



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO 03 OF 2019 (OS)

SUSAN NYAMBURA MWATHI.....PLAINTIFF

VERSUS

DUNCAN KIRIA KABETE.....DEFENDANT

RULING

1. This application was filed on **12th March, 2019** and seeks orders:

1.THAT this Application be certified as urgent, service be dispensed with and it be heard *ex-parte* in the first instance.

2.THAT this Honourable Court be pleased to order that an **inhibition** be issued and the same be registered against the parcel of land known as Title Number **THARAKA/CHIAKARIGA "A"/586** to restrict any dealings or transfer of the said parcel of land and the District Land Registrar, Chuka be directed to register the inhibition against the parcel of land pending the hearing and determination of this Application *inter partes* or until further Court orders.

3.THAT this Honourable Court be pleased to issue a temporary order of **injunction** restraining the defendants whether by himself, his servants, agents, or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the plaintiff's/Applicant's houses, selling, leasing, charging or otherwise howsoever interfering with the plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the parcel of land known as Title Number **THARAKA/CHIAKARIGA "A"/586** pending the hearing and determination of this Application *inter partes*.

4. IN THE ALTERNATIVE this Honourable court be pleased to order the *status quo* prevailing as at **March, 2019** regarding possession, user, occupation and registration of the parcel of land known as Title Number **THARAKA/CHIAKARIGA "A"/586** by the Plaintiff/Applicant pending the hearing and determination of this application *inter partes* or until further Court orders.

5.THAT this Honourable Court be pleased to issue a temporary order of **injunction** restraining the defendants whether by himself, his servants, agents, or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the plaintiff's/Applicant's houses, selling, leasing, charging or otherwise howsoever interfering with the plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the parcel of land known as Title Number **THARAKA/CHIAKARIGA "A"/586** pending the hearing and determination of this suit.

6.THAT costs of this Application be borne by the defendants.

2. The application has the following grounds:

1.THAT the Defendant/Respondent has been threatening to evict the plaintiff/Applicant from the suit land number **THARAKA/CHIAKARIGA "A"/586** which shall effectively render her and her family destitute.

2.THAT the Plaintiff/Applicant has been in **open, exclusive, continuous and uninterrupted occupation** of the suit land since the year **1974** long before demarcation started and the same was fraudulently recorded in the name of the defendant when he was a minor by his father who was a land committee member hence she has developed a beneficial interest thereto under the doctrine of adverse possession.

3.THAT the Plaintiff/Applicant has known no other land than the suit land since the year **1974** and any interference will occasion her irreparable loss and damage unless this court intervenes urgently.

4.THAT the Plaintiff/Applicant has made developments on the suit land to wit, built semi-permanent houses, planted trees, mangoes, oranges, banana stems, zero grazing, does subsistence farming and generally developed the parcel of land.

5.THAT the Plaintiff/Applicant lives with her family on the suit land for a time running now to over 45 years.

6.THAT it is only fair, just and equitable to preserve the suit land to enable the Plaintiff/Applicant herein to ventilate her case.

3. The application is supported by the plaintiff's affidavit which state:

I, **SUSAN NYAMBURA MWATHI** of **P.O. BOX 194, MERU** do hereby make oath and state as follows:-

1. THAT I am the Plaintiff herein well versed with the issues herein hence competent to swear this affidavit.

2. THAT the suit land number **THARAKA/CHIAKARIGA "A"/586** measuring about **4.55 Ha** is currently registered in the names of the Defendants herein. **Annexed hereto and marked as Exhibit SNM-01 is a copy of the Certificate of Official Search.**

3. THAT my family and I occupied the suit land sometimes in the **1974** long before demarcation started in the area and have since been in **open, exclusive, continuous and uninterrupted occupation.**

4. THAT I have made developments on the suit land which include semi permanent houses, planted trees, mangoes, banana stems and food crops. **Annexed hereto and marked as Exhibits SNM-02 are copies of photographs.**

5. THAT sometimes in **October 2002**, the defendant visited me at my home on the suit land and informed that he had come to give me notice to vacate the suit land claiming that the same belonged to him.

6. THAT I became very alarmed and shocked as at that time in **October, 2002** I had been in possession, user and development of the suit land without interference from anybody.

7. THAT I immediately visited the **DLASO** offices situated at **Marimanti** to inquire on the status of my land.

8. THAT the officers at the **DLASO** offices at **Marimanti** were unhelpful. I decided to travel to Nairobi to complain to the Director of Land Adjudication Settlement.

9. THAT on **23rd October, 2002** after listening to me the aforesaid Director wrote a letter to the **DLASO THARAKA** District instructing him to investigate my complaint and inform him. In the meantime he directed the **DLASO** to ensure the **status quo** is maintained until my complaint was addressed. **Annexed hereto and marked as Exhibits SNM-03 is a copy of the letter dated 23rd October. 2002.**

10. THAT upon receipt of the aforesaid letter by the Director of Land Adjudication & Settlement, the **DLASO** wrote to the officer in charge, **Tharaka South Division** to investigate my complaint and inform him. **Annexed hereto and marked as Exhibits SNM-04 is a copy of the letter dated 8th January, 2003.**

11. THAT after investigating the **DLASO** wrote to the defendant and I on **21st February, 2003**. The letter was copied to the area Chief **NKARINI/CHIAKARIGA** Locations and the **L.A.S.O.**

12. THAT in the aforesaid letter dated **21st February, 2003** the **DLASO** observed inter alia as follows:-

i. That the suit land was demarcated to the defendant as a minor.

ii. That I erected my boma in or around 1974 long before demarcation started and I was still living there.

iii. That I had developed the suit land and planted grown mangoes, oranges and acacia trees.

iv. That the defendant has never used the suit land.

v. That the status quo favoured me as I was utilizing the suit land.

vi. That though the records read the defendant's name it was imperative to note that he may have acquire and/or recorded fraudulently more so that his father recorded him when he was a minor and him a land committee member.

13. THAT on **9th may, 2003**, the **DLASO** wrote back to the Director of Land Adjudication & Settlement submitting a report of his investigations on my complaint against the defendant stated **inter alia** as follows:-

i. That he established that the suit land was recorded fraudulently to the defendant who was a minor and son to one of the Land committee members.

ii. That the recording was in disregard of the fact that I had lived on the suit land since 1974.

iii. That the defendant had no right whatsoever over the land.

14. THAT the Director of Land Adjudication & Settlement officer responded to the aforesaid **DLASO** letter and asked him to reconcile the records, the same was not done and the defendant ultimately obtained a title deed on **9th March, 2017**.

15. THAT in spite of the fact that the defendant became the registered owner of the suit land, I am the one who has been in open, exclusive, continuous and uninterrupted occupation of the suit land for over **45** years to date.

16. THAT in recent times I have seen some strangers looking around my land but I was not alarmed until I got information from my neighbours that the Defendant was selling the suit land and the people who came to view the suit land were the potential buyers.

17. THAT I am afraid that the Defendant may alienate the suit land at any time and I will be at risk of being evicted from the place I have called my home for over **45** years.

18. THAT without a court order my family and I shall be in a very precarious position as we can be made beggars instantly.

19. THAT I verily believe I have a good case against the defendant and pray that my application be allowed.

20. THAT all that is deposed to hereinabove is true to the best of my knowledge, information and belief sources and full particulars whereof have been disclosed.

4. The respondent responded to the application through his replying affidavit sworn on **1st April, 2019** which states:

REPLYING AFFIDAVIT

I, DUNCAN KIRIA KABETE of Kaunju village, Tunyai location, Chiakariga ward in Tharaka Nithi **do make oath and state as follows:-**

1. That I am the Respondent herein and competent to swear this affidavit.
2. That the application dated 12th March 2019 has been read and explained to me by my advocate on record and I wish to reply as hereunder.
3. That I am the registered owner of land suit no. Tharaka/Chiakariga 'A'/586 (Annexed hereto and marked as 'DKK '1' is a copy of the land title).
4. That the Applicant sued me in another suit being Chuka CMCC no 56 of 2018 but which she withdrew on 12th March 2019 after which she filed this suit (Annexed and marked as 'DKK '2' is a copy of the said Notice to Withdraw Suit)
5. That I had filed a counterclaim in that suit seeking to have the Applicant evicted from my land and she has already filed a reply to my defense as well as defense to the counterclaim.
6. That that first suit is still pending hearing and determination before the CMCC court and the Applicant has never filed an application seeking to restrain me from entering the suit land because she knows that I am in occupation and control of my land while she is in control of a small portion only.
7. That the present application is an afterthought that is intended to prop the Applicants case in which she alleges that she is in occupation of the whole land which is not true.
8. That in the CMCC SUIT NO. 56 OF 2018 the Applicant alleged that she was claiming 25 acres while in this suit she is claiming 4.55Ha which is approximately 12 acres.
9. That the truth is that the Applicant is currently occupying only a small portion of my land measuring approximately one (1) acre or less while I am in total and effective control of a portion measuring eleven (11) acres.
10. That I am currently cultivating my portion while leasing some bits to other people since the year 2006.
11. That it is not true that the Applicant has been in occupation of a portion of the suit land since 1974 as alleged.
12. The Applicant was born in a place called Murigiria in Gacheraaka and she spent most of her childhood with her relatives in that place and Igoji in Meru.
13. That the suit land belonged to my grandmother who later caused it to be registered in my names during the land adjudication period.

14. That originally my family lived in a place called Murigiria in Gacheraka and that is where I was born.
15. That later my father got land in a place called Kaunju and he moved us there while my grandparents settled in the suit land which was then a wilderness.
16. That after we set up our family home in Kaunju my father moved us to Mombasa but later I returned to stay with my grandmother in her new land which is the suit land.
17. That when I moved in to live with my grandmother I used to graze her goats and cows on the expansive land that she had gathered while also attending school at Ubarini Primary School.
18. During this time a man called KithureKaithi came and built a small hut on a portion of the land but my grandmother told me that he was a stranger to us and that she had asked him to leave.
19. That after a few years this KithureKaithi left my grandmother's land but his small hut was left behind.
20. That when I inquired from my grandmother she told me that he had gone to live in Igonji area in Meru.
21. That when widespread hunger engulfed our land an old woman by the name of Kaithi came and began occupying the small hut left behind by KithureKaithi and my grandmother explained that she was his mother.
22. A few years later two small children came to live with the old woman called Kaithi and when I inquired from my grandmother she told me that the children belonged to a daughter of the old woman who was married to a man called MwathiM'Mwaria who came from Kamujwa which is about two kilometers from our land.
23. That upon further inquiries I learnt from my grandmother that the children's mother had separated from her husband and that she had gone to live in Nyeri with another husband leaving her two children behind.
24. That on or around the year 1987-1988 the Applicants mother and her children left our land and we learnt she had gone to live with her son in Igonji but later we learnt she had died there.
25. That two years after the departure of the Applicants mother the Applicant came and began occupying the small hut left by her brother but she did not have any children with her.
26. That when she came to live in the small hut she began cultivating around the house but my grand parents stopped her and she left and went to live in Tunyai market where she set up a tailoring shop.
27. That after the death of my grandfather in 1994, the Applicant returned to the small hut and she was later joined by some of her children.
28. That during this time I was still living on the land with my grandmother and we had built houses and granaries and we were cultivating and planting trees including mangoe trees on our portion.
29. That in the year 2000 I married my wife and I sought to construct my family home on the suit land so I asked the Applicant to vacate the portion she was occupying but she declined.
30. That after discussing with my father it was decided that I could build for my wife in my other land at Kaunju while continuing my farming activities on the suit land.
31. That my grandmother died in 2003 and I continued cultivating my land while leasing out portions out to other people and the Applicant continued occupying the small portion.
32. That after the death of my grandmother in 2003 I decided to set up my family home at my land at Kaunju but I continued cultivating my portion while leasing other portions to other farmers.
33. That on and around 2002 the Applicant began to encroach on the portion where we had planted our food crops and I went to her and asked her to desist from this and she stopped and continued only cultivating the small portion around her house.
34. That in the year 2003 my grandmother passed away and my father asked me to go and
35. That during this time my grandmother and I planted trees such as mangoes and other indigenous crops on the farm and we continued to graze our cattle and goats on some areas while cultivating the rest.
36. On or around the year 2002, I noticed that the Applicant had began to expand her farm and was now farming an area estimated to be half an acre so I visited her and I asked her to vacate my land.
37. That the Applicant did not leave my land but she continued to cultivate her small portion while my grandmother and I continued

to utilize our portion.

38. That in the year 2003 my grandmother died and I decided to go to another farm that my father had allocated to me while still continuing to cultivate and lease out the portion that we had been utilizing with my grandmother.

39. That on or around 2006 the Applicant who was now living on her portion with some of her children expanded her portion to about

DATED AT EMBU this.....1STday of.....APRIL,.....2019

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NJIRU KITHAKA & CO ADVOCATES FOR THE PLAINTIFF

5. The application was canvassed by way of written submissions.

6. The plaintiff’s written submissions are reproduced herebelow in full. Any spelling or other mistakes may only be ascribed to the plaintiff and his advocates. The submissions state as follows:

SUBMISSIONS ON BEHALF OF THE PLAINTIFF’S/APPLICANT’S IN SUPPORT OF THE APPLICATION DATED 20.06.2018 AND FILED IN COURT ON 12.03.2019

Your Lordship,

We wish to most humbly submit on behalf of the plaintiff/applicant in support of the application dated **12.03.2019** and filed in court on **12.03.2019** as hereunder:-

At this stage of the plaintiff/applicant case, we seek the confirmation of the order of **inhibition** granted on **01.04.2019** and an order of **injunction** to *inter alia* prevent the eviction of the plaintiff by the defendant from the suit land pending the hearing and determination of this suit in terms of prayers numbers 2 and 5 of the application dated **12.03.2019** and filed in court on **12.03.2019**, respectively.

ISSUE FOR DETERMINATION

The main issue for determination is as follows:

- 1. Whether the applicant has satisfied the tests for granting an Injunction.**

Your Lordship,

The conditions for the grant of an interlocutory injunction are set out in the case of ***GIELLA VS CASSMAN BROWN (1973) EA 358 at 360***. First, ***an applicant must show a prima facie case with a probability of success***. Secondly, ***an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not be compensated by an award***. Thirdly, ***if the court is in doubt, it will decide the application on the balance of convenience***.

A. PRIMA FACIE CASE

To establish whether the plaintiff/applicant has established a *prima facie* case, the court needs to make a preliminary finding on the basis of the matter that the plaintiff/applicant has placed before court. The starting point has to be her pleadings.

We rely on the following pleadings:-

- 1. The grounds set out on the body of the application;
- 2. The supporting affidavit sworn by the plaintiff/applicant on **12.03.2019** and filed in court on **12.03.2019** plus the exhibits annexed thereto; and
- 3. The Originating Summons and the affidavit in support of the Originating Summons sworn by the plaintiff/applicant on **12.03.2019** and filed in court on **12.03.2019** plus the exhibits annexed thereto.

The plaintiff’s/applicant’s application is premised on *inter alia*; **Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010**.

Order 40 Rule 1 (a) thereof provides:-

“Where in any suit, it is proved by affidavit or otherwise...

a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit... the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying or preventing the wasting, damaging, alienation...as the court thinks fit until the disposal of the suit or until further orders”.

Your Lordship,

Considering the afore-cited legal provision, the injunction sought is merited to forestall wasting, damaging, alienation of the suit land by evicting, demolishing the plaintiff's houses, selling, leasing, charging or otherwise howsoever interfering with the plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of the suit land before the suit herein is heard and determined.

On the outset the plaintiff's **cause of action** is predicated on adverse possession. The plaintiff deposes that her family and herself occupied the suit land in the year **1974** long before demarcation started in the area and she has since been in open, exclusive, continuous and uninterrupted occupation. She has made developments on the suit land and the defendant who is currently the registered owner has always been threatening to evict her therefrom **(Kindly see paragraphs 2, 3, 4, 5 and 6 of the plaintiff's supporting affidavit sworn on 12.03.2019 and filed in court on 12.03.2019 plus the exhibits annexed thereto).**

The plaintiff's main **complaint** is that the defendant obtained the suit land fraudulently through his father who was a land committee member in the area who caused the same to be registered in his name (defendants) when he was still a minor. That inspite of the fact that the defendant became the registered owner the plaintiff is the one who has been in open, exclusive, continuous and uninterrupted occupation of the suit land for over **45 years** to date. **(Kindly see paragraphs 12 and 15 supporting affidavit sworn on 12.03.2019 and filed in court on 12.03.2019)**

From the foregoing, we submit that the plaintiff/applicant has a good prima facie case against the defendant with a high chance of success.

The Court of Appeal in MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS held at **page 2** as follows:- **(Kindly see No. 1 in the plaintiff's list of authorities filed herewith).**

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It 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.”

(Underlining ours).

The Court of Appeal in CENTRAL BANK OF KENYA & ANOTHER VS UHURU HIGHWAY DEVELOPMENT LTD & 4 OTHERS held at **page 382** as follows:- **(Kindly see No. 2 in the plaintiff's list of authorities filed herewith).**

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.”

It is not part of the Court's function at an interlocutory stage of litigation to try to solve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. *(Underlining ours).*

Your Lordship,

The injunction sought is merited to preserve the suit land and maintain status quo on the suit land before case is determined.

