



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 25 OF 2020

SIMON BIGAMBE MARURA.....APPLICANT

VERSUS

NAHASHON MUGOSI RUSIRI.....1ST RESPONDENT

THE LAND REGISTRAR MIGORI COUNTY.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 2nd June 2020 filed in court on 9th June 2020 under Order 40 Rules 1,2,4 and Order 51, rule 1, 3 (1) of the civil Procedure Rules 2011 and Section 3A,1A and 1B of the Civil Procedure Act, (the application herein) the applicant namely Simon Bigambe Marura, who was initially represented by Mongeri and Co. Advocates and currently by Kerario Marwa and Company Advocates is seeking orders infra:-

i. **THAT** pending the hearing and determination of this suit this Honourable court be pleased to issue an order of temporary injunction restraining the respondents by themselves, their agents, servants, brothers and/or sisters from entering, grazing, transferring, alienating, disposing, tilling cultivating, selling leasing or in any way from interfering with the subject parcels of land measuring 4 acres hived from Bukira/Bwisaboka/629 and a copy hereof be served upon the OCS Kehancha Police Station for effective compliance.

ii. **The** costs of this application be provided for.

2. The application is anchored on the applicant's supporting affidavit of 18 paragraphs sworn on even date and copies of photographs showing erected temporary home on the suit property, LR No. Bukira/Bwisaboka/629 and marked as "FTL1" and annexed to the affidavit. The same is also based on grounds 1 to 12 set out on its face including that the applicant has developed the suit property by constructing his house, planted tea, trees, farming and livestock keeping and that his occupation of the suit property is adverse to the proprietary interest of the respondents. Simply put, the applicant claims that he has possessed the suit property since the year 1978 hence, he has acquired title thereto by adverse possession.

3. In his 16-paragraphed replying affidavit sworn on 13th July 2020 and filed in court on even date, the 1st defendant, Nahashon Mugosi Rusiri through M/S Gituni Riroh and company Advocates opposed the application and termed the same vexatious, frivolous and a waste of court's time and it be dismissed with costs. That adverse possession cannot hold and that the applicant has not met the requirements for grant of temporary injunction.

4. The 1st defendant deposed, inter alia, that the applicant and his brother, Masaka Marura are the joint registered owners of land parcel number Bukira/Bwisaboka/631 and were issued with a land certificate on 16th October 1977 (NMR1) as per search certificates (NMR2 and 3). That they sold the entire parcel of land to Iresa Mwita and migrated to Mugumu in the Republic of Tanzania. That the applicant has now invaded a portion of the suit property to which he is not entitled.

5. The 2nd respondent, the Land Registrar Migori County, did not respond to the application.

6. Learned counsel for the applicant, learned counsel for the 1st respondent and the 2nd respondent in person filed their submissions on 28th July 2020, 11th November, 2020 and 9th September 2020 respectively. The same was done pursuant to this court's orders and directions made on 13th July 2020 that the application be argued by written submissions; see Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of this court's Practice Directions, 2014.

7. Learned counsel for the applicant submitted that the applicant is the legal owner of the suit property through adverse possession. That the application is merited. Counsel cited authorities namely, *Josinter Atieno Ouma and another v Joshua O. Omiti and another (2018)eKLR*, by

J.M Mutungi, and *Celina Muthoni Kithinji v Safiya Binti Swaleh and others (2018)eKLR*, by C. Yano J regarding adverse possession, in support of the submissions.

8. Learned counsel for the 1st respondent referred to the application, 1st respondent's affidavit and argued against the grant of the orders sought in the application and dismissal of the entire application. That the applicant has not satisfied the conditions for the grant of temporary injunction. Counsel relied on **Giella case (infra)** and **Paul Gitonga Wanjau –vs- Gathuthis Tea Factory Company Ltd and 2 others (2016) eKLR and Order 40 (supra)**, among other authorities, to buttress his submissions.

