



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ELC CASE NO. 101 OF 2017**

**FRANCIS MUTHUI MATHANGANI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**ALICE GATHIGIA MENJA.....DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 7<sup>th</sup> July 2020 pursuant to Order 40 Rule 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the Applicant herein seeks interim injunctive orders against the Respondent and her agents, and servants from encroaching on land parcel No Kirimukuyu/Mbogoini/563, undertaking any developments thereon, dealing with the title thereof whether by alienating, transferring, charging, leasing or in any other way pending hearing and determination of the main suit .

2. The Applicant also seeks that the orders be enforced by the Officer Commanding Station-Karatina police station.

3. Pursuant to the filing of the said application, and the Court having noted that the matter was pending Judgment, on the 8<sup>th</sup> July 2020 the Court gave an interim ex-parte order warning the Respondent to desist from interfering with the suit land pending the determination of the application.

4. On 11<sup>th</sup> August 2020, the Applicant herein filed yet another application dated the 10<sup>th</sup> August 2020 and brought under Section 5 of the Judicature Act, Section 3, 4, 5 and 28(1) of the Contempt of Court Act No. 46 of 2016 and Section 1A,1B, 63,(e) and 3A of the Civil Procedure Act and Order 40 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules and other enabling provisions of the law where he sought for unrestricted access to the suit land, to remove the development erected and by the Respondent on the suit land and to commence proceedings against the Respondent for being in contempt of Court orders issued on 8<sup>th</sup> July 2020.

5. Both applications were supported by the grounds therein as well as on the supporting affidavit sworn by Francis Muthui Muthangani the Applicant herein on the 7<sup>th</sup> July 2020 and 10<sup>th</sup> August 2020 respectively.

6. The Respondent via her replying affidavits dated 3<sup>rd</sup> August 2020 and 27<sup>th</sup> August 2020 in response to both the applications respectively deponed that although the matter was part heard before Court, she had been in actual occupation and possession of the suit property since the year 1971. That by virtue of her stay on the suit land, there had been no orders from the Court barring her from using the same. In this regard, she could not be termed as a trespasser.

7. That she has routinely repaired her house more so during the heavy rainy seasons where the house tended to break down and therefore the Applicant cannot now come to Court to restrain her from using the house she has been living in all along.

8. Applications were disposed of by way of written submissions.

**Applicant's submissions.**

9. The Plaintiff/Applicant framed her issue for determination as to whether they had established the principles of granting the injunction as set down in the case of **Giella vs Casman Brown & Company Limited [1973] EA** to wit that;

- i. An Applicant must show a prima facie case with a probability of success.
- ii. An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury.
- iii. When the Court is in doubt it will decide the application on the balance of convenience.

10. The Applicant submitted that the suit land was originally registered to one Mathangani son of Ngichabi who had been issued with a title deed on 29<sup>th</sup> December 1986. Subsequently through fraud the said suit land was registered to the Respondent in 1996.

11. That although the Respondent claimed that the land was previously adjudicated upon before the Resident Magistrate Court sitting at Karatina in RMCC No. 34 of 1987, she had failed to prove so during the trial of the suit.

12. The Applicant confirmed to not having lived on the suit land since 1996 after having been chased away by the Respondent a matter which was yet to be adjudicated on by the Court. That in the premises the Respondent had continued to develop the land in the pendency of the suit.

13. Reliance was placed on the case of **Nguruman Limited vs Jan Bond Nielson & 2 Others [2014] eKLR** and on the case of **Ali Kitsao Katana vs Kasim Muhamed Omar & 5 Others [2018] eKLR** to submit that indeed the Applicant had established a prima facie case.

14. In regard to the second application dated 10<sup>th</sup> August 2020, after defining the meaning of 'Contempt' as defined in the '**Blacks law Dictionary, 9<sup>th</sup> edition**', the Applicant submitted that the standard of proof in contempt proceedings was lower than the standard of beyond reasonable doubt as required in criminal proceedings.

