



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 270 OF 2018

FAUZA OSCAR MEULI

Suing as the Administrator of the Estate of

AISHA ALI MOHAMED.....PLAINTIFF

VERSUS

GIDEON NASSIM KITI

THE REGISTRAR OF TITLES, MOMBASA.....DEFENDANTS

RULING

1. The Application for determination is the Notice of Motion dated 19th November, 2018 by the Plaintiff/Applicant brought under Order 51 Rule 1, Order 40 Rule 2 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law. The Plaintiff/Applicant is seeking orders of temporary injunction restraining the Defendant by himself, his servants, employees, assignees and/or agents from erecting any structures, sub-letting, advertising for sale or selling and/or interfering with the Plaintiffs' right to the suit properties plots 567, 568, and 569 Kikambala together with subdivisions 2057, 2058 and **2062/III/MN** all being subdivisions of the parcel **L.R. NO. 284/III/MN** pending hearing and determination of this suit. The Applicant is also seeking an order of mandatory injunction compelling the Defendant to remove and/or demolish the illegal structures put up by the Defendant on the said plots at his cost and within timelines to be specified by the court as well as costs of the Application.

2. The Application is premised on the following grounds:

- a. **That the Plaintiffs herein are the registered owners and proprietors of the properties known as plots 567, 568 and 569 Kikambala together with subdivisions 2057, 2058 and 2062/III/MN all being subdivisions of parcel L.R. NO.284/III/MN.**
- b. **That the Defendant/Respondent herein has illegally trespassed and encroached on a portion of the properties and has started putting up illegal structures thereon, resided thereon and currently is in the process of letting out and selling.**
- c. **That the Respondent has continued to put up the illegal structures and holding himself as the owner of the suit plots while frustrating the Plaintiff's right to make use of their property. The Respondent if left unrestricted may further interfere with the properties; devalue them, use and/or abuse them with consequent losses to the owners.**
- d. **That the Defendant has defaced the Plaintiff's property and hindered their use and enjoyment contrary to Article 40 of the Constitution of Kenya, unless restrained the Defendant's actions will continue undeterred with consequent losses and damage to the Plaintiffs**
- e. **That it is in the interest of justice that this Application is allowed.**

3. The Application is supported by the affidavit of Faiza Oscar Meuli, the Plaintiff/Applicant sworn on 19th November, 2018 in which she reiterates the grounds in support of the motion. In addition, the Plaintiff depones that the 1st Defendant/Respondent had filed cases in court claiming to be the owner of the suit properties. That in Mombasa Misc. Application No. 104 of 1999 (OS) the High Court and Court of Appeal rendered decisions confirming that the Defendant is not the owner neither does he have any legal interest in the said properties. The Applicant has attached copies of Grant, title documents and judgments of the High Court and Court of Appeal.

4. The Application is opposed by the 1st Defendant/Respondent vide a notice of preliminary objection dated 26th January 2019 on the following grounds:

i. That the Plaintiff's claim against the 1st Defendant is time barred by virtue of Section 7 of the Limitation of Action Act.

ii. That the court has no jurisdiction to grant any orders on a claim which is time barred.

iii. That the Plaintiff's Application dated 19th November, 2018 and the suit herein is an abuse of the process of the court.

5. Mr. Mokaya, learned counsel for the Applicant submitted that the Plaintiff is the registered owner of the suit properties and that the 1st Defendant has encroached and/or trespassed into the Applicant's property. That the 1st Defendant manipulated the system and used copies of title documents to dispose of part of the suit properties. Counsel relied on the supporting affidavit and annexures and submitted that the Plaintiff has established a *prima facie* case as she is the registered owner of the suit properties. That it is admitted that the 1st Defendant has encroached on portions of the suit properties and has constructed on it and has converted the properties into his own use. Counsel further submitted that the Plaintiff is likely to suffer irreparable damage as the 1st Defendant may not be able to compensate her in damages for the injury suffered. That the balance of convenience tilts in favour to the Plaintiff who is the vulnerable party and further that the balance of convenience is in favour of preserving the property. On the preliminary objection, counsel submitted that the same is both an issue of fact and law. That the court cannot determine the issue unless evidence is availed. It was counsel's submission that the preliminary objection is not a pure point of law, adding that there is no replying affidavit on record to indicate when the cause of action arose.

