



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 379 OF 2017

KIOKO MUTHENYA KITHELIO.....PLAINTIFF/APPLICANT

VERSUS

MARIA MUTHAMA KATUNDA.....1ST DEFENDANT/RESPONDENT

MULI MUTHAMA.....2ND DEFENDANT/RESPONDENT

RULING

1) What is before court for ruling is the application expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1,3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law for orders that :-

1. Spent

2. That the Respondents, their servants, agents, or anyone claiming under them or through them be restrained by an order of injunction from entering into, constructing, cultivating, encroaching in, or in any way interfering with Land Parcel No. NZAUI/KITHUMBA/535 pending hearing and determination of the application herein.

3. That the Respondents, their servants, agents, or anyone claiming under them or through them be restrained by an order of injunction from entering into, constructing, cultivating, encroaching in, or in any way interfering with Land Parcel No. NZAUI/KITHUMBA/535 pending hearing and determination of the suit herein.

4. That the Officer Commanding Kalamba Police Station does enforce the orders sought in prayer 2 and 3 herein.

2) The application is dated 21st February, 2018 and was filed in court on the 22nd February, 2018. It is predicated on the grounds on its face and is supported by the affidavit of Kioko Muthenya Kithelyo, sworn at Machakos on the 20th December, 2017 and is opposed by the replying and supplementary affidavits of Muli Muthama, the second Respondent herein, sworn at Machakos on the 16th January, 2018 and 20th February, 2018 respectively.

3) On the 17th January, 2018 the court directed that the application be disposed off by way of written submissions. Consequently, the Applicant and the Respondents filed their submissions on the 22nd February, 2018 and 21st March, 2018 respectively.

4) The counsel for the parties on record are agreed that in order for the order of interlocutory injunction sought by the Applicant to be granted, the Applicant must satisfy the three principles enunciated in the case of *Giella Vs Cassman Brown & Co. Ltd [1973]EA 358*. I need not repeat those principles herein save to say that as regards prima facie case with probability of success, the Applicant's Counsel submitted that the Applicant has demonstrated that he is the registered owner of land parcel number Nzau/Kithumba/535 and that the Respondents have constructed on the said Nzau/Kithumba/535, an issue the counsel submitted that the second Respondent has confirmed in his own affidavit. On the other hand, the second Respondent's counsel submitted that the Applicant has not discharged the above principle. The counsel pointed out the Respondents have been in control and occupation of the suit property for decades and have gone ahead to put up permanent structures in addition to cultivating on it.

5) On the issue of the second principle of an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Applicant's counsel submitted that in all the pleadings before the court the Applicant has demonstrated the loss that he would incur if the orders sought are not granted. The counsel went on to submit that in any case the construction and use of the land in dispute by the Respondents deny the registered owner of the use and enjoyment of the land thereby occasioning great loss and hardship to the Applicant.

6) The counsel for the Respondents submitted that the Applicant has not demonstrated the irreparable harm that will befall him taking into consideration that he does not reside on the subject suit land.

7) Regarding the third principle of if the court is in doubt, it will decide the application on the balance of convenience, the Applicant's counsel submitted that the same tilts in favour of the Applicant since he has demonstrated that he is in occupation and use of the suit land. The counsel for the Respondents opined that upon considering the balance of convenience the court should order for status quo to be maintained.

8) I do note that the Applicant herein has in his supporting affidavit deponed that he is the registered owner of land parcel number Nzau/Kithumba/535 and that the Respondents have trespassed into it and proceeded to construct a permanent house, cultivated and have also been on grazing the said land. The Applicant is silent on when the Respondent entered into occupation of the suit land. The second Respondent in his replying and supplementary affidavits does not deny the allegation of occupation save that he says that the same is for over 50 years. Given those circumstances, the appropriate orders to make in this application is for status quo to be maintained pending the hearing and determination of the substantive suit herein. In the circumstances, I order that there be status quo as at the time of filing the application dated 20th December, 2017. I further order that each of the parties shall bear their own costs.

Signed, dated and delivered at Makueni this 16th Day of May, 2018 .

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

Mr. Mulei for the Applicant

Mr. Hassan holding brief for Mr. Mutuku for the respondents

Mr. Kwemboi Court Assistant

Mbogo C.G Judge

16/5/2018