9. The 2nd respondent submitted that upon completion of adjudication in 1969, Kige Rusiri, Mwita Rusiri and Mogesi Rusiri were registered proprietors in common as per copy of the attached adjudication register. That a green card was opened by the 2nd respondent and the original record remains intact contrary to the allegations made by the applicant.

10. I have duly considered the entire application, the 1st respondent's replying affidavit, the submissions of the applicant and the submissions of the 1st and 2nd respondents herein. So, has the applicant satisfied the triple requirements for the grant of temporary injunction as laid down in the celebrated case of **Giella v Cassman Brown and co. Ltd (1973) EA 358?**

11. In the case of **Nguruman Ltd v Jan Bonde Nielsen and 2 others (2014)eKLR**, the Court of Appeal restated that in an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

- a) Establish his/her case at a prima facie level.
- b) Demonstrate irreparable injury if a temporary injunction is not granted and
- c) Ally any doubts as to (b) by showing that the balance of convenience is in his/her favour.

12. The applicant deposed at paragraphs 14 and 16 of his affidavit in support of the application that the 1st respondent has threatened to dispossess him of the suit property. That the threatened action targets at the disruption of the applicant's quiet occupation of the suit property which he has improved or developed as shown in photographs (FTL1).

13. Conversely, the 1st respondent deposed in his replying affidavit that it is the applicant who has refused to move out of the suit property. That the applicant's brother, Masaka and his eldest son moved out of the suit property peacefully.

14. It is discernable from the applicant's assertion that he is likely to suffer irreparable harm as his quiet occupation on the suit land is bound to be disrupted by respondents. However, the respondents contended otherwise as shown in the 1st respondent's replying affidavit and the 1st and 2nd respondents' submissions in this application.

15. In **Nguruman case (supra)**, the Court of Appeal was emphatic that:

“... We stress that it must always be borne in mind that the very foundation of the jurisdiction, to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions, the relief of injunction is not available.”

16. The present application is brought under Order 42 Rule 2 (supra) which is meant to curb abuse of temporary orders as held in the case of **Director of Public Prosecutions v Justus Mwendwa Kathenge and another (2016)eKLR**. The application is made against the 1st respondent as well as the 2nd respondent, a Government of Kenya official. Indeed, an injunctive relief may be made against such an official in a proper case as observed in **B v Attorney General (2008) IKLR (G&F) 535** which I hereby endorse.

17. Section 13(7)(a) of the Environment and Land Court Act, 2015(2011) gives this court the mandate to grant preservation orders. The same include temporary injunctions.

18. In **Musa Angira Angira v ICDC (2015)eKLR**, J M Mutungi J, was of the view that since the issues were highly contested, the order that was merited therein was one conserving and or preserving the suit property until the suit is heard and determined on merit rather than an injunction in the terms sought by the plaintiff. Accordingly, he granted a status quo order in respect of the suit property and I approve the said decision without any reservation.

19. It is settled law that the court may grant an order for the maintenance of status quo over the property in question until the suit is heard and determined or terminated; see **Ogada v Mollin (2009) KLR 620**.

20. In the instant application, the issues are also highly contested and concern alleged fraudulent title to and adverse possession claim over the suit property. On that strength, there is need to preserve the suit property as noted in **Section 13(7)(a), Angira and Ogada cases (supra)**.

21. In the obtaining scenario, it is the finding of this court that a status quo order is merited to preserve the suit property. The said order is in lieu of a temporary injunction order as sought in the application.

22. A fortiori, the application is determined in the following terms:

a) The applicant and the respondents shall maintain the prevailing status quo in respect of the suit property. In particular, the respondents shall not permanently develop, lease, sell, alienate or dispose of the suit property measuring four (4) acres hived from Bukira/Bwisaboka/629 pending the hearing and determination of this suit.

b) Costs be in the cause.

DELIVERED DATED SIGNED in open court this 18th day of November 2020

G.M.A. ONGONDO

JUDGE

In presence of –

Mr. Riroh learned counsel for the 1st respondent

Mr. Ngoge holding brief for Kerario Marwa learned counsel for the applicant

Tom Maurice- Court Assistant