15. That pursuant to the finding in the case of **Kimanja Kamau (suing as the personal representative of the estate of Gideon Gitundu Kimere (deceased) vs Francis Mwangi Mwaura & Another [2018] eKLR**, the four elements that needed to be proved in order to succeed in a civil contempt proceedings include:

- i. The term of the order of injunction or undertaking were clear and unambiguous and were binding to the defendant
- ii. The defendant had knowledge of proper notice of terms of the order
- iii. The defendant had acted in breach of the term of the order
- iv. The defendant's conduct was deliberate.

16. That the Respondent and her Counsel had been duly served with the order of the Court on 10<sup>th</sup> July 2020 and the 11<sup>th</sup> July 2020 respectively whereby the Respondent with a full knowledge of the Court order deliberately continued developing on the suit land.

17. That as at the moment the Respondent had completed building a house on the suit land as annexed on the photographs and had moved in. That Court orders should be respected and upheld in order to administer justice and the Respondent should be held in contempt of the Court orders as herein above prayed.

#### **Respondent's submissions.**

18. The Respondent's submission was to the effect that the Plaintiff commenced the present suit by way of a plaint dated 5<sup>th</sup> June 2017 alleging that the Respondent had acquired ownership of the suit property illegally. The matter was fully heard and litigated and is pending delivery of the final judgment.

19. That the Respondent was widowed in the year 1984 and had been a resident on the suit land where she has been in occupation all along. That the Respondent has always known the suit premises as her home and by the Applicant filing the said application sought to evict her from therein. That seeking orders to prohibit the Respondent from re-constructing her falling house which broke during the heavy rains was malicious.

20. That the Respondent was the registered proprietor of the suit parcel of land being LR No.Kirimukuyu/ Mbogoini/563 as per a title deed which had been produced in Court during the hearing. That the Respondent had lived on the suit parcel of land in all her married life since the year 1971 making it a total of 49 years and conversely the Plaintiff had never lived on the said land.

21. That there had been no orders barring the Respondent from using her land and that was the reason why she routinely went ahead to repair her house which had caved in. That the Applicant cannot come to Court to seek to restrain the Respondent from using a house which she had used all along. That the Applicant's application was frivolous and lacked merit and the same should be dismissed.

22. That the Respondent being the registered proprietor of the said parcel of land was evidence that she was the absolute and infeasible owner and her title was protected by the law. It was their submission that the Applicant had not established a prima facie case as was required of them by virtue of the **Giella vs Cassman Brown** case (Supra)

23. The Respondent further submitted that the Applicant had not established that he would suffer irreparable damage if the orders sought were not granted as the Respondent had been living on the suit land for 49 years. That the Applicant's rights would not be violated if the Respondent continued to re-construct her broken house on the suit land. That it was worth noting that the Applicant herein had sought for similar prayers at the commencement of the case in the year 2017 where the Court rejected the prayers. The Respondent sought for the application dated 7<sup>th</sup> July 2020 to be dismissed with costs.

24. Their submission on the application dated 10<sup>th</sup> August 2020 was to the effect that the Constitution established a right to housing as an enforceable socio-economic right. That following the heavy rains, the Respondents house broke down and she had to get a loan from her

local "chama" to re-construct the said house which is now the source of the Applicant's complaint

25. That the reason why Courts punish for contempt of Court was to preserve and safeguard the rule of law as was held in the case of **Teachers Service Commission vs Kenya National Union of Teachers & 2 Others [2013] eKLR**.

26. That the Respondent had not in any way disobeyed the Court orders since she had not interfered with the suit premises but had just re-constructed her house which is of the suit premises, the assertion by the Applicant herein that she should be held liable for contempt of Court was thus frivolous and lacked merit and should be dismissed.

### **Determination**

27. I have considered the Application herein filed, both the Applicants' and the Respondent's written submissions as well as the annexures and authorities so cited.

28. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

29. Looking at the facts of this case, the Court has been moved under certificate of urgency, by the Applicants, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

30. In the present case there is no dispute that the Respondent is the legal proprietor of LR No.Kirimukuyu/Mbogoini/563 which was registered in the Respondent's name on the 3<sup>rd</sup> September 1996. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

*Section 25 (1) provides:-*

*The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of Court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-*

*a.. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and*

*b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

31. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

*“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except*

*a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or*

*b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.*

32. The Applicant has argued and asserted that the Respondent's title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provide for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The Courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued. The Respondent is thus entitled to observance of due process to have her title cancelled, revoked and/or annulled. (which issue is pending before Court)

33. The Respondent having demonstrated that she was the registered owner of the suit property namely LR No.Kirimukuyu/ Mbogoini/563 and having been issued with a title, prima facie her title is indefeasible and the burden shifts to the Applicants to show or demonstrate that the title is challengeable within the provisions of the law.

34. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Respondent's title but the mere proof that she holds a duly registered certificate which on the face of it was properly acquired is sufficient to lead the Court to hold that the Applicant has not established that there is a prima facie case.

35. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd**

**case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the Court can give an injunction unless the Court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

*“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.*

36. Consequently, I dismiss the application dated 7<sup>th</sup> July 2020 and vacate the interim orders herein.

37. The Applicant has also sought for leave to commence contempt of Court proceedings against the Respondent for being in contempt of Court orders issued on 8<sup>th</sup> July 2020 by the Court.

38. The **Black’s Law Dictionary (Ninth Edition)** defines contempt of Court as:-

*“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”*

39. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates as follows:-

*In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.*

40. Section 5(1) of the Judicature Act which provided that:

*“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Court s.”*

41. Section 29 of the Environment and Land Court is clear to the effect that;

*Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both*

42. It is an established principle of law as was held in the case of **Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** that in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.

43. From the proceedings herein the terms of the impugned order were as follows:

*‘In the meantime the Respondent is warned to desist from interfering with the suit land pending the determination of the application.’*

44. The said orders were made pursuant to the Applicant’s application dated the 7<sup>th</sup> July 2020, that he had sought for injunctive orders against the Respondent/Defendant her agents, and servants from encroaching on land parcel No Kirimukuyu/Mbogoini/563, undertaking any developments thereon, dealing with the title thereof whether by alienating, transferring, charging, leasing or in any other way pending hearing and determination of the main suit.

45. The submission against the said application was that the Respondent had lived on the suit parcel of land in all her married life since 1971 making it a total of 49 years. That during the heavy rains her house which is situate on the suit land had caved in and thus she had to renovate it, something she had done time and again.

46. Indeed Article 43 of the Constitution establishes a right to housing as an enforceable socio-economic right for which provides that every person has the right to accessible and adequate housing and to reasonable standards of sanitation. It cannot therefore be said that by the Respondent renovating a house, she has been living in for more than 40 years, after it had broken down, that the same was *interfering with the suit land* per-se.

47. The standard of proof in cases of contempt of Court is well established. In the case of **Mutitika vs Baharini Farm Limited [1985] KLR 229, 234** the Court of Appeal held that:

*“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which **can be said to be quasi-criminal in nature.**”*

48. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. It is not like any other ordinary matter. By repairing her house therein, I do not find that the Respondent was in contempt of the Court orders. The Applicant failed therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt.

49. The Supreme Court of Kenya in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** held that;

*The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.*

50. In the end, I find that the Applicant has not proved to the required standard that the Respondent as cited was in brazen disobedience of the Court order issued by this Court on 8<sup>th</sup> July 2020 and I decline to grant the order sought by the Applicant and dismiss the notice of Motion dated the 10<sup>th</sup> August 2020. The Respondent is herein acquitted of the charge of being in contempt of Court.

51. The Applicant shall bare the cost of both Applications.

**Dated and delivered at Nakuru this 17<sup>th</sup> day of December 2020**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**