



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL SUIT NO. 17 OF 2009

ABUBAKAR SALIM MACHIRIPLAINTIFF/APPLICANT

VERSUS

1. FRANCIS JUMA MUTORO

2. SAMWEL SICHANGI

3. GREGORY MUGODO DEFENDANT/RESPONDENTS

R U L I N G

What falls for my determination is the plaintiff's Notice of Motion dated 8th April 2019 and filed under Certificate of Urgency.

When it was placed before me on 9th April 2019, I granted prayers 1 and 2 and listed it for hearing inter – parte today. The application is premised under Sections 3, 3A and 63(e) of the Civil Procedure Rules and Order 40 Rule 1 of the Civil Procedure Rules 2010 and seeks the following orders:-

1. Spent

2. Spent

3. Spent

4. That a temporary injunction be and is hereby issued to restrain the 2nd defendant/Respondent acting either by himself and/or through his agents, servants or family members from burying the body of JOSEPHINE SICHANGI on land parcel NO BUNGOMA/KAMAKOIWA/2165 pending the hearing and determination of this suit.

5. That costs of this application be provided for and be borne by the defendant/Respondents.

The gist of the application is that the plaintiff is the registered proprietor of the land parcel **NO BUNGOMA/KAMAKOIWA /2165** as per copy of the annexed title deed (annexture ASM 01) yet the 2nd defendant who is a trespasser on that land wishes to bury his wife **JOSEPHINE SICHANGI** thereon. That the plaintiff stands to suffer irreparable loss if the deceased is buried on his land and he will also be cursed since it is against **BUKUSU** culture to bury a stranger on his land.

The application is opposed and by his Replying Affidavit dated 11th April 2019, the 2nd defendant who has informed the Court that his name is **SIMON KABURU SICHANGI** and not **SAMWEL SICHANGI** has deponed, inter alia, that he is the proprietor of land parcel **NO BUNGOMA/KAMAKOIWA/4080** as per the annexed copy of title deed (annexture SKS – 1) and has no interest in land parcel **NO BUNGOMA/KAMAKOIWA/2165**. That he bought the land parcel **NO BUNGOMA/KAMAKOIWA/4080** being a sub – division from land parcel **NO BUNGOMA/KAMAKOIWA/3220** from one **FRANCIS JUMA MUTORO** on 5th August 2004 at a consideration of Kshs. 155,000/=. The sale agreement is annexture SKS – 3. That the application is frivolous, vexatious un-merited and an after-thought which should be dismissed and he be allowed to bury the deceased on land parcel **NO BUNGOMA/KAMAKOIWA/4080**.

Due to the urgency of the matter, it was agreed that I deliver a ruling on the basis of the parties rival affidavits and annextures.

I have considered the application, the rival affidavits and annextures.

An application for a temporary injunction pending trial is to be determined on the basis of the well known guidelines set out in the case of **GIELLA V CASSMAN BROWN & CO LTD 1973 EA 358** which are:-

1. The Applicant must show a prima facie case with a probability of success.

2. Secondly, such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages.

3. If in doubt, the Court will determine the application on a balance of convenience.

A prima facie case, as defined in **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 KLR 125**

“..... is a case 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 as to call for an explanation or rebuttal from the latter”.

As was held in **FILMS ROVER INTERNATIONAL LTD .V. CANNON FILM SALES LTD 1986 3 ALL ER 772**, a Court considering such an application should take the route that appears to carry the lower risk of injustice should it turn out to have been **“wrong”**. Finally, the remedy of a temporary injunction pending trial is an equitable one and the Court will not find favour with a party who has approached it with un-clean hands.

It is clear from the affidavits herein that whereas the plaintiff is the registered proprietor of the land parcel **NO BUNGOMA/KAMAKOIWA/2165** on which he claims that the 2nd defendant is planning to bury his wife **JOSEPHINE SICHANGI**, the 2nd defendant has demonstrated that infact he is the proprietor of the land parcel **NO BUNGOMA/KAMAKOIWA/4080** on which he plans to bury his late wife and he has no interest in the plaintiff's land. Clearly therefore, the parties are owners of two different parcels of land. That prompted me to ask **MR WERE** and **MR. MURUNGA**, Counsels for the plaintiff, why the 2nd defendant should be restrained from burying his wife on his own land. **MR. WERE** then referred me to paragraph 6 of the plaintiff's amended plaint and added that the 2nd defendant obtained registration of land parcel **NO. BUNGOMA/ KAMAKOIWA /4080** through fraud. I have perused the pleadings herein and it is true that among the issues that this Court will be called upon to determine at the trial is whether land parcel **NO BUNGOMA/KAMAKOIWA/4080** was a sub-division of land parcel **NO BUNGOMA/KAMAKOIWA/2165** and was fraudulently registered in the names of the 2nd defendant. That will be a matter for determination at the main trial by evidence. It is not an issue to be determined at this interlocutory stage. As was held in **JAN NGURUMAN LTD .V. BONDE NIELSEN & OTHERS C.A CIVIL APPEAL NO 77 OF 2012 (2014 eKLR):-**

“..... in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case”.

On the evidence before me, it is clear that the plaintiff has not surmounted the first hurdle as set out in the **GIELLA** case (supra) of demonstrating a prima facie case. His parcel of land is **BUNGOMA/KAMAKOIWA 2165** but the 2nd defendant wishes to bury his wife on his own land parcel **NO BUNGOMA/KAMAKOIWA /4080** and I do not see which of the plaintiff's rights is **“threatened with violation”** when the 2nd defendant has demonstrated that he is not interfering with the plaintiff's land. The conditions set out in the **GIELLA** case (supra) are to be considered sequentially and it is settled that the second condition of irreparable loss need not be considered if the first condition has not been satisfied – **KENYA COMMERCIAL FINANCE CO LTD .V. AFRAHA EDUCATION SOCIETY & OTHERS C.A CIVIL APPEAL NO 142 OF 1999**. As the plaintiff has not established the existence of a prima facie case, his application must be dismissed.

The up-shot of the above is that the plaintiff's Notice of Motion dated 8th April 2019 is devoid of merit. It is dismissed with costs to the 2nd defendant and for avoidance of doubt, the exparte orders issued on 9th April 2019 and extended on 24th April 2019 are discharged.

Boaz N. Olao.

JUDGE

25th April 2019.

Ruling dated, delivered and signed in Open Court this 25th day of April 2019 at Bungoma.

Mr. Were and Mr. Murunga for plaintiff - present

1st and 2nd defendants - present

Boaz N. Olao.

JUDGE

25th April 2019.