



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 43 OF 2020

ANDREW CHACHA KENEGA

(Suing as the Administrator Estate of JOSIA KENEGA.....PLAINTIFF/APPLICANT

Versus

WEITERE MWITA NYAIMAGA.....1ST DEFENDANT/RESPONDENT

TOBIAS WAMBURA NYAIMAGA.....2ND DEFENDANT/RESPONDENT

JACKSON MOGESI NYAIMAGA.....3RD DEFENDANT/RESPONDENT

ZACHARIA MACHERA.....4TH DEFENDANT/RESPONDENT

DANIEL MWITA.....5TH DEFENDANT/RESPONDENT

MANKO MWITA.....6TH RESPONDENT/RESPONDENT

RULING

1. By a Notice of motion dated 23rd July, 2020 duly filed in court on 27th July 2020 under inter alia,section 1A, 1B,3A and 3B of the Civil Procedure Act, Article 40 of the Constitution of Kenya,2010, Order 40 Rule 1,2,3 and 4 and Order 51 Rule 1 of the Procedure Rules 2010, (The motion herein), the applicant namely **ANDREW CHACHA KENEGA** (suing as the administrator of the estate of Josia Kenega – Deceased) through Gituni Riroh and Company Advocates, is seeking the following orders;-

i. Spent

ii. THAT pending the hearing and determination of this application, a temporary order of injunction do issue restraining the respondents whether by themselves, representatives, servants, agents and/or assigns from howsoever selling, alienating, trespassing onto or in any other manner whatsoever interfering with the suit property, LR NO.BUKIRA/BUHIRING’ERA/339,(The suit land herein measuring approximately one nine decimal three nine hectares 19.39 ha) and a copy hereof be served upon the OCS Kehancha Police Station for effective compliance.

iii. THAT pending the hearing and determination of this application, an order of injunction do issue restraining the respondents whether by themselves, representatives, servants, agents and/or assigns from however selling, alienating, trespassing onto or in any other manner whatsoever interfering with the suit property LR NO.BUKIRA/BUHIRING’ERA/339 a copy hereof be served upon the OCS Kehancha Police station for effective compliance.

iv. THAT an order prohibition do issue prohibiting the respondents whether by themselves, representatives, servants agents and/or assigns from alienating trespassing onto or in any other manner whatsoever interfering with the suit property LR NO.BUKIRA/BUHIRING’ERA/339 a copy hereof be served upon the OCS Kehancha Police station for effective compliance.

v. THAT Costs of this application be provided for.

2. The motion is premised on a 27 paragraphed supporting affidavit of the applicant and copies of annexed documents marked as “ACK 1” t “ACK 9” annexed thereto. The documents include; a grant of letters of administration intestate issued on 16th June 2020 to the applicant in

respect of the estate of the deceased 1, Josiah Kenega in Migori Chief Magistrate's court Succession Cause No. 56 of 2020 (ACK1) and photographs of the suit land, LR NO. Bukira/Buhiringera 339 (ACK9). The motion is also anchored on grounds 1 to 7 stated on the face of the same which are noted accordingly.

3. Briefly, the applicant laments that the respondents have trespassed into the suit land and maliciously destroyed the boundary features and property of the estate and beneficiaries of deceased 1. That a dispute that existed between deceased 1 and the respondents had been resolved by Kehancha Land Disputes Tribunal in favour of deceased 1. That the applicant and estate of deceased 1 stand to suffer injustice, if the orders sought in the motion are not granted.

4. By a 24-paragraphed replying affidavit sworn on 28th September 2020, the six (6) respondents through M/s Kerario Marwa and Company Advocates, opposed the motion and sought its dismissal with costs. Therein, the 1st respondent, Weitere Mwita Nyaimaga deposed inter alia, that the suit land is their ancestral land. That the 1st respondent's late father, Nyaimaga Chacha Kenega (deceased 2) and deceased 1 were biological brothers and were the only sons of Chacha Sarwa (deceased 3) who was the original proprietor of the suit land.

5. The 1st respondent further deposed that deceased 1 was holding half (½) share of the suit land registered in his name in trust for deceased 2 and deceased 3. That therefore, the respondents are entitled to the suit land, as lawful beneficiaries thereto. The respondents are seeking dismissal of the motion with costs.

6. On 2nd December 2020, learned counsel for the applicant filed a 4 –page submissions further to orders and directions of this court given on 19th October 2020. Counsel referred to the orders sought in motion, provided background facts of the matter and framed three (3) issues for determination which are basically the conditions for grant of an injunction as laid down in the celebrated case of **Giella vs= Cassman Brown and Company Ltd (1973) EA 358**. In analyzing the issues in favour of the applicant, his counsel cited Order 40 (1) (a) of the Civil Procedure Rules, 2010, **Mrao Ltd vs= First American Bank of Kenya Ltd & 2 others (2003) KLR 125; Kenlab Consultant Ltd vs= New Gatitu Service Ltd & another (1990) e KLR and Paul Gitonga Wanjau vs= Gathuthis Tea Factory Company Ltd & 2 others (2016) e KLR**. Counsel submitted that the applicant is entitled to orders sought in the motion.

