



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 21 OF 2011

ESTATE OF JOHN MWENESI ADULU represented by

EBBY MUSIMBI MWENESI.....PLAINTIFF/APPLICANT

VERSUS

SAUL EGUNZA BUNYALI.....1ST DEFENDANT/RESPONDENT

EBRAHIM OMWENYI AMBWERE...2ND DEFENDANT/RESPONDENT

HARRY CITY AMBWERE.....3RD DEFENDANT/RESPONDENT

WEST KENYA SUGAR CO.....4TH DEFENDANT/RESPONDENT

PASSELS SIMIYU WANYAMA.....5TH DEFENDANT/RESPONDENT

RULING

1. This ruling is with regard to an application by way of Notice of Motion dated 31/1/2019 expressed under **Order 40 Rules 1 and 3, Order 51 Rule 1 & 3 of the Civil Procedure Rules 2010 and 13(7) of the Environment and Land Court Act 2011**. The applicant is seeking orders thus:-

(1) ...spent

(2) ...spent

(3) **THAT while pending the inter partes hearing of this application, this Honourable Court be pleased to preserve the suit property by using a temporary injunction to restrain the 5th defendant from selling, alienating or charging the land comprised in Title No. Bungoma/ Kamakoiwa/ 147**

(4) **THAT costs be in the cause.**

2. The application is premised on the applicant's supporting affidavit sworn on the even date and the annexures thereto. Which include a photocopy of the extract of the title as well as four (4) grounds on the face of the application. The grounds include that the suit property without the knowledge of the plaintiff/applicant changed hands twice, after the filing of the suit a fact that has necessitated the amendment of the plaint and that it is necessary to preserve the suit property so that it does not get sold or charged while the suit is still pending, hearing and determination.

3. The respondents opposed the application.

4. The 4th Respondent filed a replying affidavit sworn on 28/2/2019 by its Human Resource and Compliance Manager, a Mr. Japhet Alande. The gist of the affidavit is that, the application is vague, convoluted and an abuse of the court process and only meant to confuse issue and make gain through the back door where none exists at all; that the suit and issues as they exist are between the Applicant and the 5th Defendant/Respondent to the exclusion of the 4th Respondent; that the applicant herein has no locus in seeking the orders in the application as she has not attached a grant giving her authority to deal in the suit property; that the applicant has not demonstrated the damage she will suffer if the orders sought are not granted and that which cannot be compensated by way of damages; that the 5th defendant is in occupation and use of the suitland and that the applicant's application is brought in bad faith, purely intended to scuttle the course of justice and deny the 5th Respondent the rightful use of his parcel of land without any lawful justification.

5. The 5th Respondent did file a replying affidavit sworn on 28/2/2019. In the said affidavit he avers that he is the registered rightful owner and in occupation and use of the suit land; that he was an innocent purchaser for value and the registered and/or lawful owner and therefore no reason has been advanced by the applicant as to why they are seeking to place an injunction on his parcel of land thereby interfering with his lawful use; that the applicant has not demonstrated the damage she will suffer if the orders sought are not granted and that which cannot be compensated by way of damages. The 5th Respondent has urged the court to allow him use the said parcel of land for other purposes apart from selling, alienating or charging the same should the application be allowed.

6. I have perused the court file and I did not find any pleadings for the 1st to 3rd Defendants/Respondents.

7. Pursuant to court order of 11/3/2019, the application was to be argued by way of written submissions, however it seems none was filed.

8. I have considered with care the entire application and the replying affidavits. Has the Applicant met the threshold in **Giella -v- Cassman Brown and Co. Ltd (1973) EA 358** for this court to grant the orders sought in the application?

9. The principles for the grant of an interim or interlocutory injunctive remedy as settled in the above mentioned case are:

a) **The applicant must establish a prima facie case with a probability of success.**

b) **The applicant must demonstrate irreparable injury if an interim injunctive order is not granted**

c) **In case of doubt, the applicant must show that the balance of convenience tilts in his or her favour.**

10. In the case of Nguruman Ltd -v- Jan Nielsen and 2 others (2014) eKLR, the Court of Appeal laid emphasis and elaborated the said three principles thus :-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages 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. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recovered in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at the stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging by the applicant to injunction directly without crossing the other hurdles in between”.

11. A prima facie case in Civil cases was defined in Mrao Ltd -v- First American Bank of Kenya Ltd and 2 others (2003) KLR 125 as follows:-

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case.” (Emphasis laid)

12. The standard of proof of a prima facie case is on a preponderance of probabilities. The applicant alleges that the suit land in issue is registered in the name of the 5th Defendant whom she does not know personally. She annexed a copy of the title deed to this effect. The 4th and 5th Respondents on the other hand, have maintained that the 5th Respondent is in occupation and use of the suit land. To this extent, I find that, the consideration is whether on the face of it the applicant’s allegations have a probability of success. What the Applicant is alleging is illegal transfer of the suit land and which is a direct transgression of the law.

13. The documents marked “EMM1” show that at some point, the suit land was registered in the name of the plaintiff before it changed hands. The process of change of registered proprietorship is what this court must examine for its legality. I am satisfied that there is a prima facie case established by the plaintiff in this matter.

14. The second issue that the court should consider in granting the orders sought is whether the applicant has established that she is likely to suffer injury where an award of damages would be inadequate remedy. Both the 4th and 5th Respondents have submitted that the applicant has not demonstrated the damage she will suffer if the orders sought are not granted and that which cannot be compensated by way of damages. If the land did not pass from the plaintiff’s name properly, and in the absence of the injunction proposed in the instant application the same were further disposed of, that would put it further from the reach of the applicant. She would suffer a greater injury, which however this court is unable to assess for now whether it would be incapable of compensation by way of damages. This court therefore needs examine the balance of convenience in the suit.

15. On the third issue of the balance of convenience tilting on the applicant’s favor, it is imperative that the court balances and compares the claims of the parties, if a temporary injunction is refused or granted.

16. The documents marked “EMM1” show that at some point, the suit land was registered in the name of the plaintiff before it changed hands. I have considered all the legal provisions pursuant to which the application is anchored.

17. Under section 13(7) (a) of the **Environment and Land Court 2015 (2012)**, this court has the discretion to grant interim or permanent preservation orders including injunctions. It must have been with cases akin to the instant one in mind that the provisions of that section were enacted. I therefore find that the balance of convenience lies in granting the injunction sought.

18. Ultimately therefore, the Applicant's Notice of Motion dated 31/1/2019 is allowed in the following terms:

(a) Pending the inter partes hearing of this suit, a temporary order of injunction is issued restraining the 5th Defendant from selling, alienating or charging the land comprised in Title No. Bungoma/ Kamakoiwa/ 147

(b) The parties to comply with pre-trial directions so that this case is heard and determined in the next twelve (12) months otherwise the temporary order of injunction shall lapse.

(c) Costs shall be in the cause.

Dated, signed and delivered at Kitale on this 6th day of May, 2019.

MWANGI NJOROGE

JUDGE

6/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiff/applicant

Mr. Nakitare holding brief for Mulama for 4th defendant

Mr. Nakitare holding brief for Rauto for 5th defendant

N/A for 1st - 3rd respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

6/5/2019