



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 5 OF 2018

MAKUENI HANDCRAFT CO-OPERATIVE

SOCIETY LIMITED.....PLAINTIFF/APPLICANT

-VESRUS-

1. GEORGE MUSYOKA MANG'OKA *alias* MUSYOKA MANG'OKA MBULULU

2. NGEI MUSYOKA

3. ALEXANDER KAYLO MATISO

4. KIMANTHI NDAISI.....DEFENDANTS/RESPONDENTS

RULING

1) What is before this Court for ruling is the Plaintiff's/Applicant's Notice of Motion application expressed to be brought under Order 40 Rules 1(a) & 2 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act for orders:-

1. Spent

2. Spent

3. THAT pending hearing and determination of the suit herein, an order of injunction do issue against the 1st, 2nd, 3rd and 4th defendants herein restraining them, their agents, servants and/or contractors, and each and every one of them, from entering and/or trespassing into the plaintiff's Light Industrial Plot No. M-EMALI situated in Emali Township and measuring 1.21 hectares and erecting fences thereon, constructing illegal structures thereon, cultivating, grazing or in any other way interfering with the Plaintiff's said plot.

4. THAT cost of this application be paid by the defendant/respondents.

The application is dated 22nd December, 2017 and was filed in court on 01st February, 2018. It is supported by the affidavit of David Mwau Ngati, the Chairman of the Plaintiff/Applicant, sworn at Machakos on 22nd December, 2017.

2) The Defendants/Respondents have opposed the application vide the replying affidavit of George Musyoka Mang'oka, the 1st Defendant/Respondent sworn at Nairobi on 04th July, 2018.

3) The Court directed that the application be disposed off by way of written submissions.

4) David Mwau Ngati has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 15 of his supporting affidavit that by a letter dated 27/09/1994 addressed to the District Commissioner Makueni, the Plaintiff/Applicant applied to be allocated a four (4) acre industrial plot on which its members could carry on its business of wooden curios and handicrafts, that the District Commissioner vide the letter marked MHCS(C) and dated 18/10/1996 advised the District Physical Planner to allocate the land to the Plaintiff/Applicant in Emali Township, that the District Physical Planning Officer visited Emali Township and showed a vacant and bushy unsurveyed plot/piece of land to the Plaintiff's/Applicant's members and asked them to clear the bushes thereon to facilitate surveying of the plot/land and they did so, that subsequently thereafter the said District Physical Planning Officer and the District Surveyor Makueni visited the said plot, surveyed it and drew a PDP map marked as MHCS(d), that by a letter of allotment marked MCHS(e) issued to the Plaintiff/Applicant by the Commissioner of Lands on 1/7/1999, the Government of the Republic of Kenya formally allocated the suit property (Light Industrial Plot No. M-Emali) to

the Plaintiff/Applicant under the provisions of the Government Lands Act (now repealed), that the Plaintiff/Applicant accepted the allocation and paid the advised premiums to the Government of the Republic of Kenya and has subsequently paid the applicable land rates on the suit property to the County Government of Makueni MCHS(f), that on the 24th July, 2017, the County Government of Makueni issued a written confirmation to the effect that the suit property (Light Industrial Plot No. M-Emali situated in Emali Township) is registered in the Plaintiff's/Applicant's name MCHS(g) and the Plaintiff/Applicant paid all the land rates, that in or about August, 2014, the surveyors from the office of Makueni County Director of Urban Planning and Housing visited the Plaintiff's/Applicant's said property and restored/confirmed all the beacons marking the boundaries of the said plot, and issued the Plaintiff/Applicant with a beacon certificate marked as MCHS(h) and that construction of temporary showroom has been frustrated by the Defendants/Respondents who have unlawfully filled up with soil the foundations excavated by the Plaintiff/Applicant on the suit property and pulled down an upcoming building.

5) On the other hand, the 1st Defendant/Respondent has deposed in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of his replying affidavit that he has never been aware of the existence of the alleged plot No. M-Emali and he could not have trespassed into a plot that does not exist, that he is the registered owner of plot No.1579 Kinyoo Adjudication Section which was allotted during the land adjudication process as can be seen from the ground and record status marked as GMM1, that he was supplied with a plot location map clearly identifying where his plot is placed on the ground and the Plaintiff/Applicant should do the same to enable the court to make an informed judgment because seeking injunctive orders on a property which is not in any way related to the Defendants/Respondents is taking this court for a ride, that from his own knowledge of the history of the land, he knows how the Plaintiff/Applicant went to Emali and began carving business on road reserves and gradually began to encroach onto people's land but was chased away, that the suitland belonged to his father who was the original occupant and who cleared the bushes and began farming on the land and there have never been interference or claim by anybody, that the Plaintiff/Applicant was never allotted plot No. M-Emali as it alleges and if there was such an allotment, the land's physical location was never shown to it, that during the adjudication which was a public exercise, all concerned parties were required to be physically present on the respective parcels of land to identify their boundaries but the Plaintiff/Applicant did not show up, that he planted trees on the boundary line without the Plaintiff/Applicant raising the question of encroachment, that the Plaintiff/Applicant has persisted with its encroachment and trespass forcing the Defendant/Respondent to file Makindu Civil Case No.368 of 2017 which is still pending in court and that the court should allow the latter case to be heard.

6) In their submissions, the Counsel for the Plaintiff/Applicant has submitted that the Defendants/Respondents have not in any way questioned the validity of the documents exhibited by the Plaintiff/Applicant. That the Plaintiff/Applicant and its members have been on the suit property carrying out their wood carving business thereon since the year 1995. It was also submitted that the Defendants/Respondents have not told this court that they have at any given time sued either the Government of Kenya or the Commissioner of Lands regarding the allocation of the suit property to the Plaintiff/Applicant in 1999. That the Defendants/Respondents cannot purport to challenge the Plaintiff/Applicant over the suit property when they have never in any way challenged the allotting authority. That unlike the Plaintiff/Applicant who was lawfully allocated the suit property in July, 1999 the Defendants/Respondents talk of the year 2011 when the alleged plot No.712 was allocated to the 3rd Defendant/Respondent. The Counsel added that the Defendants/Respondents talk of the year 2006 being the year when a purported plot No.145 was demarcated within Kinyoo Adjudication Section. It was further submitted that the Defendants/Respondents have not denied having trespassed into the Plaintiffs/Applicants suit property and are only purporting to justify their illegal actions. That Plaintiff's/Applicant's plot No. M-Emali is not the same as plot No.712.

7) That from the above, the Plaintiff/Applicant has demonstrated that it has a prima facie case with probability of success. That Makindu PMCC No. 285 of 2013 does not relate to the suit property.

8) The Counsel concluded by submitting that the Plaintiff/Applicant has satisfied the conditions for granting the order of injunction as set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 359**.

9) On the other hand, the Counsel for the Defendants/Respondents submitted that the Defendants/Respondents are strangers to the subject matter of this suit. It was further submitted that the bringing of the present suit is purely an afterthought since the Plaintiff/Applicant was well aware of Makindu PMCC 285 of 2013 where he was the Respondent.

10) The Counsel added that there is contradiction as to what is the correct subject matter of the suit. That it is the Defendants/Respondents who have shown how the Plaintiff/Applicant has trespassed into their suit property. The Counsel was of the view that the Plaintiff/Applicant has not satisfied the conditions for the grant of the order of injunction set out in the Giella Cassman's case (supra).

11) Having read the application as well as the replying affidavit and the submissions filed by the Counsel on record for the parties, there is no doubt that in order for the court to grant the orders sought, the Plaintiff/Applicant must satisfy the three principles set out in the aforementioned Giella's case. In the case of **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] eKLR** it was held that: -

“the sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first is satisfied.”

12) In the application before me, the Plaintiff/Applicant has only submitted on the first condition in the aforementioned Giella Cassman's case. The Plaintiff/Applicant ought to have satisfied the three conditions sequentially. However, what comes out clearly from the affidavit evidence by the parties herein is that there is a dispute over the suit property with each party flaunting documents to show that they are entitled to the said property. The issue of ownership cannot be determined at this interlocutory stage as it will have to await substantive hearing. Given those circumstances, my finding is that the appropriate order to issue at this stage is one of status quo so that neither the Plaintiff/Applicant nor the Defendants/Respondents continue to further develop the suit property until this suit is heard and determined. I, therefore, proceed to issue the order of status quo.

Signed, Dated and Delivered at Makueni this 03rd day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mrs. Nzei for the Plaintiff/Applicant

No appearance for the Defendants/Respondents

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

03/10/2019.