



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 99 OF 2018

JOHN KAVITI MUNGAITHI.....PLAINTIFF/APPLICANT

VERSUS

PETER WAMBUA KAVITI1ST DEFENDANT/RESPONDENT

PAUL NDAVI KAVITI2ND DEFENDANT/RESPONDENT

SIMON MUOKI KAVITI3RD DEFENDANT/RESPONDENT

THE REGISTRAR,

MAKUENI DISTRICT LAND REGISTRY.....4TH DEFENDANT/RESPONDENT

THE MAKUENI LAND CONTROL BOARD.....5TH DEFENDANT/RESPONDENT

RULING

1) What is before this court for ruling is the Plaintiff/Applicant's Notice of Motion application expressed to be brought under Sections 13(2) (e), 7 (a) to (i) of the Environment and Land Court Act, Chapter 12 A of the Laws of Kenya, Order 40 Rules 1, 2 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Articles 40(1) and 159 (1) and (2) of the Constitution of Kenya and all other enabling provisions of the law for orders;

1. Spent

2. That an order of restriction do issue restraining the Defendants/Respondents from transferring or in any way dealing with the title to all that property known as title number: Makueni/Kako/584 and the improvements thereon, within Makueni County (the Suit Premises) until further orders of this honourable court.

3. That an order of injunction do issue restraining the Defendants/Respondents by themselves, servants, agents and/or employees or any of them or any person, body or institution acting pursuant to their instructions individually or collectively or otherwise from alienating, entering, occupying, dealing and/or interfering in any way with the Plaintiff /Applicant's quiet possession, use, occupation, development and proprietorship of the suit premises.

4. That an order of injunction do issue restraining the Defendants/Respondents by themselves, servants, agents and/or employees or any of them or any person, body or institution acting pursuant to their instructions individually or collectively or otherwise interfering with the Plaintiff/Applicant sub-dividing the suit premises.

5. That an order do issue to the 2nd and 4th Defendants/Respondents to remove the caution registered against the title over the suit premises.

6. That an order do issue to the 5th Defendant/Respondent to grant the Plaintiff/Applicant consent to sub-divide the suit premises.

7. That an order do issue directed to the OCS, Mumbuni Police Station to ensure compliance with the orders issued by this honourable court.

8. That this honourable court do grant any other orders in this matter to meet the ends of justice.

9. That the costs of this application be provided for by the Defendants/Respondents.

2) The application is dated 4th October, 2018 and was filed in court on 9th October, 2018. It is predicated on the grounds on its face and is supported by the supporting and further affidavits of John Kaviti Mungathi, the Plaintiff/Applicant herein, sworn at Nairobi on 3rd October, 2018 and 20th January, 2019 respectively.

3) The 1st to the 3rd Defendants/Respondents have opposed the application vide the replying affidavit of Simon Muoki Kaviti, the 3rd Defendant/Respondent who has sworn it with the authority of his Co-Defendants/Respondents.

4) Amongst the grounds that the Plaintiff/Applicant has raised are that the Plaintiff/Applicant is the registered owner of the suit premises which he intends to subdivide amongst his sons, that the 1st to 3rd Defendants/Respondents who are the sons of his first wife have frustrated the Plaintiff/Applicant's intention and effort to subdivide the suit premises, that the Plaintiff/Applicant has suffered and shall continue to suffer irreparable damage if the orders sought are not granted, that he has a strong prima facie case and that the Defendants/Respondents will not be prejudiced in any way if the application is granted.

5) The Plaintiff/Applicant has repeated the same grounds in his affidavit. The Plaintiff/Applicant has further deposed that the 1st to the 3rd Defendants/Respondents have chased away surveyors who on his invitation have visited the suit premises, that the three Defendants/Respondents have declined to attend the Makueni Land Control Board despite various summons by its chairperson as can be seen from a copy of summons annexed as JKM2 in paragraph 10 of the supporting affidavit. The Plaintiff/Applicant goes on to depose in paragraph 24 of his supporting affidavit that he has a strong prima facie case with a very high chance of success.

6) On the other hand, the 3rd Defendant/Respondent has deposed in paragraphs 3,4,5,6 and 8 that the suit land is matrimonial property where the Defendants/Respondents built their homes and co-existed with the Plaintiff/Applicant for several decades, that he is advised by his advocate on record which advice he verily believes to be true that the application is a non-starter and bad in law. That there is no single threat to damaging the substratum of the suit land, that granting the orders sought will amount to determining the suit before any evidence is adduced, that the reason for objecting to sub division is because it goes against what the family agreed on vide the written agreement dated 11th August, 2018 annexed as SMK -2 and that the application for consent to subdivide the suit land has not been heard by the Land Control Board which has power to grant or deny such an application upon which any dissatisfied party can appeal to the Provincial Land Control Board and not this court.

7) In paragraph 4 of his further affidavit, the Plaintiff/Applicant has deposed that the suit property has never been matrimonial property as alleged in paragraphs 3 of the replying affidavit. He goes on to depose in paragraph 5 of the same affidavit that since he owns the suit property, he should deal with it as he wishes. He further deposes in paragraph 6 that this court has jurisdiction to determine all land disputes.

8) The Plaintiff/Applicant's counsel raised the following issues for determination;

i. Whether this honourable court has jurisdiction to try this matter;

ii. Whether the suit premises is matrimonial property;

iii. The status of the agreement annexed as SMK 2 to the supporting affidavit of Simon Muoki Kaviti dated 3rd December, 2018 and filed on 4th December, 2018;

iv. Whether the Plaintiff should be forced to sub-divide the suit premises, one way or another;

v. Whether the application should be allowed;

vi. Who should bear the costs of the application.

9) On the other hand, the counsel for the Defendants/Respondents correctly submitted that the principles for granting interlocutory orders are as enunciated in the case of Giella Vs Cassman Brown & Co. Ltd [1973] EA 358 which are;

a) The Plaintiff/Applicant must show a prima facie case with probability of success.

b) An interlocutory injunction will not normally be granted unless the Plaintiff/Applicant must otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages.

c) If the court is in doubt, it will decide an application on the balance of convenience.

10) As for mandatory injunction the counsel cited the case of Kamau Mucuha V Ripples Ltd [1993] eKLR where it was held that;

“ The principles laid down with regard to temporary mandatory injunctions are that they will only be granted exceptionally and in the clearest of cases.”

11) Order 40 Rule 1 of the Civil Procedure Rules provides as follows;

“ 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 or wrongfully sold in execution of a decree or the court may by an order grant temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property, as the court thinks fit until disposal of the suit or until further orders.”

12) Order 40 Rule 2 provides as follows;

1. In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for temporary injunction to restrain the Defendant from committing breach of contract or injury complained of, or any injury of a like kind arising out of the same contract relating to the property or right.

2. The court may by order grant such injunction on such term as to an inquiry as to damages the duration of the injunction, keeping an account, giving security or otherwise as the court deems fit.

13) Whereas I agree with counsel for the Plaintiff/Applicant that this court has jurisdiction to try this matter and that only spouses can raise the issue of matrimonial property, it is clear that it is the Plaintiff/Applicant himself who wants to subdivide the suit property and he has been prevented from doing so by the Defendants/Respondents herein. There is no evidence from the Applicant's affidavit to show that the suit property is in danger of being alienated or wrongfully sold by the Defendants/Respondents herein save for the acts of the Defendants/Respondents to bar the surveyors commissioned by the Plaintiff/Applicant to subdivide the suit property from carrying out their mandate. Prima facie, the Plaintiff/Applicant has not shown that he has a case with probability of success nor has he shown that he will otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If anything, granting of the order of temporary of injunction would cause irreparable injury to the Defendants/Respondents who have been residing on the suit properties as they would be forced to move out of the said suit property. It is not lost on me that to grant the order of removal of caution and consent to subdivide would determine the suit with finality at this interlocutory stage. The Plaintiff/Applicant should follow the procedure provided for by the applicable law to obtain the necessary consent to subdivide the suit property. This court is not in doubt so as to cause it to decide the application on a balance of convenience. Lastly, I see no prayer for issuance of a mandatory injunction at this interlocutory stage.

14) The upshot of the foregoing is that the application by the Plaintiff/Applicant lacks merit. Same is dismissed with costs to the Defendants/Respondents.

Signed, Dated and Delivered at Makueni this 6th day of September, 2019.

Mbogo C.G,

Judge

In the presence of:

Mr. Nyabuto holding brief for Ms Mwendu for the Plaintiff/Applicant.

Ms C. Nzioka Court Assistant

No appearance for the 1st, 2nd and 3rd Defendants/Respondents

No appearance for the 4th and 5th Defendants/Respondents

Mbogo C.G, Judge

6/9/2019