



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC MISC. APPLICATION NO. 5 OF 2020

JOHN MWANIKI MIRIGA.....APPLICANT

VERSUS

JAMES KINYUA NDERITU.....RESPONDENT

RULING

Introduction

By a Notice of Motion dated 31st January 2020, brought under *Sections 1A, 1B, 3A, CPA, Order 51 Rule 1, Order 40 CPR* and all enabling provisions of the law, the Applicant sought the following orders:-

1. Spent.
2. That pending the hearing and determination of this application, this Honourable Court do issue an order of temporary injunction restraining the Respondent by himself, his servants, employees, agents or anyone acting under his instructions from entering, developing, interfering with the Applicant's entry, occupation and possession or in any other manner whatsoever from dealing with that parcel of land known as plot No. 17 GATWE MARKET.
3. That pending the hearing and determination of this suit, this Honourable Court do issue an order of permanent injunction restraining the Respondent by himself/his servants, employees, agents or anyone acting under his instructions from entering, developing, interfering with the Applicant's entry, occupation and possession or in any other manner whatsoever from dealing with that parcel of land known as plot No. 17 GATWE MARKET.
4. That this Court do evict the Respondent from the Applicant's plot No. 17 GATWE MARKET.
5. That the OCS Kerugoya Police Station be served with this order for compliance.
6. That costs of this application be provided for.

GROUND UPON WHICH THE APPLICATION IS PREMISED:-

- a. The Applicant is the registered proprietor of plot No. 17 GATWE MARKET.
- b. That the Applicant and the Respondent's brother the late Benard Njiraini Nderitu litigated in High Court of Kenya at Nyeri Civil Case 171 of 1991 where an injunction order was issued against Benard Njiraini Nderitu, his servants and/or agents from interfering with the Plaintiff's quiet possession and enjoyment of the suit plot vide a decree which was issued on 30th January 2006.
- c. That the said decree has never been vacated, set aside or appealed against and it is still binding.
- d. That the Respondent has started bringing construction materials on the suit plot.
- e. That the Applicant is entitled to exclusive occupation and possession of the suit plot.

Applicant's Statement of Facts

The Applicant in his supporting affidavit stated as follows:-

- i. That he is the registered proprietor of plot No. 17 GATWE MARKET.
- ii. That he became the registered proprietor of the said plot vide a decree issued on 30th January 2006 in the High Court of Kenya at Nyeri in Civil Case No. 171 of 1991.
- iii. That in the Nyeri HCCC No. 171 of 1991, he sued the late Benard Njiraini Nderitu who is a brother to the Respondent herein.
- iv. That a declaration was made that he was the lawful allottee/registered proprietor of plot No. 17 GATWE MARKET and the late Benard Njiraini Nderitu together with his servants and/or agents were restrained by way of permanent injunction from interfering with his quiet possession and enjoyment of the plot.
- v. That after the demise of Benard Njiraini Nderitu, the Respondent who is his brother has started trespassing on his plot and bringing construction materials with the aim of developing the plot.
- vi. That the decree issued on 30th January 2006 has never been vacated, set aside or appealed against and as such, it is still binding and he is entitled to exclusive occupation and possession of the suit plot.
- vii. That it is in the interest of justice that the Court do grant him prayers sought in his application.

Respondent's Statement of Facts

The Respondent filed a replying affidavit in response to the said application and deponed as follows:-

- i. That he has been advised by his advocate on record which advice he believes to be true that the application is incompetent and an abuse of the Court process.
- ii. That the applicant has sought for substantive orders through an application and therefore his application is incurably defective and should be struck off with costs.
- iii. That the Applicant seeks to enforce a decree that was issued in Nyeri High Court vide HCCC No. 171 of 1991 given on 24th November 2005 and issued on 30th January 2006. The same lacks legal basis for the following reasons:-
 - a. He was not a party to the suit and wasn't aware of its existence.
 - b. The decree cannot be executed because 12 years have lapsed and therefore it is null and void and of no legal consequence.
- iv. That he has no interest in plot No. 17 GATWE MARKET but he is the registered owner of Lock-up 7 GATWE VILLAGE. He annexed an extract of minute No. WTPM & H 47 of 2008 of Kirinyaga County Council and a bundle of Rates payment receipts marked JKN 1(a) & (b).
- v. That he has developed the said lock up 7 GATWE VILLAGE and has been in exclusive possession of the same since 2008.

Analysis and Decision

I have considered the Notice of Motion, the supporting affidavit and the annexures thereto. I have also considered the replying affidavit and the applicable law. The proceedings in this case is commenced by a Miscellaneous application. From a cursory look at the orders sought, the applicant appears to be seeking enforcement of orders issued in another suit in High Court at Nyeri being HCCC No. 171 of 1991 (Nyeri). A copy of a decree has been annexed to the supporting affidavit. Upon looking at the parties in the said case being HCCC No. 171 of 1991 (Nyeri), the applicant in this case was the plaintiff while the defendant was the defunct Kirinyaga County Council and one Benard Njiraini Nderitu. The applicant appears to suggest that the respondent is an agent and/or servant of the said Benard Njiraini Nderitu. However, no letters of administration has been shown that the respondent is being sued as an administrator or legal representative of the Estate of the alleged Benard Njiraini Nderitu. On the flip side, the applicant is seeking an equitable relief of injunction under Order 40 Civil Procedure Rules. For an order of injunction to issue, an applicant must satisfy the principles as set out in the celebrated case of **Giella Vs Cassman Brown (1973) 358**. First, an applicant must prove a prima facie case. Secondly, he must show that he will suffer irreparable loss which cannot be adequately compensated by damages. Thirdly, where the Court is in doubt, it may decide the matter on a balance of convenience. The respondent was not a party in the case before the High Court at Nyeri No. 171 of 1991. He has stated that he has nothing to do with the subject matter of the case in Nyeri but that he is the registered proprietor of Lock-up 7 GATWE VILLAGE. He annexed copies of minutes from the defunct County Council of Kirinyaga and a bundle of payment receipts. In light of the averments by the respondent, the applicant has failed to establish a prima facie case. The applicant has not also shown that he will suffer irreparable loss unless the orders sought are granted. I have also noted that the applicant has commenced these proceedings by a Miscellaneous Application. A temporary injunction can only issue at an interlocutory stage where the applicant is seeking a permanent injunction after the hearing of the main suit. The injunction orders being sought by the applicant is substantive in nature as no permanent injunction orders is being sought in the case. Being a Miscellaneous application, there is no mechanism which the applicant would seek a permanent injunction. Without going into the merits of the case, I am only inclined to decide on whether the applicant has established the principles for the grant of injunction orders.

From the analysis herein above, I find that the applicant has miserably failed the two principles. Deciding this matter on the third principle, I find that the balance of convenience tilts in disallowing the application. Consequently, the Notice of Motion dated 31st January 2020 is hereby dismissed with costs to the respondent. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya **this 11th day of December, 2020.**

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms. Githaiga for the Respondent
2. Ms. Wanjiru Waweru for the Applicant
3. Mbogo, Court clerk.