7. The respondents' counsel filed submissions dated 8th December 2020 making reference to orders sought in the motion, the background of the matter and identified the three (3) conditions for the grant of injunction. Counsel, too cited Paul Wanjau case (supra) and argued that the applicant has not met the threshold for the grant of orders sought in the motion.

8. I have carefully, examined the entire application, the replying affidavit and the rival submissions. In that regard, the issues to resolve are compressed to whether the applicant has met the threshold for the grant of orders sought in the motion.

9. The present application was commenced under the cited Constitutional and statutory provisions cited therein. Indeed, this court is pretty conscious of its special and inherent powers as well as the applicant's right under **Article 40 (supra)**, all tailored to meeting the overriding objective provided for under **section 3 of the Environment and Land Court Act, 2015 (2012) and sections 1A and 1B (supra)**.

10. Therefore, has the application met the threshold in **Giella case (supra)**? I am of course, guided by three conditions to be attained for the grant of an injunctive relief as stated thereunder and the same are noted accordingly (infra).

11. In **Nguruman Ltd vs= Jan Bonde Niesen & 2 others (2014) eKLR**, the Court of Appeal applied the decision in **Giella case (supra)** and held that in an interlocutory injunctive application, the applicant has to satisfy the triple requirements to:-

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

12. The court further observed thus:-

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

13. Regarding a prima facie case, I do subscribe to the Court of Appeal definition of a “**Prima facie case**” in civil cases in the case of **Mrao Ltd case (supra)**. The applicant has to show that he has more than an arguable case as his rights over the suit land are being violated by the respondents. Nonetheless, the latter have asserted that they equitable trust thereon.

14. On irreparable injury, it is the contention of the applicant that he is bound to suffer irreparable loss in respect of the suit land if the application is not allowed. However, the respondents asserted otherwise.

15. I also note the balance of convenience which the applicant claims that it tilts in his favour. Besides, the respondents have disputed the same bearing in mind the decision in **Paul Wanjau case (supra)**.

16. It is trite law that the doctrine of lis pendens is meant to maintain the status quo over a property which is the subject matter of a pending

suit until after the final determination of the suit or until the suit is in any other manner terminated; see **Ogada =vs= Mollin (2009) KLR 620 at 635** .

17. In **Musa Angira Angira=vs= ICDC (2015) eKLR**, J.M. Mutungi J held that the plaintiff had demonstrated a prima facie case and the issues in dispute were highly contested calling for hearing and determination of the same on merits. That the order that was merited in the circumstances was status quo rather than an injunction in the terms sought in the suit, in order to preserve the suit property. I endorse the said reasoning accordingly.

18. In this suit, the applicant has sought a temporary injunction against the respondents. In **DPP=vs= Justus Mwendwa Kathenge and others (2016) eKLR**, it was opined that conditions under **Order 40 Rule 2 (supra)** are meant to curb abuse of temporary orders.

19. This court is also a live to the laid down law that the duration of injunctive relief is the sole discretion of the trial Judge and depends on circumstances of each case; see the Court of Appeal decision in **National Bank of Kenya Ltd =vs=Shimmers Plaza Ltd (2009) KLR 278 at 283**.

20. Notably, the issues in the instant suit are highly contested and yearn for hearing and determination of the same on merits. The applicant has demonstrated a prima facie against the respondents. He is entitled to interim preservation orders in regard to the suit land as envisaged under **Section 13 (7) (a) of the ELC Act, 2015 (2012)**. So, having considered the entire application and the circumstances obtaining herein, the order merited is the maintenance of status quo in lieu of the temporary injunction in the terms sought in the application to preserve the suit land as noted in **Ogada and Angira cases as well as section 13 (7) (a) (supra)**.

21. In the upshot, the application is hereby determined in terms infra:-

a) The parties herein shall maintain the obtaining status quo on the suit land pending the hearing and determination of this suit. In particular, the parties shall:-

i. continue to occupy their respective portions on the suit land without interruption or eviction therefrom.

ii. Finalise preliminary lawful process including Succession, if any, as disclosed in the pleadings in order to facilitate the hearing and determination of this suit.

iii. Not sell, lease, part with, dispose of or erect permanent structures or interfere with the existing boundaries within the suit land.

b) Cost be in the cause.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of December 2020.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Gituni Riroh learned counsel for the Plaintiff/Applicant

Mr. Mwita Kerario learned counsel for Defendants/Respondents

Mr. Tom Maurice – Court Assistant