The Court of Appeal in Nairobi Court of Appeal Civil Applic. No. 312 of 2005: Hutchings Biemer Ltd Vs Barclays Bank of Kenya Ltd & Another held at **page 4** as follows:- **(Kindly see No. 3 in the plaintiffs list of authorities filed herewith).**

“We have considered carefully the rival arguments and the principle we have stated hereinabove. In our view injunctive orders are meant to preserve property and maintain the status quo.” *(Underlining ours).*

B. IRREPARABLE INJURY

If the **injunction** sought is not granted and the defendant effectuates the aforesaid activities *viz, evicting, demolishing the plaintiff's houses, selling, leasing, charging or otherwise howsoever interfering with the plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment* of the suit land before the suit herein is heard and determined, the plaintiff shall definitely incur profound harm, loss and damage which cannot be adequately **atoned for**, by a pecuniary award.

In Tritex Industries Limited & 3 others Vs Nationa Housing Corporation & Anor (2014) eKLR, Muriithi J, in granting an injunction, held at **page 5** that:- **(Kindly see No. 4 in the plaintiff's list of authorities filed herewith).**

“This adequacy of damages test is common denominator in the prima facie test of *Geilla v. Casman Brown* and the balance of convenience test of *American Cyanamid* because under both tests an injunction will not be granted if the injury or loss complained of may adequately be remedied by an award of damages. As held in *Mbuthia v Jimba Credit*, supra, in matters of land it is usual to grant injunctions to protect the parties’ profound interest in ownership of land whether as a residential property or as capital asset of production”. (Underlining ours).

C. BALANCE OF CONVENIENCE

This tilts in favour of the plaintiff/applicant because she has demonstrated through supporting affidavit and the annexures thereof that she has been in occupation of the suit land since 1974 long before demarcation started in the area, she has since been in open, exclusive, continuous and uninterrupted occupation and that she has made developments on the suit land and .

Regarding the balance of convenience, Lesiit J, stated at pages 4 and 5 in the case of *Meru H.C.C.C. No. 12 of 2010: Thomas Mungiria & 9 others vs. Joseph Mutuma & 4 others* thus:- (Kindly see authority No. 5 in the plaintiff’s list filed herewith).

“The case can also be determined on a balance of convenience. This being an interlocutory application, I have cautioned myself that I should not make conclusive findings...The plaintiffs have deposed that they are in possession of their respective parcels of land and the defendants have not controverted that fact. The plaintiffs seek specific orders in the plaint. That ground is the precise reason why any further dealing in the lands in question should be halted or prevented in order to give the parties in the suit to be heard on the merits.” (Underlining ours).

May Your Lordship be persuaded to find and hold that the balance of convenience in this case inclines in favour of the plaintiff/applicant.

D. CONCLUSION

Consequently, we submit that the Plaintiff/Applicant has satisfied the tests for granting the **inhibition** and **injunction** sought as laid down in the above cited authorities.

The Plaintiff’s/Applicant’s humble submissions.

DATED at **MERU** this.....24th day ofApril,2019.

FOR: JOHN MUTHOMI & CO.

ADVOCATES FOR THE PLAINTIFF

7. The defendant’s submissions are reproduced in full herebelow. Any spelling or other mistakes may only be ascribed to the defendant and his advocates. The submissions state as follows:

SUBMISSIONS ON BEHALF OF THE RESPONDENT

My Lord allow me to submit that the instant application has no merit because it is sub judice Chuka CMCC suit no 56 of 2018 that is pending for hearing and determination and in which the Applicant and the Respondent are both litigants.

Background information

Chuka CMCC suit no. 56 of 2018 was filed on 14th February 2018 by the Applicant who referred to herself as Susan Nyambura. She was suing the Respondent Duncan Kireakabete claiming that he had been fraudulently registered as owner of the suit land parcel no. Tharaka Nithi / Chiakariga ‘A’/586 and that the land belonged to her. She then went ahead to plead for the following relief from the court in that suit:-

- a. Permanent injunction, restraining the 1st Defendant, her agents, assignees, representatives, servants or anyone acting on her behalf from whatever ejecting or preventing the Plaintiff from enjoying the peaceful, quiet, and exclusive possession and use of the suit land no. 586 Chiakariga ‘A’ Adj Section
- b. That this Honorable Court do order that that the title issued to the 1st Defendant be cancelled by the Land Registry Chuka and to direct the Land Registrar Chuka instead to issue title in respect of land parcel no. 586 CHIAKARIGA ‘A’ Adj section in the name of the Plaintiff.
- c. Costs of this suit and interest at prevailing commercial rates
- d. Any other better relief that this court may deem fit and just to grant.

