



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 10 OF 2016

NANCY NDEGI NYAGA.....PLAINTIFF

VERSUS

ELIUD WANGONDU GITHINJI.....1ST DEFENDANT

THE LAND REGISTRAR MBEERE DISTRICT....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. By a notice of motion dated 4th February 2016 brought under the provisions of **sections 3A, 63 (C) & (e) of the Civil Procedure Act (Cap 21), Order 51 Rule (1), Order 40 Rules 1, 2, 3 & 10 of the Civil Procedure Rules 2010, section 68 (1), (2) and (3) of the Land Registration Act, 2012 and all enabling provisions of the law**, the Plaintiff sought the following orders;

a. That pending the hearing and determination of this suit this honourable court be pleased to grant a temporary injunction restraining the 1st Defendant/Respondent, his agents or anybody claiming through him from entering, occupying, selling, alienating, transferring, evicting the Plaintiff/Applicant or in any other manner dealing with land parcel No Nthawa/Siakago/104.

b. That pending the hearing and determination of this suit this honourable court be pleased to grant an inhibition order against registration of any dealings and/or transactions in the register for land parcel No. Nthawa/Siakago/104 and the order be served upon the 2nd Defendant being Land Registrar Mbeere District for enforcement of the order.

c. That costs of this application be provided for.

2. The said application was based upon the several grounds set out on the face of the motion the gist of which was that the Plaintiff was the beneficial owner of *Title No. Nthawa/Siakago/104* (hereinafter *the suit property*) and that the 1st Defendant had fraudulently obtained title thereto.

3. The said application was supported by the Plaintiff's supporting affidavit sworn on 4th February 2016 together with the annexures thereto. In the said affidavit, the Plaintiff reiterated the contents of the plaint and asserted that she had been in lawful occupation of the suit property since 1990. She stated that the 1st Defendant had threatened her with unlawful eviction and that she would suffer irreparable loss or damage if she and her four children were evicted from the suit property before the suit was heard and determined.

4. The 1st Defendant filed a replying affidavit sworn on 6th January 2018 in opposition to the Plaintiff's said application. He disputed the Plaintiff's claims and asserted that he was the registered owner of the suit property and that he had merely allowed the Plaintiff to reside and work thereon free of charge as a licensee. He further stated that sometime in 2015 the Plaintiff signed a memorandum of understanding in which she undertook to vacate the suit property by 31st December 2017.

5. When the said application was listed for hearing on 18th July 2018 the advocates for the Plaintiff and the 1st Defendant agreed to canvass the said application through written submissions. The record shows that the Plaintiff's submissions were filed on 18th July 2018 whereas the 1st Defendant's were filed on the same date. The 2nd and 3rd Defendants did not file any response or submissions to the Plaintiff's said application.

6. The court has considered the Plaintiff's said application, the 1st Defendant's replying affidavit in opposition thereto as well as the written

submissions on record. It would appear that the Plaintiff's family has been in possession of the suit property for a considerable period of time although it is in dispute whether or not that possession was with the permission of the 1st Defendant who was registered as proprietor in 2006.

7. The court is reasonably satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial. The court is aware that it is not required to determine conclusively the matters in controversy at this interlocutory stage. The question of whether or not the 1st Defendant bought the suit property from the Plaintiff's late father-in-law will be conclusively determined by the trial court.

8. The court is also satisfied on the basis of the material on record that unless the order of injunction is granted, the Plaintiff might otherwise suffer irreparable loss or damage. She has been residing on the suit property together with her children and a serious disruption of family life might ensue if she is evicted before suit is heard and determined. The rights of the parties can only be determined conclusively through a trial.

9. For the foregoing reasons, the court is satisfied that the Plaintiff has satisfied the requirements for the grant of an interim injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. Even if the court were to be in doubt, the balance of convenience would still be in favour of the Plaintiff for reasons given in the preceding paragraphs.

10. The court has considered the prayer for an order of inhibition to prevent further dealings with the suit property. The court is inclined to grant the said order in order to preserve the suit property pending the hearing and determination of the suit. In the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907**, it was held, *inter alia*, that;

“...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result, and that it is the duty of the court to avoid...”

11. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 6th February 2016 and the same is hereby allowed in terms of order Nos 1 and 2 thereof. Costs of the application shall be in the cause.

12. In view of the value of the subject matter of litigation herein the suit is hereby transferred to the Magistrate's court at Siakago for trial and disposal.

13. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of FEBRUARY, 2019.

In the presence of the Plaintiff in person and in the absence of the Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

07.02.19