



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 70 OF 2006

PAULINE MPAKA KWARIA..... PLAINTIFF/APPLICANT

VERSUS

MARK MUNGIIRIA MUGUNA....DEFENDANT/RESPONDENT

RULING

1. Vide the application dated 28.1.2019 and filed on 31.1.2019, the plaintiff is seeking for an order that the firm of John Muthomi and Co, advocates be allowed to formally come on record for the plaintiff in lieu of Messer's. Mithega & Kariuki advocates, that there be an order of inhibition in respect of land parcel no. Ntima/Ntakira/3349 (herein after the Suitland), as well as an order of injunction restraining the defendant, his agent, and servants from evicting, leasing, selling or otherwise preventing and interfering with plaintiffs use of the suit land.

2. The application is brought pursuant to the provisions of Section 1A, 1B, 3A, and 63 (c) and (e) of the Civil Procedure Act and Section 68 of the Land Registration Act as well as order 9 rule 9 & order 40 rule 1, 2, 3 and 4 of the Civil Procedure Rules.

3. The application is supported by the grounds on the face of the application and on the two supporting affidavits of the applicant.

4. The plaintiff had filed this suit way back on 14.8.2006 claiming entitlement to land parcel No. Ntima/Ntakira/3349 by way of adverse possession. Pursuant to a judgment delivered on 31.10.2018, plaintiffs suit was dismissed.

5. The applicant contends that she intends to appeal, hence, she has filed a notice of appeal and she annexed two documents marked PMK – 01 and PMK-02 indicating that she applied for the proceedings. She contends that the suit land is the only home she has known, which parcel is no. 3349. Therefore, if the orders she has sought are not granted, she will be evicted. She also states that defendant with hired goods have invaded and encroached on her land where they destroyed crops and also blocked a road of access to her house by digging round the house threatening to demolish the said house.

6. Mr. Muthomi appearing for the applicant made reference to this court's ruling of 10.7.2019 in so far as the issue of whether he is properly on record or not is concerned. He also contends that this issue was not opposed in the replying affidavit.

7. As regards the prayer for inhibition and injunction it was argued that when the applicant's suit was dismissed, defendant set in motion mechanisms to evict the plaintiff hence if those prayers are not granted the applicant might be evicted.

8. On the balance of convenience, and whether the appeal is arguable, it was submitted that the applicant has been on the suit land since 1978. However, the appeal shall be rendered nugatory if the substratum of the appeal is not preserved.

9. It was also argued that the dispute has been in court for the last 12 years and so defendant will not be prejudiced in any way if the orders are granted.

10. In support of the plaintiff's case, the following authorities were proffered;

- **Patricia Njeri & 3 others vs National Museum of Kenya (2004) eKLR.**
- **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) eKLR.**
- **Central Bank of Kenya & another vs Uhuru High way development Ltd & 4 others.**
- **Giella vs Cassman Brown & Company Ltd (1973) EA 358**

11. The respondent/defendant has opposed the application via his replying affidavit, where he contends that applicant's advocate has not

formally come on record. He further states that the plaintiff has several other suits in court over neighbouring parcels No. Ntima/Ntakira 3348 and 3350 which are all subdivisions emanating from the parent parcel No. Ntima/Ntakira 1808.

12. The respondent has availed documents in respect of Meru CM E & L case No. 108/2018 to support this claim. He contends that in the aforementioned case no. 108/18, plaintiff obtained injunctive orders on 11.5.2018 restraining the defendant from evicting her from parcel No. 3348 yet now she is claiming parcel No. 3349. Respondent avers that he can't be enjoined from occupying the parcel he has settled on since 1999.

13. The respondent also avers that there is no appeal pending since no memorandum of appeal has been filed within the mandatory 60 days hence the orders of stay are not warranted.

14. Mr. Muriuki appearing for the respondent argued that the counsel for applicant is not on record going by the provisions of order 9 rule 9 of the civil procedure rules.

15. He further argued that since there is a judgment, the relevant provisions of law is order 42 of the Civil Procedure Rules where applicant ought to seek for a stay of the judgment. It is contended that the court is functus officio in so far as the prayers for inhibition and injunction are concerned. The counsel also urged the court to consider the supporting affidavit of the applicant in CM ELC No. 108/18 (availed as an annexure by respondent) where applicant says she resides on parcel No. 3348 and she obtained injunctive orders against the defendant on 10.5.2018. Mr. Muriuki wondered how plaintiff can now be seeking an injunction in respect of suit no. 3349. He added that the contents in their replying affidavit (of defendant) have not been disputed and therefore claims that plaintiff is on a fishing expedition.

Determination

16. The issues for determination have been clearly framed by the applicant as follows;

- i. "Whether the firm of John Muthomi & Co advocates should be granted leave to formally come on record for the plaintiff in lieu of Messrs. Mithega & Kariuki Advocates**
- ii. Whether the applicant has satisfied the tests for granting an inhibition and temporary injunction pending the hearing and determination of the intended appeal".**

Legal Representation

17. I find that on 19.3.2019, the counsel for defendant had raised a Preliminary Objection averring that the firm of John Muthomi advocates should be struck from the record for none compliance with the provisions of order 9 rule 9 of the civil rules. I dismissed the preliminary objection in my ruling delivered on 10.7.2019 where I dealt with this issue at length. Of particular importance is the observation that the prayer to come on record has been combined with the other prayers where I had made reference to the case or **Pravinchandra Jamnadas Kakad vs Lucas Oluoch Mumia (2015) Eklr.**

18. I therefore conclude that the firm of John Muthomi is properly on record for the applicant.

Inhibition Injunction

19. The plaintiff lost her case vide the judgment delivered on 18.10.2018 and perhaps that is why she has given order 42 of the civil procedure rules a wide berth.

20. Can the court grant an order of inhibition and injunction after judgment? In the case cited by the applicant, **Patricia Njeri and others vs National Museum of Kenya (2004) eKLR**, it was stated that this is a discretionary matter guided by certain principles some of which are:

"The discretion will be exercised against an applicant whose appeal is frivolous (see Madhupaper International Limited vs Kerr (1985) KLR 840 (cited in Venture capital). The applicant must state that a reasonable argument can be put forward in support of his appeal (J.K Industries vs KCB (1982 – 88) KLR 1088 (also cited in venture capital). The discretion should be refused where it would inflict greater hardship than it would avoid (see Madhupper supra). The applicant must show that to refuse the injunction would render his appeal nugatory (see Butt vs Rent restriction tribunal (1982) KLR 417 (cited also in venture capital). The court should also be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358 as set out in case of Shitukha Mwamodo & others (1986) KLR 445"

21. The main provisions of law cited by the applicant are section 63 of the Civil Procedure Act and Order 40 rule 1,2,3 & 4 of the Civil Procedure Rules.

22. The interlocutory orders of injunction are usually granted to preserve the substratum of the subject matter awaiting the final determination. In the present case, the court pronounced itself and the suit was determined. As such, the court cannot purport to consider whether the applicant has a prima facie case or not or whether the applicant has an arguable appeal.

23. The applicant avers that he intends to appeal and to that effect, he filed a notice of appeal on 8.11.2018. **Rule 82 of the court of appeal rules** provides that;

"Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry within 60 days of the date when the

notice was lodged - a memorandum of appeal and the record of appeal”.

While **Rule 83** provides that;

“if a party who has lodged a notice of appeal fails to institute an appeal within appointed time, he shall be deemed to have withdrawn his notice of appeal....”

24. It is now one year and one month from the time the judgment was delivered and no appeal has been lodged nor has the applicant demonstrated that he has moved the relevant court to have the time extended for the lodging of the appeal. Even at the time the of the hearing of the application orally before me on 1.10.2019, there was not the slightest indication of the existence of an appeal or an application to extend time to appeal. I therefore conclude that there is no appeal against the Judgment of this court.

25. The other issue the court has taken into account is the actual parcel of land being claimed by the applicant. All along in this suit, the applicant has been basing her claim on parcel 3349. This is captured in her pleadings and in her evidence and she was emphatic that her home and land is on parcel no. 3349.

26. However, the respondent in his replying affidavit has stated that plaintiff had also filed a suit in the lower court where she was claiming parcel No. 3348 and one of the documents availed therein is a supporting affidavit of Pauline Mpaka the applicant herein and in Meru CM E & L No. 108 of 2018 (filed on 10.5.2018) where in paragraph 7, she states as follows:

“That when I realized that all was not well, I made a search at the land’s office and I discovered that the portion I occupy and which my husband was entitled was given Ntima/Ntakira/3348 and transferred to Silas Kiriga Ntaari”.

27. Further in paragraph 11, she states as follows;

“I have been in exclusive and continuous occupation of the suit land Ntima/Ntakira/3348 to date”.

28. The present applicant thereafter obtained injunctive orders against defendants in that suit restraining them from inter-alia demolishing her homestead or evicting her from her family parcel no.3348 as per the court order of 10.5.2018.

29. The applicant did not seek leave to file any further affidavit to counter those averments made by the respondent. It follows that applicant is not candid and is also guilty of material disclosure. This court is not certain as to which land she is occupying.

30. I therefore conclude that this court doesn’t have sufficient material placed before it to enable it exercise discretion in favour of the applicant.

31. The upshot of my finding is that the application lacks merit and the same is hereby dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 4TH DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriuki for defendant/respondent

Muthomi for plaintiff/applicant

Both parties

HON. LUCY. N. MBUGUA

ELC JUDGE