Upon being served with the pleadings in suit no 56 of 2018 the Respondent filed a counterclaim in which he sought for the following orders against the Applicant:-

- a. An order of eviction of the Defendant in the counterclaim, her agent, and family members from the Plaintiff in the Counterclaim’s

land parcel number THARAKA NITHI/CHIAKARIGA 'A'/586.

b. Costs of the Suit

On 11th February 2019, the Applicant filed a notice of change of advocates from WAMACHE ADVOCATES to JOHN MUTHOMI Advocates in that suit and proceeded to file her Reply to the Defense and Defense to the Counterclaim.

On 12th March 2019 the same Applicant filed a Notice of Withdrawal of Suit by the Plaintiff against the Defendant under order 25 Rule 1 and Section 3A of the Civil Procedure Rules and Act respectively. She then proceeded to file this suit and the instant application on the very same day that she withdrew that suit.

We wish to submit the following issues before your Lordship for determination

- a. Whether the present suit and application are subjudice Chuka CMCC no 56 of 2018
- b. Whether the application is an abuse of the court process
- c. Whether the Application meets the criteria set out in *GiellavsCassman Brown* on grant of interlocutory injunctions
- d. Whether there was material non disclosure on the part of the Applicant and if that affects the interim orders issued on 1st April 2019
- e. Whether the application should be dismissed with costs.

A. Whether the present suit and application are subjudice Chuka CMCC no 56 of 2018

We submit that there is currently pending hearing and determination suit no. Chuka CMCC no 56 of 2018 and that this application is sub judice that suit. The said suit was initially filed by the Applicant but she later withdrew her main claim leaving the counterclaim by the Respondent intact.

Our submissions that are guided by previous case law on effect of withdrawal of the main suit is that the Counterclaim is a full suit and it is not affected by the purported withdrawal of the main suit by the Applicant. Meaning that there is currently subsisting between the Applicant and the Respondent a prior suit filed at the Chief Magistrates Court in Chuka and that this instant suit and Application is sub judice that earlier suit.

My Lord kindly refer to the case of *BEATRICE MUMBI WAMAHIU v MOBIL OIL KENYA LTD* [2011] eKLR where Justice Serگون held that the withdrawal of the main suit did not affect the counterclaim and that a counterclaim is treated as a separate suit under section 35 of the Limitation of Actions Act hence its survival cannot be pegged on the pendency of the primary suit.

We submit that the above being the case the Applicant ought to have disclosed the existence of Chuka CMCC no. 56 of 2018 at the time she filed the main suit as well as this application. The applicant is therefore guilty of non-disclosure of material facts that could have aided the Court reach a just finding and decision in the matter before it.

In any case my Lord the instant suit and application are sub judice the Chuka CMCC suit no 56 of 2018. The crucial test to be applied by a court in deciding whether a suit is subjudice a prior suit is whether:-

- a. The parties in the suit are substantially the same
- b. Whether the matter in issue is identical in both suits
- c. And Whether the subject matter is the same

We submit that the parties in CMCC no 56 of 2018 and the current suit are substantially the same. This is despite the Applicant trying to disguise herself by describing herself as Susan NyamburaMwathi in this suit whereas in the other suit she describes herself as Susan Nyambura. The material issues are identical in the two suits; including the issue whether the registration of the Respondent as owner of the suit land was fraudulent; and whether the Applicant had lived on the suit land since 1974 and also whether the land could now be transferred in her names. She is also seeking for restraining orders to be issued against the Respondent including orders stopping him from evicting her from the suit land. It is important to note that the subject matter of the two suits is land parcel no. Tharaka Nithi/Chiakariga/586 currently registered in the names of the Respondent.

My Lord the principle against the sub judice rule is set out in section 6 of the Civil Procedure Act and the same is couched in mandatory terms as follows:-

‘No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.’

The meaning of the term ‘proceedings’ as used in the above statutory provision has been elaborated upon in the case of **Tatu City Limited & 3 Others Vs Stephen Jennings & 6 Others (2016) Eklr** where the court observed that the term proceedings as used in section 6 of the Civil Procedure Act can be defined to refer to ‘a process or activity, prescribed by law or procedure, which seeks to invoke the power of the court, or a tribunal as the case may be, to enforce the law, or obtain legal remedies pursuant to a law.’

The court in that suit went on to cite the writings of **EDWIN E. BRYANT, THE LAW OF PLEADINGS UNDER THE CODES OF CIVIL PROCEDURE 3-4 (2nd Ed 1899)** who stated that the term ‘proceedings’ can be applied to refer to ‘(1) the institution of the action; (2) the appearance of a defendant; (3) all ancillary or provisional steps such as arrest, attachment of property, garnishment, injunction, writ of exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motion made in an action (7) the trial (8) the judgment; (9) the taking of the appearance of writ of error (10) proceedings supplementary to the execution in code practice; (11) the taking of the appeal of writ of error; (12) the remittitur; or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of judgment, or a new trial, as may be directed by the court of last result.

We submit that the instant application is a proceeding within the meaning of section 6 of the Civil Procedure Act and so being it falls foul of the said section and should not be entertained by this Honorable Court.

B. Whether the application is an abuse of the court process

We further submit with all humbleness my Lord that the Applicant is abusing the court process by brining this application here instead of filing it in the CMCC suit. The reason for this is that the Applicant filed this application in this suit on the very same day she withdrew her main suit in CMCC no. 56 of 2018. She claims that the application is urgent but she does not tell the court at what time the urgency arose and why she did not find it expedient to file the application in the lower court. My Lord take a judicial notice that the Application was filed on 12th March 2019; the very same day she withdrew her main suit in CMCC no 56 of 2018. Her supporting affidavit does not contain any thing new to warrant the matter being certified as urgent since the issues she is canvassing in this application are the same old matters that are at issue between her and the Respondent in the CMCC case.

My Lord a scrutiny of the Applicants behavior including filing this suit on the same day she withdrew her main suit in CMCC no 56 of 2018 are an abuse of the court process and she should not be allowed to get away with this behavior. The Applicant is guilty of ‘forum shopping’ with the hope that she will gain an undue advantage over the Respondent. For what harm would she have suffered if she had disclosed that there is a prior suit awaiting hearing and determination before the Chief Magistrates Court? What harm would she have suffered if she had filed this application she dubs as urgent in the Chief Magistrates Court?

It is our submission that the Applicant has not come to this Court with clean hands. My Lord if you have time to look at her Supporting Affidavit she is creating an impression that she is in dire risk of being evicted from the suit land whereas this is not true. She failed to inform the court that there is a longstanding suit between her and the Respondent and that the said suit is addressing the very same issues she has raised in her application and that no new development has taken place to warrant the urgency she is trying to create in the said application.

We submit that the Applicant is in serious abuse of the court process and ought not be entertained by your Lordship.

We rely on the case of Stephen Somek Takwenyi & Another –Vs– David Mbutia Githare & 2 Others Nairobi (Milimani) Hcc No. 363 Of 2009 (Cited in **Richard Muthusi V Patrick Gituma Ngomo & Another [2017] Eklr**) where Honorable Justice Kimaru observed that the circumstances in which abuse of process can arise are varied and that sometimes it can be shown by the very steps taken and other times by extrinsic evidence only. It was also observed that filing multiple suits can amount to abuse of court process.

C. Whether the Application meets the criteria set out in GiellavsCassman Brown on grant of interlocutory injunctions

On whether the Application has merit, we humbly submit that it has no merit. The Application does not meet the criteria set out in GiellavsCassman Brown as argued by the Applicant. **The test in assessing whether there is merit in an application for interlocutory injunction is as follows:-**

‘First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience’

It is our submission that the Application before the court has fallen foul of the subjudice rule and therefore the applicant cannot prove that she has a prima facie suit with a probability of success. Her application therefore fails on the first criteria.

My Lord since her application has failed on the first criteria, it is not possible for this court to proceed to examine the other two criteria including whether the applicant will suffer irreparable injury which would not be compensated by an award of damages and whether the application can be decided on a balance of convenience.

The courts have variously declined to delve in the other two criteria whenever they failed to find that the applicant had failed to prove he had a prima facie case with a probability of success. A good example is the decision to dismiss an application for interlocutory injunction by Judge Oundo in **Vic Preston Murithi Ruchabi v Mary Wangari & 3 others [2018] eKLR**. The dismissal was premised on the failure of the applicant to adhere to section 34 (1) of the Civil Procedure Act which barred the applicant from filing separate suit seeking to resolve a question arising from a suit filed in another court. The Honorable Judge said as follows:-

‘ Having found that The Plaintiff/Applicant has therefore not established a prima facie case, by virtue of the provisions Section 34(1) of the Civil Procedure Act, I need not consider the other two conditions for the grant of temporary injunction as established in

the **Giella –vs- Cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.’

We also submit that the Applicant failed to make some fair and material disclosures including the fact that there is currently an ongoing suit between her and the Respondent and that the said suit is addressing similar issues as has been raised in this application and suit. This non disclosure is critical and should be taken into account by your Lordship.

D. Whether there was material non disclosure on the part of the Applicant and if that affects the interim orders issued on 1st April 2019

My Lord the Applicant sought for the interim orders ex parte meaning she had intention of hoodwinking the court into granted her the orders without disclosing all material facts before the court.

We humbly pray that your Lordship finds no merit in the instant application and that you dismiss the same with costs for it is contradicting the provisions of section 6 of the Civil Procedure Rules.

We wish to rely on YOUR LORDSHIPS own decision in **GEOFFREY KINJA V GILBERT KABEERE M'MBIJIWE & ANOTHER [2015] ECLR** for reasons discussed below:-

My Lord in the **GEOFFREY KINJA V GILBERT KABEERE M'MBIJIWE & ANOTHER [2015] ECLR** you placed proper reliance on the decision of the Court of Appeal in **BAHADURALI EBRAHIM SHAMJI - VERSUS - AL NOOR JAMAR & 2 OTHERS, CIVIL APPLICATION NO. 210 OF 1997** when you said the following:-

“In the case, the Court of Appeal quoted with Approval, Warrington L. J. at Page 509 as opining:

“It is perfectly well settled that a person who makes an ex parte application to the Court – that is to say, in the absence of the person to be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it.”

Likewise you also had this to say about the test to be used in evaluating whether there has been relevant non-disclosure and the consequences to be attached to the failure to comply with the duty to make full and frank disclosure.

‘The Court of Appeal also quoted with approval the case of **BRINKS – MAT Ltd – Versus - ELCOMBE [1988], 3 ALLER 188** where the opinion of Ralph Gibson L. J. eruditely enunciated the principles relevant to material non-disclosure as follows:

“In considering whether there has been relevant non-disclosure and what consequence the Court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following: (i) The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) the material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) the extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including, (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant and (c) the degree of legitimate urgency and the time available for the making of inquiries. (v) if material non-disclosure is established the Court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.....See Bank Mellat v Nikpour at (91) per Donaldson L J, citing Warrington LJ in the Kensington Income tax cmrs case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty of the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) finally, it is not for every omission that the injunction will be automatically discharged. Alocus poenitentiae (chance of repentance) may sometimes be afforded. The court has discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

In the case of GEOFFREY KINJA V GILBERT KABEERE M'MBIJIWE & ANOTHER [2015] ECLR, Your Lordship proceeded to dismiss an application for interlocutory orders while setting aside interim orders granted ex parte because there was non-disclosure of material and crucial facts.

E. Whether the application should be dismissed with costs

In the same vein we pray that you dismiss this application and set aside the interim orders granted on 1st April 2019 due to non-disclosure of material information by the Applicant. We also pray for the costs of this application

We respectively submit.

Dated at EMBU this.....29thApril..... 2019

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NJIRU KITHAKA & CO

ADVOCATES FOR THE RESPONDENT

8. The parties have proffered various authorities to buttress their diametrically opposite assertions. As the principles those authorities enunciate have been elaborated in the submissions (op.cit) already reproduced in full herein before, I find it not necessary to regurgitate those authorities and the principles they seek to buttress.

9. I have considered the pleadings, the authorities and the submissions proffered by the two litigants in support of their assertions. Issues such as if or if not this suit is subjudice CMCC 56 OF 2018 have been raised. On the defendants own admission, this suit which was withdrawn by the plaintiff and whose counter-claim the defendant claims subsists, has not been heard and determined. It is a moot point needing oral canvassing as to whether or not the said counter-claim still subsists as a suit.

10. All in all, I find that the issues both parties have raised need to be escalated to an oral hearing in court which will definitely make apposite findings. It will, therefore, pending hearing and determination of the main suit be necessary to preserve the suit property. I, however, do not think that the defendant who is the registered owner of the suit land should be enjoined from accessing parts of the suit land which may not be occupied by the plaintiff. I opine that the resolution of this dispute is expeditious hearing.

11. The following orders are issued:

- a. An order of inhibition is hereby issued to be registered against Title Number Tharaka/Chiakariga/ 'A'/586 pending the hearing and determination of this suit.
- b. An order of injunction is hereby issued restraining the defendant from evicting the plaintiff or demolishing his houses.
- c. The plaintiff should fully comply with the provisions of order 11, CPR, within 21 days of delivery of this ruling and the defendant should comply with order 11, CPR within 21 days after the period stipulated for compliance by the plaintiff.
- d. Costs shall be in the cause.
- e. Parties will come to court for **directions on 16th July, 2019**

Delivered in open Court at Chuka this 29th day of May, 2019 in the presence of:

CA: Ndegwa

Rimita h/b Muthomi fo the Applicant

M/s Kithaka for the Respondent

P. M. NJOROGI,

JUDGE.