



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC NO. 45 OF 2017

GREGORY D. MUTANGILI

(suing as the personal representative of the estate of the late

DANIEL MUTANGILI..... PLAINTIFF

VERSUS

COSMAS MULUI MUUMBI.....1ST DEFENDANT /RESPONDENT

CHRISTOPHER K. MBINA....2ND DEFENDANT /RESPONDENT

JOSEPH M. MAINGI.....3RD DEFENDANT /RESPONDENT

RULING

1) The notice of motion application for ruling is the one dated 27th March, 2017 and filed in court on the 28th March, 2017. It is expressed to be brought under order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act of the Laws of Kenya and all enabling provisions of the law for orders :-

I. Spent

II. Spent

III. Pending the hearing and final determination of the suit herein, the Honorable Court be pleased to issue a temporary injunction against the Defendants, their agents, servants and/or representatives from entering, taking possession, and /or in any other manner interfering with Plot Number 17 within Kilome Market within Kilungu Sub County.

IV. Pending the hearing and determination of the suit herein, the Honourable Court do issue a mandatory injunction for the removal of the Defendants form Plot Number 17 Kilome Market.

V. The orders herein be enforced by the officer in-charge Kilome Police Station.

VI. Costs be provided for

2) The application is grounded on the grounds on its face and is supported by the supporting and supplementary affidavits Gregory D. Mutangili, the first Plaintiff/Applicant herein. The two were sworn at Nunguni and Machakos on the 27th March, 2017 and 12th June, 2017 respectively. The Application is opposed by the Respondents vide the replying and further affidavits of Christopher K. Mwina, the second Respondent, both sworn at Nairobi on the 29th May, 2017 and 23rd February, 2018 respectively.

3) On the 2nd May, 2017 the court directed that the application be disposed off by way of written submissions. On the 1st March, 2018 the respondents indicated that they would not file any submissions and as such the submissions on record are those from the Applicant.

4) The Application's submissions are that the Respondents have never filed a defence to the Applicant's action and it is presumed that they are not opposed to the suit.

5) The Applicant further submitted that parcel of land known as number 17 Kilome Market belongs to Daniel Mutangili (*hereinafter referred to as the deceased*) and that the Applicant is his legal representative as can be seen from the letters of administration annexed to his supporting affidavit.

6) Regarding Judicial Review No. 6 of 2017 where the second Respondent alleges that the County Government of Makueni has acknowledged that the suit property belongs to one Peter N. Ndula and Peter J.K Walya as per the annexed order to the second Respondent's replying affidavit, the Applicant pointed out the second Respondent is not a party to the suit in question and neither has he demonstrated his interest in the plot and nothing was exhibited to show/prove that the County Government of Makueni has acknowledged that the deceased is not the owner of the plot in question. The Applicant further submitted that the Applicant is not named as a party in the Judicial Review proceedings as an interested party.

7) Finally the Applicant submitted that he has met the conditions for the grant of order of injunction set out in the case of **Giella Vs Cassman Brown Case**. The Applicant added that should the suit property be transferred to a third party (*emphasis are mine*) the same cannot be compensated by way of damages.

8) In an application for interlocutory injunction, the Applicant must satisfy the three principles set out in the famous case of **Giella Vs Cassman Brown and Co. Ltd [1973] EA 358**.

9) The principles are:-

- 1) An Applicant must show a prima facie case with a probability of success,
- 2) An injunction will not normally be granted unless the Applicant might suffer irreparable injury,
- 3) When the court is in doubt, it will decide the application on the balance of convenience.

10) From the affidavit evidence before me, I do note that although the Applicant did annex a copy of grant of letters of administration intestate dated 15th March, 2004 to his supporting affidavit as GDM 1, he did not disclose whether or not he was latter issued with a confirmed grant to show how plot number 17 Kilome Market was to be devolved but this is besides the point since annexure GDM1 confers upon him the authority to administer the estate of the deceased. On the other hand, the Respondent rely on the order issued on the 9th May, 2017 in the Misc. Application JR no. 6 of 2017 where the parties were Peter N. Ndolo and Peter J.K Walya (*as Exparte Applicants*) with the County Government of Makueni being the Respondent. The Applicant in this matter before me was not a party in the miscellaneous application JR No. 6 of 2017. The Applicant appears to have been condemned unheard. Under the circumstances, I am of the view that the most appropriate step to take at this juncture is to issue an order of status quo. I, therefore, order that there be status as at the time of filing this suit pending the hearing and determination of the suit herein.

Signed, dated and delivered at Makueni this 11th day of June, 2018.

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

Mr. Munyasia for the Defendant/Respondents.

The Plaintiff/Applicant

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

11TH JUNE, 2018