on behalf of the 1st Plaintiff on 29th June 2020. The 2nd Plaintiff avers that the application is an abuse of the court process and a waste of judicial time as it is bereft of any truth. He further avers that the application is filed in a vacuum and is misconceived as the Applicant is seeking orders in respect of his late mother's estate yet he lacks the requisite locus standi. He states that the Applicant is a vexatious litigant who has filed similar applications, none of which has been successfully prosecuted.

4. He claims that the Applicant has failed to disclose the date when the trees were allegedly planted as the ones displayed in the photos annexed to the Applicant's affidavit are tall and were on the suit property at the time the Plaintiffs purchased the land.

5. The application was prosecuted by way of written submissions and both parties filed their submissions.

BRIEF BACKGROUND

6. Before I delve into the merits of the application it is important to give a brief background of this matter. The Plaintiffs who are the registered proprietors of L.R No Central Kitutu/Daraja Mbili/2231 filed suit against the Defendants seeking an order of eviction and a permanent injunction to restrain the Defendants from trespassing on the suit property.

7. Together with the Plaintiff the Plaintiffs filed an application for injunction to restrain the Defendants from trespassing upon the suit property and a mandatory injunction for the eviction of the Defendants who were occupying the suit property.

8. The Defendants resisted the application and explained that in the year 1980 the 2nd Defendant who is the 1st Defendant's mother sold a portion of her land parcel measuring 200 feet by 70 feet to one Henry Nyanducha and Oliver Oserio. According to the Defendants, they continued to occupy the remaining portion. The said Henry Nyanducha and Oliver Oserio however fraudulently transferred the entire parcel

of land to themselves and later sold the same to the Plaintiffs. In its ruling dated 16th May 2014 the court granted an injunction against the Defendants but stated that the injunction would not extend to that portion of the suit property which was in actual occupation and use of the Defendants.

9. On 12th May 2015 the Defendants filed an application for injunction to restrain the Plaintiffs from blocking the Defendants' access to the suit property and from demolishing the buildings, trees and Napier grass thereon. In his affidavit in support of the said application, the 1st Defendant averred that he had been evicted from the suit property in contravention of the court orders issued on 16th May 2014. The Plaintiffs opposed the application and claimed that they had purchased the entire parcel of land.

10. In his ruling dated 22nd July 2016 Justice Mutungi dismissed the application and observed that there would be no basis for granting an injunction when the court had already granted a similar order though on terms. He was of the view that if the first order of injunction had been disobeyed, the appropriate route would have been for the 1st Defendant to seek enforcement of the terms of injunction.

11. On 18.10 2018, the 1st Defendant filed an application for contempt of Court against the Plaintiffs citing the reason that the Plaintiffs had violated the court order dated 16.5.2014 by demolishing the 1st Defendant's house and chasing the Defendants away using the police. The said application was subsequently withdrawn by the 1st Defendant.

12. On 27.6.2019 the 1st Defendant filed yet another application for injunction to restrain the Plaintiffs from extending to the portion of land occupied by the Defendants. When the matter came up for hearing on 6.11.20 the court directed that the case proceeds for hearing of the main suit. The application was therefore marked as withdrawn.

13. The case then proceeded for hearing and the Plaintiffs testified and closed their case after which the 1st Defendant sought an adjournment in order to file his witness statements. The case was stood over to 6.2.20 but owing to the COVID-19 pandemic which resulted in the suspension of open court sessions, it could not proceed. The matter is fixed for hearing on 14.10.2020.

14. Undeterred by the previous directions issued by the court, the 1st Defendant has now filed another application for injunction to restrain the Plaintiffs from planting trees on the suit property.

Against the foregoing background the singular issue for determination is whether the Applicant has met the threshold for the grant of injunctive relief.

15. In order to qualify for an order of injunction an Applicant must meet the conditions set out in the case of **Giella v Cassman Brown & Company Limited 1973 E.A973 E.A58** which are as follows:

“First, the Applicant **must show that he has a prima facie case with a probability of success**. Secondly, an interlocutory injunction will not normally be granted unless the Applicant **might otherwise suffer irreparable injury** which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a **balance of convenience**.”

16. The first hurdle that the Applicant must surmount it to demonstrate that he has a prima facie case with a probability of success. Learned Counsel for the Respondents has submitted that there are no substantive proceedings on which the application is based and the application has therefore been made in a vacuum. He has further submitted that the application is misconceived as the Applicant lacks the locus standi and that the Applicant has previously sought similar orders without success. It is counsel's submission that the Applicant is a dishonest litigant as he has exhibited photos of trees that were planted a while back without disclosing when the said trees were planted. He also faults the Applicant for prevaricating between seeking an injunction an order of status quo.

17. Looking at the Applicant's supporting affidavit I can't help agreeing with the Respondent's counsel that there is really no basis upon which the application has been made. The photo annexed to the said affidavit is inconclusive as it does not show when the said trees were planted and whether indeed they have been planted on the disputed portion. The fact that there is in existence an order of injunction in respect of the suit property does not help the Applicant's case. What is even more intriguing is that this matter is already part heard and the same is fixed for further hearing on 14.10.20, four days after delivery of this ruling. All this works against the Applicant as it is clear that he has no prima facie case to warrant the orders sought. Given the numerous applications for injunction that have been filed by the Applicant, I am tempted to think that he is not keen on having the matter concluded.

18. Be that as it may, since the Applicant has not surmounted the first hurdle, I need not consider the other conditions in the Giella case.

Accordingly, I find no merit in the application and I dismiss it. The costs of the application shall be in the cause

Dated, signed and delivered at Kisii this 8th day of October 2020

J.M ONYANGO

JUDGE