



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 72 OF 2018 (O.S)

RAPHAEL OBUDHO MAMBAH

PETER OTIENO OBALAPLAINTIFF/RESPONDENTS

VERSUS

JOHN KAMAU KARIUKI sued as legal representative of

ERASTUS KARIUKI APPOLO (Deceased)...1ST DEFENDANT/APPLICANT

NICHOLAS OWAKA OTIENO.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling is with regard to an application by way of Notice of Motion dated 25th September 2018 expressed under Order 40 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A and B of the Civil Procedure Act, Section 150 of the Land Act, No. 6 of 2012, Article 162 (2) (b) of the Constitution of Kenya and all the enabling provisions of the law. The 1st and 2nd defendants (applicants) through learned counsel, Veronicah Migai are seeking orders thus:-

a) Spent

b) Spent

c) **THAT** temporary injunction do issue restraining the plaintiffs/respondents, their agents, servants and/or employees by whatever name called from encroaching upon, interfering with, taking possession or developing land parcel number KANYAMWA/KABONYO-KWANDIKU/206 (the suit land) pending hearing and determination of the main suit herein.

d) **THAT the** Officer Commanding Station Ndihiwa Police do enforce compliance with orders of this honourable court.

e) **THAT** costs of this application be provided for.

2. The application is premised on the 2nd applicant's supporting affidavit sworn on the even date and annexed documents marked NOO-1 (copy of register of the suit land), NOO -2 (a) and (b) (photos of the current state of the suit land) as well as five (5) grounds on the face of it. The grounds include that this court's order of 31st July, 2018 that no party should work and or deal with the suit land after harvesting of sugar cane which was being harvested at the time pending the hearing and determination of this matter has been violated by the respondents and that in the interest of justice the orders sought be granted.

3. The plaintiffs (respondents) through learned counsel G. S. Okoth, opposed the application. Their grounds of opposition dated 5th October 2018 are that:-

a) The application is misdirected, misconceived, malicious and is not made in good faith.

b) The applicants have obtained an illegitimate grant of letters of administration and effected an illegal transfer of land despite an existing restriction lodged on the title since 1995 and since registration and ownership was obtained illegally, an equitable relief of injunction cannot be in law, granted since the applicants have not come to equity with clean hands.

c) The respondents have been in occupation of the suit land ever since before adjudication and even at the time of filing this suit since the sugar cane of the respondent was growing there as plant crop and therefore the term encroachment or entry or

interference is not applicable to the situation.

d) The court did not and could not issue an order of injunction against the respondents since there was no application before the court and as such the prayer is misdirected.

4. Simultaneous with the grounds of opposition, the 1st plaintiff filed a replying affidavit sworn on the even date. He annexed to the affidavit, some affidavit in respect of the originating summons dated 18th May 2018, a copy of green card/register and other documents in relating to the land.

5. The 2nd defendant through Stafford Nyauma, Senior litigation counsel filed a memorandum of appearance dated 19th September, 2018.

6. Pursuant to court order of 9th October, 2018, the application was argued by way of written submissions; **see Order 51 Rule 16 of the Civil Procedure Rules, 2010 as read with Practice Direction number 33 (b) of the Environment and Land Court Practice Directions, 2014.**

7. In her submissions dated 2nd November 2018, learned counsel for the applicants asserted that the respondents ignored the court's order of 31/8/201. That the respondents are geared to defeating Justice and have encroached on the suit land, among other things.

8. By his submissions dated 2nd November 2018, the plaintiffs/respondent's counsel contended that the respondents have been in possession of the suit property thus the application is misdirected. He further contended, inter alia, that there is no evidence that the applicants shall suffer irreparable harm and that they have not shown a prima facie case with a probability of success.

9. Counsel urged the court to make an order to preserve the status quo ante. He relied on **Order 40 Rule 1 of the Civil Procedure Rules, 2010** and the case of **Sodha –v- Vora and others (2004) 1 EA 313.**

10. I have considered with care the entire application, the grounds of opposition and submissions by counsel. To that extent, have the applicants met the threshold in **Giella –v- Cassman Brown and Co. Ltd (1973) EA 358** for this court to grant the orders sought in the application?

11. The principles for the grant of an interim or interlocutory injunctive remedy are already settled; see **Giella Case (Ibid)**. For the sake of convenience, the principles are listed as hereunder;

a) The applicant must establish a prima facie case with a probability of success.

b) The applicant must demonstrate irreparable injury if an interim injunctive order is not granted

c) In case of doubt, the applicant must show that the balance of convenience tilts in his or her favour.

12. In the case of **Nguruman Ltd –v- Jan Bonde Nieleesen and 2 others (2014) eKLR**, the Court of Appeal laid emphasis and elaborated the said three principles thus :-

“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. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recovered in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at the stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging by the applicant to injunction directly without crossing the other hurdles in between”.

13. A prima facie case in Civil cases was defined in **Mrao Ltd –v- First American Bank of Kenya Ltd and 2 others (2003) KLR 125** as follows:-

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case.” (Emphasis laid)

14. The standard of proof of a prima facie case is on a preponderance of probabilities. The 2nd applicant alleges that the 1st applicant obtained a grant of letters of administration in respect of the suit land. That the 1st applicant then sold the land to him by way of written agreement and the same transferred accordingly. The 2nd applicant made reference to a green card marked NOO-1 accompanying his affidavit. However, the respondents allege that the grant is not legitimate. Therefore, the consideration is whether on the face of it the applicant's allegations have a probability of success.

15. On the second principle, the applicants have to establish that they are likely to suffer injury where an award of damages would be inadequate remedy. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or

the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy; see **Nguruman Ltd case (supra)**

16. On third issue, applicants claim that it will be just and equitable that the orders sought in the application be granted owing to the circumstances of the suit land. On the other hand, the respondent's state that they have been in occupation of the suit land hence the orders sought are not applicable. The convenience to the applicants has to be balanced and compared with that of the respondent, if a temporary injunction is refused or granted.

17. I bear in mind all the legal provisions pursuant to which the application is anchored. Documents marked NOO-1 and 2 (a) and (b) show that there was a restriction on the suit land and the very physical state of the land respectively. On 31st July, 2018, by consent of the parties, this court made an inhibition in respect of the suit land as notice of motion dated 31st May, 2018 2018 was disposed accordingly.

18. Under **section 13(7) (a) of the Environment and Land Court 2015 (2012)**, this court has the discretion to grant interim or permanent preservation orders including injunctions. There is no indication on record that the inhibition granted on 31st July, 2018 was served on the Registrar for registration in appropriate register as required under **section 68 (2) of the Land Registration Act, 2012**. In the circumstances, it would be superfluous to grant an injunction in the terms sought herein as there is a subsisting inhibition issued by this court on 31st July, 2018.

19. Thus, I order that the inhibition made on 31st July, 2018 be sealed, served and be registered by the land Registrar, Homa-Bay in accordance with **section 68 (2) of the Land Registration Act, 2012** rather than grant the orders sought in this application.

20. The parties to this suit shall serve the Land Registrar, Homa-Bay accordingly.

21. Costs of this application be in the cause.

DELIVERED, SIGNED and DATED in open court at MIGORI this **16th day of JANUARY, 2019**.

G. M. A. ONGONDO

JUDGE

In the presence of:

Ms.Nancy Nyarige learned counsel for the plaintiff/respondents

Nonappearance for defendant/applicants

Tom Maurice, Court Assistant