REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 38 OF 2017

JOHN MUROGI TOKATHENYA.....PLAINTIFF

VERSUS

JOHN KITHINJI GICHIB.....1ST DEFENDANT

KITHEKA KITHINJI.....2ND DEFENDANT

RULING

INTRODUCTION

The application before me is the Notice of Motion dated 5th June, 2017 brought under Order 40 Rule 1 (a) and (b) CPR Sections 3 and 3a CPA.The applicant is seeking a temporary injunction to restrain the defendants whether by themselves, their agents, employees, family members or howsoever from trespassing or fencing, threatening, making new boundaries and sub-dividing the suit land and claiming ownership of the suit land and/or in any manner interfering with the plaintiffs unserveyed land situated at Nkaraku village Gacigongo sub-location, Tharaka location, Mumoni Division, Murini sub-county in Kitui County within the Republic of Kenya pending the hearing and determination of this application. He also sought a second prayer for a temporary injunction order pending the hearing and determination of the suit. That application was brought under certificate of urgency which upon being placed before me sitting as the duty court and upon considering the supporting affidavit and the materials relied in support thereof, I certified the same urgent and granted temporary injunction orders pending the hearing and determination of this application.

In a supporting affidavit sworn on 5th June, 2017 the applicant deposed that he is the legal owner of the suit property having acquired the same in 1981 as an inheritance from his father, Tukathenya Mbwee (deceased).

The applicant further deposed that their family members met on 2nd day of December, 2006 and sub-divided the family land among him and all his siblings. Following the subdivision of the ancestral land, the plaintiff/applicant deposed that he is the owner of the suit property.

The applicant further stated that on or about 23rd December, 2008, the 1st respondent entered into the suit property and started fencing destroying his fence, cutting down trees and sub-dividing the suit land without his consent. The applicant further deposed that he reported to the local administration who have failed to resolve the dispute.

The respondents in a replying affidavit sworn on 14th August, 2017 denied the applicant's averments and stated that the subject of this suit is unadjudicated and unserveyed land which is an ancestral land. The respondent contend that they have their own distinct portion of the anadjudicated and unserveyed land which is very different from that of the plaintiff/applicant. The respondent argued that they have never ventured onto the plaintiff's portion which is separate and distinct from theirs.

I have considered the affidavits both in support of the said application. I have also considered the numerous affidavits in opposition to the application. The applicant is seeking an equitable relief of injunction whose principles are now well settled in the celebrated case of GRELLA –VS- CASSMAN BROWN CO. LTD (1973) EA AT PAGE 358. The three principles are set out as follows:

1. **An applicant must establish a prima facie case.**

2. **An applicant must demonstrate that he will suffer an injury for which damages will not be sufficient remedy.**

3. **Where the court is in doubt, it may decide the case on a balance of convenience.**

The subject of this is a parcel of land which is unserveyed. The plaintiff averred that he inherited it from his late father one Tokathenya Mbwee.

The applicant's claim in my view is a customary land rights which are governed under the community Land Act No. 27 of 2016. Customary Land rights are defined in the preliminary of the Community Land Act as follows:

"Refer to rights conferred by or derived from African Customary Law, customs or practices provided that such rights are not inconsistent with the Constitution or any written law."

Section 5 (2) provided that Customary Land Rights shall be recognized, adjudicated for and documented for purposes of registration. The applicant's claim in the suit land under the Customary Land Rights is yet to be recognized, adjudicated for and documented for purposes of registration until that exercise is undertaken, the applicants right as an individual cannot be said to have crystalized to require the protection of the law. The applicant in my view has not met the requirements for the grant of injunction orders as set out in the celebrated case of **Grella –Vs- Cassman Brown Co. Ltd (1973) EA.** The first principle is that an applicant must establish a prima facie case with a probability of success at the main trial.

The second principle is that an applicant must show that he shall suffer injury for which damages will not be an adequate remedy and where the court is in doubt, it shall decide the case on a balance of convenience. There is no doubt in my mind that the applicant has not met the first two principles. Applying the third principle to this case, the balance of convenience lies in making the following orders which I hereby do:

1. **The application dated 5th June, 2017 is hereby dismissed.**

2. **The parties to maintain the status quo pending the adjudication of the area by the Ministry of lands.**

3. **Each party to bear his own costs of this application.**

Read, delivered and signed in the open court this 10th day of May, 2018.

Hon. E. C Cherono (Mr.)

ELC Judge

In the presence of:

1. Applicant

2. 1st respondent

3. 2nd respondent

4. Ijabo-Court Clerk