6. Ms. Murage, learned counsel for the 1st Defendant submitted that the Preliminary Objection is on a pure point of law and that based on the pleadings filed, the Plaintiff's claim against the 1st Defendant is time barred by virtue of Section 7 of the Law of Limitation of Actions Act. She referred to annexures '4' in the supporting affidavit which is a judgment in Misc. Application No.104 of 1998 (O.S) which at page 3 it is admitted that the 1st Defendant encroached onto the suit property in 1998 and therefore action should have been brought within 12 years. Ms. Murage submitted that the court does not have jurisdiction to entertain any matter that is time barred arguing that the suit together with the Application is an abuse of the court process and should be dismissed adding that there is no *prima facie* case established on a suit that is time barred.

7. I have considered the Application, the affidavit in support and the preliminary objection as well as the submissions made. The principles to be applied when considering an Application for temporary injunction are well settled. In the famous case of **Giella –v- Cassman Brown & Co (1973 EA) 358**, the conditions were laid and that is:

“First the 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide Application on a balance of convenience.”

8. In this case there is no dispute that the 1st Defendant has been in possession and occupation of the suit properties for some time. Indeed in the judgment in HC Misc. Application No.104 of 1999 (O.S.) attached to the Applicant's affidavit in support of the Application, it is apparent that the encroached by the 1st Defendant took place way back in 1998 which is a period of over 20 years ago. The 1st Defendant has raised the issue of limitation in the Preliminary Objection filed. It is the 1st Defendant's submissions that the Plaintiff's claim against her is time barred. The issue cannot however be considered merely through evidence from the bar or submissions. The court needs to be moved appropriately or the issue is decided upon trial to determine clearly when the cause of action arose. For that reason, the preliminary objection fails.

9. In this case, the 1st Defendant has also filed a counter-claim in which she is seeking a declaration she is entitled to the suit properties by virtue of adverse possession. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavit, it is the view of the court that the Plaintiff has not established a *prima facie* case with a probability of success against the 1st Defendant. Secondly, the Applicant has not shown that he stands to suffer irreparable harm not compensable in damages.

10. The Plaintiff also seeks a mandatory injunction compelling the 1st Defendant to remove and/or demolish the structures put upon the suit properties. In the plaint, the Plaintiff seeks inter alia, a permanent injunction, an order of eviction and demolition of the said structures. It is therefore clear that the Plaintiff by the Application herein seeks final orders which are also sought in the plaint. The court of Appeal in the case of **Olive Mwhaki Mugenda & Another –v- Okiya Omtata Okoit & 4 Others (2016) eKLR** considered a persuasive decision of India on issuance of final orders at interlocutory stage and stated:

“2. Ashok Kumar Bajpai –v- Dr. (Smt) Ramjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88 at paragraph 17 of the Indian Court expressed as follows:

i....it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact situation warrants granting such a relief, the court may grant the relief but it must record reasons for passing such an order to make it clear as what are the special circumstances for which such a relief is being granted to a party.”

In the case of **Olive Mwhaki Mugenda (supra)** the Court of Appeal held:

a. “Applying the decision of this court in Vivo Energy Kenya Limited –v- Maloba Petrol Station Limited & 3 Others (2015)eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms –v- Naftali Ogola (2009)eKLR it has been stated an

order which results in granting of a major relief claimed not to be granted at an interlocutory stage.”

11. The Plaintiff also seeks a mandatory injunction. The law as regards the principles to be applied when considering whether or not to grant an interlocutory mandatory injunction is different from the principles set out in the **Giella-v- Cassman Brown & Co Ltd** case for the standard of approach is higher. In the case **of Locabail International Finance Ltd. –v- Agro Export & Another (1986) 1 ALL 901**, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory Application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the court has to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than required for a prohibitory injunction.”

In the case of **Lucy Wangari Gachara –v- Muindi Okemba Lore (2015) eKLR**, the Court of Appeal stated:

“It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage such injunction should not be granted absent special circumstance of only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decides that there was no basis for the mandatory injunction at the interlocutory stage. ”

12. In this case, both the Plaintiff and the 1st Defendant are claiming the suit properties. It will have to be decided at the hearing which of the parties is entitled to the suit properties and which one should not. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has not been made out. No special circumstances have been shown by the Applicant and the case is not one that I can consider a clear one that can be decided at once or in a summary manner.

13. The upshot of the foregoing is that the Plaintiff has failed to satisfy the conditions for granting the orders sought. In the result, I find no merit in the Notice of Motion dated 19th November 2018 and the same is hereby dismissed. Each party to bear their own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 8th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Sidinya holding brief for Malombo Plaintiff

No appearance for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE