



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 845 OF 2017

MOSES MURIMI MASIAGA.....APPLICANT/APPLICANT

VERSUS

THOMAS MAGAIWA SARIMA (Sued as the legal representative of SARIMA SARIMA

and MURIMI SARIMA (Deceased).....1ST DEFENDANT/RESPONDENT

CALEB ROBI MWITA.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff (applicant) namely **MOSES MURIM MASIAGA** who is represented by learned counsel Mr. Odondi Awino filed a Notice of motion application against the defendants (respondents) namely **THOMAS MAGAIWA SARIMA** (1ST respondent) and **CALEB ROBI MWITA** (2ND Respondent) seeking the following orders:-

a. Spent

b. Spent

c. THAT pending the hearing and determination of this suit in te-partes, a temporary order of injunction do issue, restraining the defendants their employees, servants, agents or whomsoever, from entering upon, taking possession of, trespassing into, encroaching, remaining upon developing alienating, selling, transferring and or in any manner whatsoever interfering by any other means howsoever with the plaintiff's proprietary interest in land parcel no. BUGUMBE/MABERA/199 or any part thereof.

d. Cost of this application be provided for.

2. The application is based on the applicant's supporting affidavit sworn on the even date and grounds 1 to 5 including that the respondents are trespassers on the portion (1-25 hectares) of the suit land LR NO. BUGUMBE/MABERA/1999. Documents marked MMM1 (sale of land agreement dated 4th January 2012) to MMM5 and 6 (photographs of the vandalized fence in respect of the suit land) and annexed to the affidavit, are all in support of the application.

3. It is the applicant's claim that in the year 2012, he entered into land sale agreement with the 1st Respondent for the purchase of the suit land registered in the name of Sarima Sarima and Murimu Sarima (both deceased) who were the 1st Respondent's father and uncle respectively. That the purchase price was Kshs.340,000/= out of which kshs. 50,000/= was to be refunded to the 2nd Respondent. The applicant paid a total sum of kshs. 290,000/= to the 1st Respondent leaving a balance sum ofKshs. 50,000 the purchase price to be paid in the presence of 2nd Respondent. The applicant then took possession of the portion of suit land , planted Oranges and fenced off the portion.

4. The applicant further claims that on 2nd October 2017, some employees and agents of the respondents forcefully and unlawfully entered the suit land and vandalized the applicants fence, removed building materials and started to erect a building thereon. Upon discovery of the respondent's activities on the portion of the suit land, the applicant filed the instant application.

5. The respondents through learned counsel Mr, Kerario Marwa filed grounds of opposition dated 2nd May, 2018. The grounds are :-

a. THAT the application dated 10th October 2017,does not meet the criterion set in the case of Giella –vs- Cassman Brown &

Co. Ltd (1973) 358EA for grant of injunctions.

b. THAT the application is premised on illegal land purchase agreement as the same was in contravention of Section 6 of the Land Control Act.

c. THAT the applicant can always be compensated by way of damages for any loss that may arise out of the respondents' activities on the disputed piece of land.

6. Learned counsel for the applicant referred to paragraph 6 of the 1st defendant's statement of defence relating to purchase of the portion of the suit land, possible succession and transfer of the land by the 1st defendant. He cited the case of **Joseph Mathenge Kamutu –vs- Joseph Wainaina Karanja and Another (2015) eKLR** with regard to agreement for controlled transaction. Counsel urged the court to order the maintenance of status quo pending the determination of the rights of the parties in this matter.

7. Learned counsel for the respondents in his submissions did refer to Section 6 (1) of the Land Control Act (Cap 302) on consent in respect of transaction under the Act and **Section 45 of the Law of Succession Act (Cap 60)** regarding intermeddling with any free property of a deceased person. He termed the suit a nonstarter and cited the case of **Nelson Githinji and Another –v- Munene Irangi CA 133 of 1987** to buttress his submissions.

8. I have carefully perused the entire application, grounds of opposition and submissions. The issues for determination at this stage are whether the applicant has satisfied the triple requirements for interlocutory injunction as well settled in **Giella –v- Cassman Brown Co. Ltd (1973) EA 358**. The threshold is as hereunder:-

a. Establish his prima facie case.

b. Demonstrate irreparable loss

c. If in doubt, show that a balance of convenience tilts in favour of the applicant.

9. The term “**a prima facie case**” in Civil cases was defined by the court of Appeal in **Mrao Ltd – v- First American Bank of Kenya Ltd and 2 others (2003), KLR 125**. I am on the considered view that I should not over emphasize that fashioned definition.

10. In **Kenya Commercial Finance Co. Ltd –v- Afraha Education Society (2001) Vol. 1 EA 86**, it was held that all the three requirements are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. Therefore, apart from the applicant establishing a prima facie case as a basis for the grant of an interim injunction, the court must be satisfied that the respondent will not suffer irreparable injury.

11. The application is brought under Sections 3 and 3A of the Civil Procedure Act as read with **Order 40 Rule 1 (a) of the Civil Procedure Procedure Rules, 2010**. Indeed this court has inherent and discretionary powers to grant the orders sought in the application bearing in mind the facts as well as the circumstances of the case and to meet the ends of justice.

12. Moreover, this court shall have power to make any order and grant any relief as it deems fit and just in exercise of its jurisdiction as provided under Section 13 (7) of the Environment and Land Act, 2015 (2011). The orders include interim or permanent injunctions to preserve the subject matter in dispute.

13. In **Musa Angira Angira –v- ICDC (2015) eKLR J Mutungi J** took a position which I fully approve with regard to grant of interim injunction. The learned Judge held that the issues in controversy in the matter were highly contested and that the orders merited at that stage, was the maintenance of the obtaining status quo rather than an interim injunction in the manner sought in the application.

14. In the instant application and the suit the issues revolve around alleged sale of 1.25 acres of the suit land, unlawful entry into the land and dealings thereon. The issues are highly contested and call for hearing of the suit on merits. The parties have not agreed to maintain status quo prevailing on the suit land as envisaged under **Practice Direction No. 32 of the Environment and Court Act, 2015 (2011)**.

15. I have heard both sides of the application and the nature of the case. I find that an order for maintenance of status quo obtaining on the suit land in lieu of an interim injunction in the manner sought in the application, merited in the circumstances.

16. I thus direct and order the applicant and the respondent to maintain the obtaining status quo in respect of the suit land and in particular, there shall be no further fencing, building or any other development, lease or transfer of the land pending the hearing and determination of the suit on merit.

17. Costs of the application be in the cause.

18. Mention for pretrial directions on 21/11/2018. The defendants/respondents be served.

19. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of September 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Odondi Awino learned counsel for the plaintiff/applicant

Cc – Court assistant