



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL CASE NO. 18 OF 2020

NARKISHO OCHOLA MASEMBA.....APPELLANT

VERSUS

JOSEPH OGOLA YAMBO.....1ST RESPONDENT

CHARLES ODIRA YAMBO.....2ND RESPONDENT

LUCAS YAMBO YAMBO.....3RD RESPONDENT

WILFRED NDONGA YAMBO.....4TH RESPONDENT

RULING

1. By a Notice of Motion dated 10th August 2020 duly filed in court on 11th August 2020 pursuant to Sections 1A, 1B, 3A, 63(e) of the Civil Procedure Act, Order 40 Rules 1, 4(4) 51 Rule 13(2) of the Civil Procedure Rules 2010 Cap 21 Laws of Kenya, Article 40 of the Kenyan Constitution (The application herein), Narkiso Ochola Masemba (the applicant) through M/S Odingo and Company Advocates, is seeking the following orders:

a) Spent.

b) That this Honourable Court be pleased to issue temporary injunction orders restraining the respondents, their servants, agents and anybody interested in them and/or having any rights over them from trespassing into, interfering with the boundaries, cultivating and cutting trees or destroying any developments in the suit land referenced as Kanyamwa/Kabonyo/Kwandiku/1314 till the determination of this appeal.

c) That upon granting the said order (2) above the status quo be maintained.

d) That the respondent be committed to civil jail for contempt of court order in the event that orders 2 and 3 are granted and are disobeyed.

e) That the respondents be condemned to pay the cost of this application.

f) Any other relief that this Honourable Court would deem fit to grant in the circumstances of this application.

2. The application is premised on an 8-paragraphed supporting affidavit of even date sworn by the applicant. Briefly, the applicant deposed at paragraph 3 of the affidavit that;

“ The respondents have entered the applicant’s parcel of land, the suit land herein thereby cutting down the trees, removing the boundary sisal cultivating it and/or alienating it and creating disturbances an act that prejudices me and my entire family”

3. In a 12-paragraphed replying affidavit sworn on 15th September 2020 and filed in court on 17th October 2020, the 1st respondent, Joseph Ogola Yambo through H. Obach Partners Advocates for and on behalf of the other respondents, opposed the application and sought its dismissal with costs. That the same lacks merit, is frivolous and an abuse of the court process.

4. The 1st respondent deposed, inter alia, that the application is fraudulent, malicious, driven by greed and a ploy to defeating ends of justice, unfair and detrimental to him and other respondents. That judgment in the matter was delivered on 17th June 2020 by the principal magistrate, Hon Mary A. Ochieng where the court found fault in the title deed of the applicant in respect of the suit land. That the

respondents have a claim over the suit land and that the applicant wants to deny them their rights over the same.

5. On 17th September 2020, this court ordered that the application be argued by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction Number 33(a) and (b) of the Environment and Land Court Practice Directions, 2014.**

6. Accordingly, learned counsel for the respondents filed submissions dated 6th October 2020 on 12th October 2020. Therein, counsel gave the background information of the matter and framed two (2) issues for determination namely whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction in the suit land and whether the application should be dismissed with costs.

7. Counsel submitted that the respondents are entitled to the suit land in their capacity as beneficiaries of the estate of their deceased father. That they have proved that the applicant procured title thereto illegally and or fraudulently and that the court ruled in their favour. That the application has not attained the threshold in the case of **Giella v Cassman Brown and Co. Ltd (1973) EA 358** for the grant of the orders sought therein. That the application be dismissed with costs.

8. The applicant's counsel filed submissions dated 28th October 2020 on 28th October 2020 whereby he cited **Giella case (supra) and Lilian Mercy Mutua t/a Lilian M. Gems =vs= Elizabeth Wangechi Olongida & 3 others (2013) eKLR** that the balance of convenient tilts in favour of the applicant. Counsel urged this court to grant the orders sought in the application.

9. I have duly considered the application, the replying affidavit and the submissions **of the parties** herein. Therefore, has the applicant satisfied the requisite conditions for the grant of temporary injunction and status quo orders as sought in the application?

10. The 3 principles of granting an interlocutory injunction were laid down in the celebrated case of **Giella case (supra)**. These are:

- a) The applicant must show a prima facie case with a probability of success.
- b) The applicant might otherwise suffer irreparable injury which would not be adequately compensated by way of damages.
- c) If the court is in doubt, it will decide an application on the balance of convenience.

11. In **Nguruman Ltd v Jan Bonde Nielsen and 2 others (2014)eKLR**, the Court of Appeal restated the principle in **Giella case (supra)** and further stated;

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially; see Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol.1 EA 86...”

12. I take into account the meaning of a “prima facie case” in a civil application. That the power of a court in an application for an interlocutory injunction is discretionary; see **Mrao Ltd v First American Bank Ltd and 2 others (2003) KLR 125.**

13. The applicant contended that he cannot carry out any activities on the suit land due to intrusion of the respondents. On the other hand, the respondents asserted that the applicant took advantage of their absence thereon and unlawfully registered the suit land in his name.

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

15. Similarly, it is trite law that the court can issue orders of status quo (lis pendens doctrine) to preserve the property in dispute pending its outcome or termination; see **Ogada v Mollin (2009)KLR 620.**

16. Additionally, I approve the stand point taken by Mutungi J in **Musa Angira Angira v ICDC(2015)eKLR**, where he held, inter alia;-

“...that the plaintiff has demonstrated a prima facie case on the material presented and noting that the issues in dispute in this matter are highly contested, the court is of the view that the order that is merited in this matter is one conserving and or preserving the property until the suit is heard and determined on merit rather than an injunction in the terms sought by the plaintiff...”

17. In view of the grounds on which the instant appeal is anchored, the issues herein are also highly contested calling for hearing and determination of the same on merits. As such, the temporary preservation order merited is the maintenance of the prevailing status quo on the suit land as noted under **Section 13(7) (a)Ogada and Angira cases (supra)**.

18. Accordingly, the application dated 10th August 2020 is hereby determined in terms of the maintenance of the prevailing status quo over the suit land, **LR Kanyamwa/Kabonyo/Kwandiku/1314** in lieu of temporary injunction sought in application, pending the hearing and determination of this present appeal. Costs be in the cause.

19. In order to expedite the hearing and disposal of the appeal pursuant to Article 159(2)(b) and (e) of the Constitution of Kenya, 2010, it is further ordered that:

a) The applicant's counsel to file and serve a complete record of appeal within the next 45 days from the date hereof.

b) The Deputy Registrar of this court to call for original record and certified copies of proceedings from the trial court within the timelines stated in number (a) hereinabove.

DATED, SIGNED DELIVERED in open Court at MIGORI this 9TH DAY OF NOVEMBER 2020.

G.M.A. ONGONDO

JUDGE

In presence of:-

Mr. H. Obach learned counsel for the respondent

Tom Maurice – Court Assistant