



REPUBLIC OF KENYA

THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO. 66 OF 2017

GIDEON KITHUKA MALEVE....PLAINTIFF

VERSUS

KASYOKA MUSYA 1ST DEFENDANT

MUTHUI MUSYA2ND DEFENDANT

RULING

INTRODUCTION

The applicant, Gideon Kithuka Maleve has filed this application dated 16th October, 2017 seeking the following orders:

1. (Spent)

2. THAT pending the hearing and determination of this application and or suit the defendants whether by themselves, their agents or servants be restrained by way of an injunction from trespassing or occupying, cultivating, developing and or in any other way interfering with the plaintiff's quiet possession of all that parcel of unsurveyed land situated at Makutano Kwa Salee in Kathanze, Malawa Sub-location, Wingemi location, Nuu Division, Mwingi East District Kitui County.

3. THAT costs of this application be provided for.

The application is supported by the applicant's affidavit sworn the same date and grounds shown on the face of the said application. In a brief summary the applicant avers that he is the sole proprietor of all that unsurveyed parcel of land situated at Makutano kwa Salee Kathenze, Malawa sub-location, Wingemi location, Nuu Division which he bought at a purchase price of Kshs.180,000/=. He annexed a copy of the sale agreement drawn in Kikamba vernacular and translated into English by Maureen Githinji Advocate marked bundle A1. The applicant avers that he bought the suit land from one Martha Kavungo Mbaluka and later Mr. Mbaluko Kiema (Husband to Martha Kavungo Mbaluka) filed a case against Musya Mutyongo (husband and father to the 1st and 2nd defendants respectively) In the Land Dispute Tribunal which upon hearing awarded the same to Mbuuka Kiema. He also annexed copies of the award marked A2. The applicant further averred that on 28th June, 2017 the respondents illegally and unlawfully trespassed into the suit property and cleared the vegetation and also cut down trees in readiness for planting. The respondents also erected structures. He annexed a copy of a photograph of the temporary

structure marked A3.

The applicant also avers that on 30th June, 2017 the area chief wrote a letter to the respondents to stop their illegal activities and on 5th July, 2017 the Assistant County Commissioner wrote another letter expressing his frustration to dissolve the issue. On 4th September, 2012 the applicant's advocates wrote a demand letter to the respondent to stop their illegal activities with no avail. A copy of the said demand letter is marked A6. In his replying affidavit filed on 7th November, 2017 the respondents opposed the application saying that the purported purchase of the suit property by the applicant was unenforceable as the property is a subject of a court case in Mwingi being PMCC No.5 of 2015. He attached copies of the pleadings marked A-0. The respondent also contends that SRMCC No. 10 of 1999 (Mwingi) mentioned in the applicant's supporting affidavit paragraph 3 was between the husband of the seller of the suit land and her late husband and that the seller purported to sell the land while the same had a dispute and that the applicant is not therefore a purchaser for value without Notice.

The respondent further contends that when the suit land had a dispute in the Land Disputes Tribunal, her husband passed away before the dispute was concluded. She attached a copy of the death certificate marked KM-11. The respondents further aver that they have been using the suit land and have done developments by constructing rental houses which are leased out to tenants. In conclusion, the respondents state that they stand to suffer irreparable loss if the orders sought are granted.

APPLICANT'S SUBMISSION

Other than the facts which are contained in the affidavit evidence, the applicant through his counsel submitted that the guiding principles for the grant of the orders sought are set out in the celebrated case of *Giella –vs- Cassman Brown Ltd* (1973) EA 358. The learned counsel also relied on the following other case:

1. *FLEX CONSTRUCTORS SOLUTIONS LTD –VS- VERANDELL COURT LIMITED* (2012) Eklr
2. *SULEIMAN –VS- AMBOSELI RESORT LIMITED* (2004) 2KLR at page 589

In conclusion the Learned Counsel submitted that the plaintiff has been able to establish a prima facie case with a probability of success and that he will suffer irreparable loss if the respondents were to be allowed to continue with their illegal activities.

RESPONDENTS SUBMISSIONS

In his submissions, counsel for the respondent argues that the applicant purported to buy the suit property while the same had a dispute. As such, the applicant is not an innocent purchaser for value without notice. He also argued that the applicant has no locus standi to institute this suit as the seller did not obtain letters of administration to the estate of her late husband. The learned counsel for the respondents submitted that they are in occupation of the suit land and that the application before court is frivolous and an abuse of the court process.

I have considered the affidavit evidence both in support and opposition to the applicant's application dated 16th October, 2017. I have also looked at the documents attached in support of the application. The applicant in his case is seeking an equitable relief of an injunction whose principles were set out in the locus classicus case of *Giella –vs- Cassman Brown Ltd* (1973) EA at page 358. In that case the court set out the three principles for the grant of an injunction as follows:

1. **The applicant must establish a prima facie case with a probability of success at the main hearing.**
2. **The applicant must show that he will suffer irreparable injury not capable of being**

compensated by damages if the orders are not granted and

3. Where the court is in doubt, it shall decide the matter on a balance of convenience.

The applicant has deponed in his supporting affidavit that he brought the suit property for consideration of Kshs.180,000/=. A sale agreement in my understanding is not a prima facie evidence of ownership of a property. In my mind title documents is a prima facie evidence of ownership of a property. The suit property is yet to undergo adjudication process to determine the actual proprietors who will subsequently be entered in the register.

The applicant has not also demonstrated what injury he stands to suffer which cannot be compensated by way of damages if the orders sought are not granted. Deciding this matter on the third principle, the balance of convenience tilts in declining the orders being sought which I hereby do. Consequently, the application dated 16th October, 2017 is hereby dismissed with costs to abide the event.

Read and delivered in the open court this 25th day of January, 2018.

Hon. E.C Cherono (Mr.)

ELC Judge

In the presence of:

1. Kinyua holding brief for Mbaluka for defendant
2. Mr. Nzili holding brief fr Mwaniki for Mutua for applicant
3. Ms. Ijabo –court clerk.