



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELCA 13 OF 2018

JAMES MAINA KIMEMIA.....APPELLANT

VERSUS

JAMES MAINA KIMEMIA.....1ST RESPONDENT

FRACIAH WANJIRU NDIRANGU.....2ND RESPONDENT

(Appeal from the Ruling delivered by Hon M W Wachira Chief Magistrate at Murang'a on the 28/6/18 in CMCC NO 1 of 2018)

RULING

1. The Plaintiff filed suit on the 2/1/18 against the Defendants seeking the following orders;
 - a. A permanent injunction against the Defendants their servants and or agents from entering cultivating constructing structures of whatever nature occupying or in any other manner dealing with the suit land and or committing any acts of waste thereof.
 - b. Eviction of the Defendants from the suit land.
 - c. Costs of the suit.
2. Simultaneously, the Plaintiff filed a Notice of Motion of even date seeking the orders as follows;
 - a. Spent
 - b. That the honourable Court be pleased to issue a temporary injunction against the Defendants herein from entering, cultivating, building any structure on the suit property or committing any other acts of waste either by themselves their servants and or agents on land parcel LOC8/THERI/1320 until determination of this suit or suit further.
 - c. That the costs of the application be provided for.
3. The Appellant and the 1st Respondent are step brothers, being sons of Gathenya MWANGI but of separate mothers.
4. The application is supported by the affidavit of the Appellant who deponed that he is the registered proprietor of LOC 8/THERI/1320 comprising of 2 acres. That the registration is pursuant to succession of the estate of his father Gathenya Mwangi.
5. He avers that the suit land was the resultant subdivision of parcel LOC 8/THERI/393 which was subdivided to yield LOC 8/THERI/1319 measuring 0.40 ha and parcel No LOC 8/THERI/1320 measuring two acres.
6. That after the succession of his father's estate parcel LOC 8/THERI/394 and 1319 totaling 4.4 acres devolved to Margaret Wambu Gathenya, the mother of the 1st Respondent and the step mother to the Appellant.
7. It is his case that the 1st Respondent has constructed on his suit land and despite several demands to relocate to either LOC 8/THERI/394 or 1319, he has adamantly remained in possession and has continued to commit acts of waste of the land by cultivating the land as a trespasser.
8. That the 2nd Respondent has forcefully occupied a portion of the suit land despite her claim of being a purchaser having been dismissed during the succession cause No 2 of 2002.He argued that if the 2nd Respondent has any claim on the suit land, she should claim from parcel

LOC 8/THERI/1319 which belonged to Margaret Wambui Gathenya. That the 2nd Respondent too has unlawfully constructed permanent buildings on the suit land and continues to be in trespass on his land.

9. He annexed a copy of the official search and title dated the 12/10/17 registered in his name to support his case for a temporary injunction.

10. The Appellant resisted the Notice of Motion in the lower Court and filed a Replying Affidavit in which he claimed that he has occupied the suit land for a period in excess of 20 years. He averred that if the 1st Respondent has obtained title to the suit land he did so illegally and further argued that he is a stranger to the succession cause and the alleged subdivision of the original land LOC 8/THERI/393. It was his case that the original land LOC 8/THERI/393 has not been subdivided. He averred that his late father gave him the portion of the land that he occupies in his lifetime as a gift *inter vivos*.

11. The 2nd Respondent averred that she purchased the suit land in 2001 pursuant to an agreement of sale dated the 14/12/01 which was annexed to her replying affidavit. That she has build a school namely Kanini York Primary School which has been in operation since 2003 and annexed evidence of payment of rent , licenses from the Ministry of education and the County Government of Murang'a interalia to support the existence of the school.

12. It was the 2nd Respondents case that she paid the full purchase price and the last installment of Kshs 100,000/- was paid into Court but the 1st Respondent has refused to collect it and is frustrating her by bringing the instant suit and application. She annexed an order dated the 20/5/2011 issued in SUCC Cause No 2 of 2018 in which the Court ordered that the 2nd objector (Frazier Wanjiru Ndirangu) process the payment of Kshs 100,000 and pay the 1st Respondent within 30 days and secondly that thereafter the grant to be rectified to include 0.33 acres being the share of the 2nd Respondent in parcel LOC 8/THERI/393.

13. Upon hearing both parties on the application, the learned Magistrate rendered a decision allowing the application in its entirety.

14. Aggrieved by the decision of the learned Chief Magistrate, the Appellant then the 1st Respondent in the lower Court) proffered this appeal on the following grounds; That the Learned Magistrate ;

- a. Misdirected herself in failing to analyse the totality of the evidence adduced and therefore arrived at the wrong decision.
- b. Erred in issuing temporary injunction tantamount to eviction at interlocutory level
- c. Failed to appreciate chapter 4 section 53(2) of the Constitution of Kenya thereby abusing the same.
- d. Failed to appreciate that the real issues can only be determined after full hearing.

15. With the concurrence of the Court the parties elected to canvass the application through written submissions which I have read and considered.

16. The Appellant submitted that he has been in occupation of the suit land for over 20 years. That he got the land from his father during his lifetime. That he has developed the land over the years.

17. He added that the orders sought by the 1st Respondent interalia are to restrain him from entering cultivating and building on the suit land. He explained that as a matter of fact he has constructed a house which he resides with his family and derives his source of livelihood from the suit land. He denied ever wasting the suit land. He maintains that he is been in possession and granting the orders is tantamount to evicting him without being heard.

18. He relied on the case in **Lucy Wangui Gachara Vs Minudi Okemba Lore (2015) ECLR** where the Court confronted with the same application stated as follows;

“The application that the Respondent presented before the High Court was, on the face of it, an application for a prohibitory injunction ‘restraining’ the Appellant from doing something, engaging in certain conduct or taking certain action. But rather mischievously, the same application sought to restrain the Appellant from occupying, living, continuing to live, or staying on the suit property. It is not disputed that by the time the application for injunction was made, the Appellant was in possession of the suit property and had been in possession and occupation of the same for more than 10 years. To seek to stop her from occupying, living, continuing to live or to stay on the suit premises required nothing short of clear and specific prayer for a mandatory injunction. In view of the drastic nature of the remedy that the Respondent was seeking at an interlocutory stage, the Appellant was entitled to be notified in the clearest of terms that what was being sought in the application was her eviction, even before the suit was heard, from the property she was claiming to be matrimonial property. Instead, the application was made to appear as though all that it sought was to prohibit the Appellant from wasting, damaging, alienating or wrongfully selling the suit property”

19. It is the view of the Appellant that the Court issued orders that were final in nature thus preempting the determination of the suit on its merits. That the orders as issued will render the main suit an academic exercise. That the Court should have made an order maintaining status quo pending the hearing and determination of the main suit.

20. The Appellant submitted that the nature of the injunction orders granted by the lower Court were mandatory in nature which was not sought. Holding that it is trite that mandatory injunctions should be given under special circumstances placed reliance on the case of **Lucy Wangui Gachara V Minudi Okemba Lore eCLR (supra)** where the Court stated as follows;

“Ultimately the Court granted what was for all intents and purposes a mandatory injunction for the eviction of the Appellant from the suit property. 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 circumstances or only in the clearest of cases. The circumspection with which the Court approaches the matter is informed by the fact that the grant of 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 decide that there was no basis for the mandatory injunction stage.....Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the Court find otherwise after trial; the Defendant has accelerated the development that the Plaintiff seeks to restrain, with the intention of defeating the Plaintiff’s claim or where the Defendant is otherwise bent on stealing a march on the Plaintiff. On the other hand, the Court will not grant a mandatory injunction if the damage feared by the Plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must be sacrificed or substituted by a summary hearing”.

21. The Court was asked to be guided by the decision of Gupta J in the case of **Bharat Petroleum Corp Ltd Vs Haro Chand Sachdeva, AIR 2003** where the judge pronounced himself as;

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

22. In conclusion the Appellant stated that if he is evicted and his house demolished and the tea uprooted he will stand to suffer irreparable damage in the event that the said orders are reversed after the hearing and determination of the suit. He informed the Court that the Respondent does not stand to be prejudiced in any way as he lives on another property.

23. The 1st Respondent on the other hand opposed the appeal and gave the background of the suit.

24. In respect to the injunctive orders the 1st Respondent stated that there is nothing to show that the Appellant has developed permanent structures on the suit land.

25. Maintaining that the Appellant failed to demonstrate that he has erected any buildings on the suit land and that the alleged tea licences are in respect to original plot LOC8/THERI/393 and not the suit land, the Respondent urged the Court to dismiss the appeal with costs.

26. The key issue for determination is whether the trial Court erred in issuing mandatory orders which determined the suit. In other words, whether there anything left to be determined in the main suit?

27. It is not in dispute that the 1st Respondent is the registered owner of the suit land. As to whether it is unlawful or otherwise is not for this Court to determine at this stage. I say so because the Appellant has argued that the 1st Respondents registration of the suit land is unlawful.

28. It is not in contention that the Appellant and 2nd Respondent are in occupation of the land but in separate portions. The Appellant has claimed that he has occupied and developed the land for a period of over 20 years. Similarly the 2nd Respondent has claimed that she has been operating the school on the suit land since 2003, a period of 15 years.

29. Given that background, it is the Appellant’s appeal that granting the orders as she did, the learned Magistrate effectively evicted them from the suit land at the interlocutory stage before being given the opportunity to be heard on their claims. It is on that ground that the ruling is being impugned.

30. I have examined the prayers in the main suit which are word for word similar to the prayers in the interlocutory motion.

31. The principles on which the Courts will grant an injunction are well known. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, an 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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

32. What then is a *prima facie* case? The Court of Appeal in **Mbao vs First American Bank of Kenya Ltd & two others C.A. No. 39 of 2003 eK.L.R** defined a prima facie case in the following terms;

“A prima facie case in a civil application include 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”.

33. *Under Order 40 of the Civil Procedure Rules there is a mandatory requirement that interlocutory orders can only be granted where a suit has been filed pending determination.*

34. The supreme Court of India in the case of **Wander Ltd Vs Anox India P Ltd 1990 (supp) SCC 727** stated as follows;

“Usually the prayer for grant of injunction of an interlocutory injunction is at a stage when the existence of the legal right asserted by the Plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The Court at this stage acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated... is to protect the Plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from having been preserved from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against the other and determine where the balance of convenience lies.”

35. I have considered the circumstances of this appeal that the 1st Respondent sought to restrain the Appellant from entering, cultivating building any structure on the suit land or committing any acts of waste until the determination of the suit. The evidence as gleaned from the material before the Court in the lower Court and the suit is that the Appellant and the 2nd Respondent have been in occupation the suit land for over 20 and 15 years respectively. They have annexed photographs to show the developments on the suit land. The 1st Respondent has not contested this. He has alluded to the same as well. It would therefore be misplaced to grant such orders which effectively would be eviction orders. I agree with the submissions of the Appellant in that regard. It will lead to unintended and or undesired outcome of evicting the Appellant and the 2nd Respondents before the suit is heard. It is tantamount to granting a permanent or mandatory injunction as wells as determining the suit at the interlocutory stage.

36. A permanent or mandatory injunction is one that determines a matter in finality, unlike a temporary injunction which offers a temporary reprieve. The Plaintiff has prayed for a permanent injunction but in his submissions however he proceeded to argue on a non-existent application on interlocutory injunction which he did not plead in his application.

37. In **Shepherd Homes Limited Vs Sandahm Homes Limited V. Sandahm [1971] 1 CH. 34, Megarry, J.** stated:

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.

38. The same principle was restated by **Mustil, LJ in Locabaill International Finance Ltd. v. Agro-export [1986] 1 ALL E.R. 901** as thus:

“The matter before the Court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

39. In **Bharat Petroleum Corp ltd v. Haro Chand Sachdeva, Air 2003, Gupta, J.** of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship.

40. In the case of **Nandan Pictures Ltd. v Art Pictures Ltd & others, Air 1956, Cal 428, Chakravartti, CJ.** of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the Plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the Defendant does that act and thereby alters the factual basis upon which the Plaintiff claimed his relief. An injunction issues in such a case in order that the Defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the Defendant to undo what he has done with notice of the Plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

41. From the above cases it is trite law that Courts do grant mandatory applications in very rare of circumstances and in circumstances where the justice of the case require that a mandatory injunction be granted. As to whether the 1st Respondent is entitled to a permanent injunction, the answer is no. The Plaintiff has not shown reasons why a permanent injunction should be granted. Save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing. The instant case is not one of those cases that entitles the 1st Respondent a mandatory injunction. What the Respondent is asking the Court is to determine rights in land in finality at an interlocutory stage.

42. Leaving the current orders in place will have the effect of changing the status of the subject matter and the rights of the parties without affording them a hearing. There are arguments and counter arguments in the suit that are best dealt with on trial.

43. A temporary injunction being an equitable remedy, the Court is bound to consider equitable principles in arriving at a decision to grant an injunction. In this case the conduct of the 1st Respondent is called into question as far as the issue of laches is concerned. The Court has taken note of the uncontested claim of the parties that they have occupied the suit land for periods over 15 years. Equity does not assist the indolent. I leave it at that.

44. In the end it is the view of this Court, based on the material on record that the 1st Respondent did not demonstrate a prima facie case with respect to grant of a temporary injunction and or mandatory injunction.

45. The Court is satisfied that the Learned Magistrate fell in error in granting the 1st Respondent the orders of interlocutory injunction. The decision of the Learned Magistrate is substituted with the orders stated in the next paragraph.

46. Since the hearing is yet to begin, in the interest of justice and fortified by the inherent powers bestowed upon this Court by Section 63(e) of the Civil Procedure Act, and for purposes of preserving the suit property, I order status quo be preserved. That is to say the Defendants, their servants and or their agents or any person claiming under them from disposing, selling, wasting or constructing new buildings/structures or in any manner wasting the suit properties until the final disposal of the case. The Plaintiff is also restrained from disposing, selling or in any manner alienating the suit land pending the disposal of the suit.

47. Reasons wherefore I order an inhibition barring all dealings to be registered on the suit land pending the hearing and determination of the suit.

48. The costs of the appeal shall be borne by the parties equally.

49. It is so ordered.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 17TH DAY OF OCTOBER 2019

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Appellant: Present in person. Advocate is absent.

Respondent: Present in person. Advocate is absent.

Irene and Kuiyaki, Court Assistants