



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 41 OF 2019

JESSICA MARGARET ADHIAMBO OYIGO.....PLAINTIFF

-VERSUS-

1. CAFFIN PIERLUIGI

2. COUNTY LAND REGISTRAR/LAND

REGISTRAR MOMBASA COUNTY.....DEFENDANTS

RULING

1. The application for determination is the Notice of Motion dated 13th March, 2019 by the Plaintiff brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 2 & 4 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The applicant seeks the following orders:

1. That this application be certified as urgent and be heard ex-parte in the first instance;

2. That pending the hearing and determination of this application, the 1st respondent, by himself, his employees, servants and/or agents otherwise howsoever be restrained from: -

i) Interfering in any manner whatsoever with the quiet and peaceful occupation, enjoyment, running and operation of the property by the plaintiff/applicant, her employees, her tenant(s), servants, agents, assigns or licensees, at the property.

ii) Harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operation by the plaintiff/applicant, her employees, her tenant(s) servants, agents, assigns or licensees, at the property.

3. That pending the hearing and determination of this suit, the 1st respondent, by himself, his employees, servants and/or agents or otherwise howsoever be restrained from:

i) Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running and operating of the property by the plaintiff/applicant, her employees, her tenant(s), servants, agents, assigns or licensees, at the property.

ii) Harassing, intimidating, threatening, or in any other way whatsoever interfering with the smooth running and operation by the plaintiff/applicant, her employees, her tenant(s), servants, agents, assigns or licensees, at the property.

4. An order compelling the 2nd respondent to remove the entries relating to the purported lease dated 2nd March 2018 to one Caffini Pierluigia for a term of 99 years from 1st June 1970 (a quarter portion carved out of 1618/1/MN) and reinstate the property to the status quo ante the fraudulent entries.

5. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit to grant.

Such other or further relief as this Honourable Court may deem appropriate

2. The application is based on the following grounds:

i. That the applicant is the sole heir to the estate of Joshua Oluoch Oyigo (deceased) and the suit property was transmitted to her via a Deed of Assent on 10th March 2017;

ii. That the applicant's parents Joshua Oluoch Oyigo (deceased) acquired the property by way of a Transfer dated 16th April 1973 as joint tenants for a consideration of Kshs.199,500.00 (Kenya Shillings One Hundred Ninety-Seven Thousand Five Hundred).

iii. That unknown to her the Lands Registrar has unlawfully registered a lease dated 2nd March 2018 to one Caffini Pierluigia for a term of 99 years from 1st June 1970 (a quarter portion carved out of 1618/1/MN).

iv. That the said Caffini Pierluigia is not known to the applicant and particulars of the said unlawful lease are further unknown to her.

v. That the applicant retains full and unfettered possession and control over the suit property.

vi. That the 1st respondent has placed a day guard outside her property albeit at the boundary with her neighbour.

vii. That it is only just and fair that the applicant has quiet possession over her lawfully acquired property and the offending encumbrance removed from the registers.

3. The application is supported by the affidavit of Jessica Margaret Adhiambo Oyigo the applicant sworn on 13th March 2019. The applicant has deposed that the suit property was transmitted to her via a Deed of Assent on 19th March 2017 pursuant to a Grant issued in Succession Cause No. HC 857 of 2005 in the High Court of Kenya at Nairobi. The applicant has annexed a copy of the Certificate of Grant to the suit property and the County Government Property Rate statement in her name. The applicant has also annexed a copy of provisional Certificate of title. The applicant avers that sometimes in April 2018, she received various calls and emails from her tenant and neighbours that there were strangers who had visited the property severally claiming to be the owners. That she became apprehensive that she may be divested of her property and therefore instructed her lawyers, Messrs Oraro & Company Advocates to write to the Land Registry Mombasa and place a caveat on the property which was done. Copies of the said letter and the said Restriction have been annexed. The applicant has deposed that upon receiving the Certificate of Postal Search, she realized that the Land Registrar had unlawfully registered a lease dated 2nd March 2018 to one Caffini Pierluigia for a term of 99 years from 1st June 1970 (a quarter portion carved out of 1618/1/MN) as an encumbrance against the property. The applicant states that the said Caffini Pierluigia is not known to her and the particulars of the said lease are also unknown to the applicant. The applicant states that the suit property has permanent wall and the applicant retains full and unfettered possession of the property. The applicant further states that she has engaged a security company, Texas Alarms to provide guarding services and a radio alarm to secure the property. Copies of the security Agreements have been annexed. The Applicant states that she has been to the suit property and established that the 1st respondent has placed a day guard outside the applicant's gate albeit at the boundary wall with her neighbours. The applicant further states that they have attempted to undertake a search on the said property but the same is not forthcoming. The applicant contends that she has suffered loss and damage and urged the court to grant the orders sought.

