



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 163 of 2012

FLORENCE NJUGUNA1ST PLAINTIFF

MICHAEL NG'ANG'A.....2ND PLAINTIFF

VERSUS

PAUL MAINA NGUGIDEFENDANT

RULING

Florence Nyanguma and Michael Ng'ang'a (*the Applicants*) in their Notice of Motion dated 10th May, 2012 (*the Application*) sought against Paul Main Ngugi (*the Respondent*), an injunction restraining the Respondents, his servants, agents employees and any other person acting on their instructions from trespassing into, entering, occupying and/any another manner dealing with the parcel of land known as Title Number **NYANDARUA/MELANGINE/1378** (*the suit land*) in detriment to the applicants' proprietary rights.

The application was based upon the grounds on the face thereof and the Supporting Affidavit of Michael Ng'ang'a sworn on 10th May 2012. It was opposed by the Replying Affidavit of Paul Maina Ngugi (*the Respondent*) sworn on 29th May 2012 and filed on 30th May, 2012.

The respective cases are these. The Applicants say that they are purchasers for value of the suit property, and have enjoyed quiet and uninterrupted occupation of the said parcel of land without any interference since the year 1999, and the Defendant has through dubious and barbaric means forced out the Applicants without any colour of right.

The Applicants also contend that the Respondent in breach of the doctrines of equity has obtained eviction orders against the Applicants and thus doing them grave injustice as their entire lives are dependent upon the occupation, possession and use of the suit land.

Mr. Kamau learned counsel for the Applicants in addition to the above grounds argued that the suit land was sold to the applicants and a sub-division obtained together with letters of consent. However, a title deed was issued in the name of the Respondent following succession cause Number 160 of 2004 at the Principal Magistrates Court at Nyahururu. Counsel contended that the said court had no jurisdiction to hear and determine the said cause, in Nyahururu Principal Magistrate Court Case No. 258 of 2011 which resulted in the orders of eviction of the Applicants as only the High court has such jurisdiction. Counsel therefore contended that the applicants had established a prima facie case with a probability of success, particularly counsel added, as the applicants have been in occupation for thirteen years and would therefore suffer irreparable loss.

Mr. Mbugua, learned counsel for the Respondent would hear none of these arguments. He opposed the application. He relied upon the Replying Affidavit of the Respondent sworn on 29th May 2012 and filed on 30th May, 2012. The Respondent's case counsel contended is three fold. **Firstly**, that the application is incapable of being enforceable as it is incompetent. **Secondly**, that the learned magistrate had jurisdiction, and that there had been no challenge to his decision by way of appeal, that the Applicants seek to relitigate a matter that has been dealt with by a court of competent jurisdiction, and that the matter was therefore **res judicata**. **Thirdly**, that the title to the suit land held by the Respondent is genuine, and is not a forgery, as due process was followed in the issue thereof.

I have considered the rival arguments. I have also considered the grounds, the Supporting and Replying Affidavits of the respective parties. The principles for granting an injunction are laid down principally by the rules of court, order 40, rules (1) and (2), and by precedent. Under Order 40 rule (1) and (2) the Applicant has to establish by Affidavit -

- (a) That the 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, or**
- (b) The Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff may or will be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit.**

Rule 2 of order 40 covers situations of threatened breach of contract. That is not the situation here.

The principles of granting injunction have also been set by judicial precedent. The classic case is that of **GIELLA -VS- CASSMAN BROWN and CO. LTD. [1973] EA 358** which set out three propositions for the grant of temporary injunction-

- (i) An applicant will show or establish a prima facie case with a probability of success.**
- (ii) The applicant will also show that he will suffer substantial loss which cannot be compensated in damages unless temporary injunction is granted.**
- (iii) Where there is doubt the court will decide the matter on the balance of convenience.**

In this case, the Respondent's claim to the suit land is transmission of the intestate estate of the late Benson Ngugi Kiraba alias Ngugi Kiraba Njathi in a **Certificate of Confirmation of Grant** issued on 23rd March 2006, in the Principal Magistrates Court at Nyahururu when the Respondent was granted plot Number Nyandarua/Milangine/1378 – 5.5 acres (*the Suit Property*) and the Eviction Orders of 14th February, 2012 following an ex parte hearing on 7th February, 2012 in Nyahururu Principal Magistrate Court Civil Case No. 258 of 2011.

The Applicant's case is that the lower court had no jurisdiction to sustain the succession court and that whereas the original seller died in the year 2007, (17/1/2007) the Respondent obtained title on 28th July 2006, and that therefore that title was obtained fraudulently.

I also observe from the Respondent's Replying Affidavit paragraphs 8 and 13 that the title to the suit land was originally in the name of Waweru Muchami Kagombe, who the Respondent acknowledges died in the year 2004, and yet he not only obtained title to the suit land in 2006 well before the registered owners demise, but also claims to have succeeded to the suit land by transmission in Nyahururu Principal Magistrate's Court and Succession Cause No. 160 of 2004 (***in the Estate of Benson Ngugi Kiruba alias Ngugi Kiraba Njathi***). There is need for inquiry into how Ngugi Kiraba acquired a purchasers' interest on or before 11th May 1999, as per entry No. 3 in the Proprietorship Section of the Register (*Respondent's Exhibit No. PMN 1(a)*), apart from the need to clarify these issues of conflicting claims of purchase, and issues of jurisdiction and fraud are weighty and will have to be determined upon hearing of evidence.

For these reasons, I am satisfied that the Applicants have established a prima facie case with a likelihood of success and will suffer loss unless the orders of temporary injunction are granted. An injunction will therefore issue in terms of paragraph 3 of the Notice of Motion dated 10th May, 2012 and filed on 16th May, 2012.

It so ordered.

Dated, signed and delivered at Nakuru this 5th day of October, 2012

M. J. ANYARA EMUKULE
JUDGE