



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 325 OF 2017

MILLICENT WANJIRU.....PLAINTIFF/APPLICANT

VERSUS

MARGARET CHELENGAT KIMOE.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 13th March 2017 filed under, Order 40 Rules 1(a), 2(1) and 4(1) of the Civil Procedure Rules, and all other enabling provisions of the Law where the Plaintiff/Applicants' seeks orders that:-

i. Spent

ii. Spent

iii. That this Honourable court do issue an order of temporal injunction restraining the Defendant by himself , her agents, servants and/or employees and or anybody acting pursuant to her instructions from trespassing, entering, remaining, occupying, cultivating, constructing, harvesting, grazing, leasing out and or in any manner whatsoever interfering with the Plaintiff's peaceful and quiet possession and occupation of Plot No. B43 Rumuruti Town Council African Location pending the hearing and determination of the suit.

iv. That this order be served upon the OCS Rumuruti Police Station for enforcement

v. Spent

vi. That cost of this application be provided for.

2. The said application was supported by the grounds on the face of the application and an Affidavit, sworn by Millicent Wanjiru Wanjohi the Applicant herein.

3. By consent parties agreed that the matter be disposed of by way of written submissions wherein the Applicant filed her submissions on the 6th October 2017 while the Respondent filed hers on the 17th October 2017. The submissions largely reiterated the facts as set out in the filed affidavits by the parties.

4. Counsel for the parties subsequently highlighted their submissions on the 27th November 2017.

5. I have read the written submissions by both parties as well as considered their highlights and the annexures therein.

6. The Applicants' submission was to the effect that she was allocated the said suit plot by the Rumuruti Town council in 1999 after having balloted for the same. That after the allocation, she took possession of the plot and went ahead to pay her Rates and Rent to the said council from the year 2000 to 2017.

7. That upon the county of Laikipia succeeded the council, she got a clearance certificate from thereon dated the 31st December 2015

8. She also submitted that the Respondent did not have any documentation to prove ownership and neither was the ownership of the said plot determined by the National Land Commission as no proceedings were availed by the Respondent.

9. In so submitting the Applicant confirmed that she had established a prima facie case and prayed that this application be allowed.

10. In response, the Respondent herein submitted that she was the first allottee of the suit land having been allocated the same in the year 1986 by Councilor Mureithi, wherein she built a 2 bedroomed house, dug a latrine and planted trees as a live fence. That the ballot paper annexed by the Applicant and marked as MWW1 is fraudulent and a forgery in the circumstance. The Respondent went ahead to submit on why the said Ballot paper was a forgery facts which would best be dealt with at a full hearing and not at this stage.
11. The Respondent further submitted that because the Applicant had not availed any evidence in the form of either a letter of allotment, offer or an application for the suit plot, she could not lay claim as the legal proprietor of the suit plot and neither could she be granted the orders so sought in the present application as she had no registerable interest over the suit plot in the circumstance and was not therefore entitled to the protection sought.
12. The Respondent's submission was that she had been in possession of the suit land and had to be unlawfully evicted twice from thereof as is evidenced vide the annexures marked as MCK 2 and MCK4 on her relying affidavit and with the first eviction having occurred in July 2015.
13. That vide annexure marked MCK 3 she was restored onto the suit plot only to be evicted again on the 20th December 2016 as is evidenced by annexure MCK 4.
14. It was the Respondent's submission that around the time when she was being unlawfully evicted is when the Applicant herein purportedly identified the suit plot and allegedly balloted for the same.
15. That the Applicant stood to suffer no irreparable damage or loss as she had never been in possession of the suit land and that her annexure marked as Mww5 only showed that the Respondent had tried to retake possession of what had been taken away from her. This she had done by instructing her sons to dig up the pit latrine that had been destroyed by the Applicant.
16. That the interim orders obtained by the Applicant were based on falsehood and misleading information, misrepresentation of facts and non- disclosure of material facts of which she could not benefit from such conduct.
17. In closing their submissions, the Respondent stated that the three principles enunciated in the case of **Giella vs Cassman Brown** tilted in her favor wherein she should be re-instated or restored in possession of the suit plot. The respondent urged the court to dismiss the application.
18. I have reviewed the affidavits and the annexures thereto and have also considered the filed submissions by the parties. The issue for determination is whether on the material and evidence presented to the court, the Applicant had established a prima facie case with a probability of success to enable the court to grant her the order of injunction.
19. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.
20. Has the Applicant in this case made out a prima facie case with a probability of success?
21. In the case of **Mrao vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, 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.”***
22. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.
23. The first issue that I need to consider for determination is whether the Applicant has established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.
24. In consideration of the Applicant's submission that she is the proprietor of the suit land, I find that at a glance of the proceedings before me, the proprietorship of the suit land are issues that need to be decided at a full hearing since the parties have not established proprietorship herein.
25. It is procedural that after the letter of allotment is issued, a lease document is then prepared which lease is finally registered in the County Land Registry and a Certificate of lease or title is issued to the lessee.
26. Looking at the facts of this case, the Applicant has based her claim to ownership of the suit plot yet no letter of allotment or title deed have been produced by the Applicant to support her allegation. What the court has been asked to consider as evidence of proprietorship is a piece of paper that was stamped 'Ballot Paper' and the words "Town Clerk" inscribed thereon as well as receipts showing various payments.
27. On a balance of probability, the Applicant has not demonstrated that she was allocated suit Plot and that thereafter she had been

registered as the proprietor through the issuance of a title deed. Being in possession of a ballot paper and receipts that is said to have been issued upon allotment of the land is not sufficient evidence of ownership.

28. In my view, the Plaintiff has not established a prima facie case in that her claim to of Plot No. B43 Rumuruti Town Council African Location is not supported by any evidence.

29. On the issue as to who is on the suit premises, I have looked at the Respondent's annexures marked as MK2 and MCK3 and MCK 4 and I believe that she was in possession of the suit land thus the balance of convenience tilts in her favour.

30. The Applicant not having established a prima facie case, I decline to grant the orders sought herein set aside the interim orders granted on the 13th March 2017, and dismiss the Applicants' application dated 13th March 2017 with costs to the Respondent.

31. I also order that the Respondent be re-instated in the suit plot, with a caution that she shall not commit any acts of destruction to the suit property until the hearing and determination of the suit.

32. Parties to comply with order 11 within the next 30 days of delivery of this ruling. Looking at the value of the suit property as well as in consideration of the pecuniary jurisdiction of Magistrates' Courts in Land matters, this matter is subsequently transferred to the Chief Magistrate's court for further directions, hearing and determination thereafter. Parties to take dates in the Registry.

Dated and delivered at Nyahururu this 26th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE