



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 557 OF 2017

(Formerly Kisii ELCC NO. 453 OF 2013)

SALMON AGUTU CHAAN

PAUL OOTE ORIMBA.....PLAINTIFFS/RESPONDENTS

Versus

KRISTINA JAOKO OPONDO.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of a Notice of motion dated 20th November 2018 expressed under certificate of urgency pursuant to **Order 40 Rule 1 (a),3(i),(ii) and 4(4),51 Rule of the Civil Procedure Act (Cap 21 Laws of Kenya)** (the motion). The applicant /defendant represented by learned counsel, Mr. Gilbert Ouma Owade of Owade and Company Advocates is seeking the following orders:-

a) **THAT** the honourable court be pleased to issue temporary injunction restraining the plaintiff/respondents whether by themselves, servants agents and or representatives from the further trespassing, cultivating and or constructing structures on all that parcel of land known as **Kamagambo/Kanyimach/842** measuring 3.8 hectares or in any manner howsoever interfering with applicant's enjoyment of the property pending hearing and determination of the suit.

b) **THAT** the cost of the application be provided for.

2. The motion is premised on the applicant/defendants supporting affidavit sworn on even date, grounds (a) to (i) on the face of the motion and documents marked KJO-1 to 7 annexed to the same motion. The applicant/ defendant averred inter alia, that he purchased the suit land, LR NO. KAMAGAMBO/KANYIMACH/842 measuring approximately 3.8 hectares from the late NICODEMUS ASINJO (Deceased) who had been it's sole registered owner since the year 1982 as per copy of the title deed (KJO-1). That since there was sugarcane plantation thereon the deceased also sold and transferred to her the sugar cane plantation development on the suit land at consideration of Kshs. 80,000/=. That the applicant obtained title deed to the land on 21st December 2005 (KJ 0-2) and took possession of the land after the prescribed procedure. That in year 2017, the plaintiffs/respondents

unlawfully entered the suit land and commenced developing sugarcane thereon hence precipitating the instant motion.

3. In their eleven paragraphed relying affidavit sworn on 5th March, 2019, the plaintiff/respondent averred inter alia, that the suit land was hived off LR NO. KAMAGAMBO/KANYIMACH/596 which belongs to the family of Chaan. That the land was subdivided and sold to one Nicodemus Asinjo (Deceased) who subsequently transferred the same to the defendant/applicant in unclear circumstances. They claim adverse possession over the land having been in occupation of the same for over 30 years.

4. The respondents/plaintiffs are represented by learned counsel, Mr. Agure Odero. On 11th December 2018, counsel for the respective parties entered into a consent inter alia, that the respondents/plaintiff's counsel be granted leave to file and serve reply to the motion within the next seven(7) days from that date and that the motion be canvassed by written submissions. The applicant/defendant's counsel filed submissions dated 14th January 2019, while the respondent/plaintiff' counsel filed submissions dated 5th March 2019 for and against the motion respectively.

5. I have considered the entire application and submissions. The central issue for determination at this stage is whether the applicant/defendant has met the threshold for the grant of interlocutory injunction as well settled in **Giella -v- Cassman Brown and Co. Ltd (1973) EA 358.**

6. In the case of **Nguruman Ltd –v- Jan Bonde Nielezen and 2 others (2014) eKLR**, the court of Appeal approved the triple requirements for the grant of an interlocutory injunctive application. Therefore the applicant has to:-

a) Establish his/her case only at a prima facie level.

b) Demonstrate irreparable injury if a temporary injunction is not granted and;

c) Alleviate any doubt as to (b) by showing that the balance of convenience is in the applicants favour.

7. The above triple requirements 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** and again **Nguruman Ltd case (supra)**.

8. Admittedly, this court is guided by the court of Appeal decision in **Mrao Ltd –v- First America Bank of Kenya Ltd and 2 others (2003) KLR 125** regarding the definition of the term “**Prima facie case**”. The applicant stated that he is the registered owner of the suit land and that he lawfully purchased it together with the sugar cane plantation thereon from one Nicodemus Asinjo (deceased). That she took possession of the land in the year 2005 and the plaintiff/respondents have forcefully entered into the suit land. By document marked KJO-2, the applicant /defendant is the prima facie proprietor of the suit land ; see **Section 26 (1) of the Land Registration Act, 2016 (2012)**. The respondents/plaintiffs’ encroachment of the land is an apparent infringement of the applicant/defendant’s right to the land which calls for an explanation from the former.

9. The applicant defendant also averred that being the registered holder of the title to the suit land, she has suffered irreparable economic loss and damage since the year 2017 when the respondents/plaintiffs unlawfully started occupying and utilizing the suit land. It must be borne in mind that temporary injunction should not issue when an action for a ward of damages would adequately compensate the injuries threatened or caused; see again **Nguruman Ltd case (supra)**. In the present case, owing to the size of the suit land and economic nature of the sugar cane plantation on the land which the respondents/plaintiffs have continued to occupy and develop, beg an interim preservation order.

10. On the balance of convenience, I note the applicant/defendant’s statement on ownership and occupation of the suit land. The respondents/plaintiffs have disputed the orders sought in the motion on the basis that they have sought same conservatory orders in their originating summons dated 13th November 2013. Nonetheless interim conservatory orders would serve the interest of justice in the obtaining circumstances.

11. All in all, this court is empowered to grant interim preservation orders including injunctions under **Section 13 (7) (a) of the Environment Land Act 2015 (2012)**. I am of the considered view that the interim order merited in the motion, is the maintenance of status quo in respect of the suit land rather than an interim injunction; see **Musa Angira Angira –v- ICDC (2015) eKLR**.

12. Accordingly, I order the parties to maintain the prevailing status quo, on the suit land in lieu of the interim injunctive order in the terms sought in the

notice of motion dated 20th November 2018, pending the hearing and determination of the suit.

13. For the avoidance of doubt, the said status quo shall be in the following terms;-

a) The parties shall not sell, lease, dispose of, part with or transfer the suit land or any part thereof.

b) The parties shall not further cultivate and or erect permanent structures or at all on the suit land.

c) The plaintiffs/respondents to harvest the mature sugarcane on the land and vacate the suit land until the suit is heard and determined.

14. Costs of the motion shall be in the cause.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 6th Day of MARCH 2019.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. G. O. Owade learned counsel for the defendant/applicant

Mr. Agure Odeor f, learned counsel for the plaintiff/respondents