4. In opposing the application, the 1st respondent filed a replying affidavit sworn by Caffini Pierluigia on 5th July 2019. He has deposed that the application is misconceived, frivolous and ought to be struck out in the first instance. The 1st respondent avers that the application is a nullity because vide ELC No. 20 of 2018-CAFFINI PIERLUIGI-v- JESSICA MARGARET ADHIAMBO OYIGO(thro' her Attorney Jared Omondi Onyango), the 1st respondent instituted a suit against the applicant herein adjudicating similar issues, similar cause of action which issues have already been heard and finally decided. He has annexed copies of a plaint dated 25/6/2018 together with a Notice of Motion date, judgment delivered on 18.3.2019 and decree dated 3.4.2019. The 1st respondent therefore contends that the matter is res judicata.

5. The application was canvassed by way of written submissions which were duly filed by the advocates for the applicant and the advocates for the 1st respondent. I have considered the application and the rival submission.

6. It is pertinent to note that vide a ruling delivered on 30th October, 2019, Hon. E. Makori C. M. stayed the judgment and all orders emanating from the judgment in ELC No. 20 of 2018 were set aside. The applicant was directed to move to this court within 60 days to have ELC No.20 of 2018 recalled and consolidated with this case. Although the file in Mombasa CMC ELC No. 20 of 2018 is attached to this file, it is not clear how the same was forwarded to this court as no order to withdraw and transfer the case has been made by this court. Nonetheless, Section 18 of the Civil Procedure Act gives power to this court, on its own motion, to withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter try or dispose of the same. Since the two files are now together and in order to regularize the issue I invoke the powers bestowed on this court by the provisions of Section 18 of the Civil Procedure Act and hereby suo moto withdraw Mombasa CMC ELC No. 20 of 2018 to this court for hearing and disposals, together with this suit.

7. By the application herein the applicant seeks temporary injunction pending the hearing and determination of the suit to restrain the 1st respondent from interfering with the applicant's occupation and enjoyment of the suit property. The applicant's case is that she acquired the suit property by transmission from her deceased parents. It is the applicant's contention that the property has been unlawfully registered in the name of the 1st respondent. The 1st respondent in his replying affidavit has deposed that the matter is res judicata because there is a judgment and decree in his favour in ELC Case No. 20 of 2018. In this case, it is apparent that both the applicant and the 1st respondent are claiming ownership of the suit property. At this moment, I am not called upon to decide who is the true owner of the suit property and

despite parties attempt to get me to decide, I decline.

8. The conditions for the grant of temporary injunctions were laid in the case of **Giella –v- Cassman Brown & Company Ltd (1973)EA 358** as follows:

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

9. In the case of **Mrao Ltd –v- First American Biscuits (2003)KLR 125**, a prima facie case was said to be “one in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

10. The courts have also accepted that in dealing with an application for an injunction, the court is not necessary bound by the three principles set out in the Giella Case. The court may look at the circumstances of the case generally and the overriding objective of the law. In the case of **Suleiman –v- Amboseli Resort Ltd (2004) KLR 589**, Ojwang Ag. J (as he then was) stated thus:

“.....counsel for the defendant urged that the shape of the law governing the grant of injunction relief was long ago in Giella –v- Cassman Brown in 1973 cast in stone and that no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law always kept growing to greater levels of a refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770 – 781. A fundamental principle of....that the court should take whichever counsel appears to carry the lower risk of injustice if it should turn out to have been “wrong”.....Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown the Court has had to consider the following questions before granting relief:

iv) Is there a prima facie case.....

v) Does the applicant stand to suffer irreparable harm.....

vi) On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory relief, should always opt for the lower rather than the higher risk of injustice.....”

11. In the above case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disputed by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned.

12. In this case, there is a dispute over ownership of the suit property. Whereas the applicant contends that she acquired the property by transmission and that the same was unlawfully registered in the 1st respondent’s name, the 1st respondent on his part contends that he acquired the property through purchase and that there is a judgment and decree in his favour. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

13. Besides the order for prohibitory injunction, the applicant also seeks an order for mandatory injunction compelling the 2nd respondent to remove the entries relating to the lease registered in favour of the 1st respondent. The law as regards the principle to be applied when considering whether or not to grant mandatory injunction is higher than that in respect of prohibitory injunction. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) 1 ALL ER 990**, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

14. It is apparent that both the applicant and the 1st respondent are claiming the suit property. In my view, no special circumstances have been shown to warrant the grant of the order of mandatory injunction. The applicant has not met the test of special circumstances. Further, this is not a clear case that the court can decide at once or in a summary manner and grant the orders sought. The issue of ownership is yet to be determined and that can only be done at the trial. I therefore decline to grant the orders of mandatory injunction sought by the applicant.

15. Having looked at the application and considering the circumstances of this case, I allow the application to the extent that the 1st respondent is restrained from interfering with the applicant’s possession and occupation of the suit property in any manner whatsoever until the case is heard and determined. Costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 25th day of November 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE