



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.322 OF 2016

MWANGI KIUNGA (Suing as the Administrator of the Estate
of KIUNGA KIRURI WAIRATI –DCC).....**PLAINTIFF**

VERSUS

GERALD KAMWARO.....**1ST DEFENDANT**

JOSEPH KIBE GATHAYO.....**2ND DEFENDANT**

WANJIKU NJUGUNA**3RD DEFENDANT**

PAUL WANYOIKE.....**4TH DEFENDANT**

RULING

(Application for injunction; plaintiff claiming that defendants wrongfully took possession of land in the year 2007; case filed in the year 2016; delay before seeking an order of injunction can make the court decline the order; instead order of status quo given pending hearing and determination of suit).

1. This suit was commenced by way of a plaint which was filed on 12 August 2016. The plaintiff has filed this suit as the administrator of the estate of one Kiunga Kiruri Wairati (deceased) who died on 11 December 2001. He has pleaded that the deceased is registered as proprietor of the land parcel Naivasha/Mwicingiri Block 2/119 (hereinafter referred to as "the suit land") and despite the defendants being strangers to his estate, they have interfered with part of the suit land by encroaching into it , constructing structures and forcibly taking possession of it. It is the case of the plaintiff that the defendants have no right over the suit land. In the plaint, the plaintiff has sought the following orders :-

(a) An order that the defendants do vacate from the suit land and in default that they be forcefully evicted.

(b) General damages for trespass.

(c) Costs and interest.

2. Together with the plaint, the plaintiff filed an application for injunction, seeking to have the defendants restrained from the suit land, pending the hearing and determination of this case. It is that application which is the subject of this ruling.

3. In the supporting affidavit, the plaintiff has deposed that the defendants/respondents started encroaching into the suit land in the year 2007. It is averred that the respondents proceeded to subdivide the land amongst themselves and created 8 plots, and that they have constructed structures therein. It is averred that the subdivision and possession of the land by the respondents is illegal and contrary to the distribution of the land as ordered in the succession cause of the deceased.

4. The defendants entered appearance and filed defence. It is claimed that the confirmed grant annexed by the plaintiff is a forgery. They have pleaded that they purchased a portion of the suit land from one Joseph Kariuki Kiunga who is a legal beneficiary of the estate of the deceased.

5. What is before me is an application for injunction and the principles that a court assesses an application such as this were set down in the case of *Giella vs Cassman Brown (1973) EA 358*. One needs to demonstrate a prima facie case with a probability of success; and also show that he/she stands to suffer irreparable loss if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience.

6. It is apparent, and it is not denied, that the suit land is registered in the name of a deceased person. From the Certificate of Confirmation of Grant, the plaintiff appears to be the administrator of the estate and the estate has been distributed to the plaintiff, to hold the land in trust for himself and three other persons. I have seen that the deceased died in the year 2001, and I do not see how the respondents can claim to have properly acquired the suit land before administration of the deceased estate. I do think that the applicant has a prima facie case with a probability of success. I however have a problem with the delay in filing suit and the application. The respondents have been in possession since the year 2007, a fact admitted by the applicant. I wonder why it is now that he feels that the estate stands to suffer irreparable loss when he has stood by and allowed the respondents to be in possession for about 10 years. Delay, is one of the matters which may make the court refrain from issuing an order of injunction and it is only on that reason that I decline to issue an injunction restraining the defendants from being in the land until the case is heard and finalized. If I allow the injunction, which is not sought to be a mandatory injunction, then I will have decided the case and issued an eviction order without first hearing the case on its merits.

7. Given the above reasons, I will not issue an order of injunction in the manner sought by the applicant, but instead, I order that the status quo be maintained, until the case is heard and finalized. The respondents are not to make any developments in the suit land until the case is heard and determined.

8. The costs of this application will be costs in the cause.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of February 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

No appearance on the part of M/s C.M King'ori & Co Advocates for the plaintiff/applicant.

No appearance on the part of M/s Omwoyo Masese & co. Advocates for the respondents .

Court Assistant: Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU