



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 161 OF 2018**

**ISAAC GICHIA MBUGUA**

**JOSEPH MBAI MBUGUA**

**ELIZABETH WANJIKU (suing as Administrators of MOSES MBUGUA**

**MWANGI alias MBUGWA MWANGI DECEASED).....PLAINTIFF**

**VERSUS**

**SAMMY KAVINGO**

**MUNGA RWAMBI**

**KANZE POPO**

**JOSEPH REUNEN MNAZI.....DEFENDANTS**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> July 2018 and brought under Section 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rules 1, 2 & 3 and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiffs/Applicants seek an order of temporary injunction restraining the Respondents from entering, selling portions of the land, cultivating, alienating, developing, cutting trees, clearing bushes, fencing and/or in any manner interfering with the applicant's suit property being PARCEL NUMBER LR. NO.715/MN TITLE NO.2152 pending hearing and determination of the suit herein. The application is premised on the following grounds:

- a. That the applicants are the Administrators of the estate of Moses Mbugua Mwangi alias Mbugua Mwangi (deceased) the legal owner of suit property being PARCEL NUMBER LR. NO 715/VI/MN TITLE NO. 2152 which said piece of land he bought way back on 27<sup>th</sup> July 1971.
- b. That the respondents are illegally claiming the said land without the consent of the applicant hence they are trespassers.
- c. That the 1<sup>st</sup> defendant/respondent aided and/or in collaboration with 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have made clear their intentions to unlawfully take over the suit property by using any possible means including the use of force despite the plaintiff plea to stop them from encroaching and developing the suit property.
- d. That the applicant continues to suffer irreparable loss as a result of the respondent's occupation thereof.
- e. That the respondents will suffer no prejudice if orders sought do issue.
- f. That the applicant has a prima facie case with high chances of success.
- g. That it is in the interest of justice if the orders sought are granted.

2. The application is supported by the affidavit of Isaac Gichia Mbugua sworn on 6<sup>th</sup> July 2018 in which he has deposed that the Respondents who are trespassers on the suit land, have been given notice on several occasions not to interfere with land but have refused to comply. That

his late father purchased the suit land on 27<sup>th</sup> July 1971 and has annexed a copy of the title marked “B” and a search dated 7<sup>th</sup> March 2018 which confirms that the property is still registered in the name of the deceased.

3. The applicant avers that on or around 20<sup>th</sup> February 2018, he realized that someone had started developing the suit property without their consent or approval. Some photographs showing the alleged development are annexed. The Applicants aver that they are apprehensive that the respondents will forcefully and unlawfully disfranchise them the suit property. That when approached, the 1<sup>st</sup> Defendant who is developing the suit property claimed he purchased it from the 2<sup>nd</sup> defendant who had no documents of ownership but has been threatening the applicants. The applicants aver that the respondents have no colour of right over the suit land.

4. The 2<sup>nd</sup> respondent opposed the application through a replying affidavit dated 12<sup>th</sup> February, 2019 in which he has deposed that he has lived in the suit property since 1962 as the employee of one Sheli Sheli who was the owner of the land. The 2<sup>nd</sup> defendant avers that he does not recognize any proprietary interest of the estate of Moses Mbugua as he has been in occupation continuously and peacefully and that he has acquired the same by way of adverse possession. It is the 2<sup>nd</sup> defendant’s contention that the application is not meritorious.

5. On his part, the 4<sup>th</sup> defendant filed a letter addressed to the Deputy Registrar of the court stating that he built a house on the suit property in the year 1962. That although he never purchased the plot, he entered the same when it was not occupied or fenced, though he added that one Mzee Wanini Dalu was residing on the said land and that he married his daughter and are still living together as husband and wife. He avers that he has complied with the interim orders issued herein by not erecting new structures. He admits that he does not have any title documents to prove ownership.

6. The application was canvassed by way of written submissions. The plaintiffs filed their submissions on 29<sup>th</sup> April 2019 while the 2<sup>nd</sup> defendant filed his on 22<sup>nd</sup> July 2019. I have considered the application and the submissions filed. The orders sought are of temporary injunction and the courts apply the established principles as laid down in the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**. The principles to be considered are that the applicant must show a prima facie case with a probability of success; the applicant must show that he would suffer irreparable injury which would not normally be compensated by an award of damages; and when the court is in doubt, it will decide the application on the balance of convenience. The application is for interlocutory relief and is made under order 40 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Rules by invoking the inherent jurisdiction of the court. Having gone through the facts as pleaded and the evidence, I would like now to apply them to these principles. In the case of **Stanley Munga Githunguri –V- Jimba Credit Corporation Limited, Civil Appeal No.144 of 1998**, the Court of Appeal stated that the stage at which this matter is presently, all that I am required to do is to determine whether the Applicants in this case have presented a prima facie case which may well succeed. In the case of **Mrao Ltd –v- First American Bank of Kenya Limited & 2 Others (2003) eKLR**, a prima facie case was described as follows:

***“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.”***

7. In this case, there is no dispute that the suit property is registered in the name of Mbugua Mwangi (deceased). The applicants are suing as administrators of the estate of the deceased. The applicants have exhibited a copy of the title in the name of the deceased as well as a certificate of official search indicating that the suit property is still registered in his name. The 2<sup>nd</sup> and 4<sup>th</sup> defendants’ case as I can understand it is that they are entitled to the suit property by way of adverse possession having been in possession and occupation for over 12 years. The issue of whether or not the plaintiffs’ claim is time barred and whether the defendants have acquired the suit property by way of adverse possession in view are matters that can only be determined at the trial. Before this court, it has been established that the defendants are in occupation of the suit property which both the plaintiffs and the defendants claim ownership. There are developments undertaken by the defendants based on their claim of ownership. In my humble view, the most appropriate orders that should be granted is an order of temporary injunction restraining the respondents from carrying out further developments on the suit land pending the hearing and determination of the suit. This will preserve the suit property in the current state pending determination of the suit.

8. From the evidence on record, I find that the applicants have established a prima facie case with a probability of success. I am also satisfied that the applicants are likely to suffer irreparable loss not compensable in damages because in the event the land is sold the substratum of the suit will be lost and further development will certainly change the status of the land. The balance of convenience if I had doubt, rests with the preservation of the current status quo.

9. The upshot is that the notice of motion dated 6<sup>th</sup> July 2018 is merited and the same is allowed in the following terms:

**1. An order of temporary injunction is hereby issued restraining the respondents from selling the land and from undertaking any further developments on the property known as PARCEL NUMBER LR. 715/VI/MN TITLE NO.2152 or any part thereof pending hearing and determination of the suit herein.**

**2. Costs of the application shall be in the cause.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF OCTOBER 2019.**

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C.K. YANO

JUDGE

**IN THE PRESENCE OF:**

Ms. Ngigi holding brief Waithera for plaintiff/applicant

No appearance for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants

4<sup>th</sup> defendant present in person

Yumna Court Assistant

**C.K. YANO**

**JUDGE**