



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 90 OF 2014

SAMUEL MWANGI MBATHI.....PLAINTIFF

-VERSUS-

CHARLES MAINA MARUGA.....1ST DEFENDANT

NELIUS WANGUI MUGO.....2ND DEFENDANT

RULING

1. The plaintiff took up the originating summons on 5th May, 2014 and simultaneously filed a notice of motion dated 28th April, 2014 seeking the following orders;

1. Spent

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3. That an order of temporary injunction do issue restraining the defendants/ respondents either by themselves, their relatives, servants, employees, agents, assignees or anybody claiming under or in their name from cultivating, farming, entering, trespassing, encroaching or in any way whatsoever interfering with the plaintiffs/applicants quiet occupation, use and possession of land parcel number Konyu/Gakuyu/662 pending the hearing and determination of this suit.

4. That this honourable court do issue a prohibitory order against registration of any transaction relating to land parcel number Konyu/Gakuyu/662.

5. That costs be paid by the defendants/ respondents.

2. Prayers 2 and 4 in the application were granted on an interim basis but the interim orders were not extended after 5th June, 2014. This application has never been prosecuted to date.

3. The defendants/applicants have now filed the notice of motion dated 23rd May, 2018 seeking the following orders;

a. That pending the hearing and determination of this suit, the respondents their agents and/or servants be restrained by a temporary injunction from encroaching, trespassing, subdividing, fencing, developing, leasing out, selling of further dealings with the parcel of land LR No. Konyu/Gakuyu/662.

b. Costs be provided for.

4. The application is premised on the grounds that the plaintiff/respondent has started constructing on the suit property while the suit is still pending. The application is supported by the affidavit sworn on 23rd May, 2018 where the grounds are reiterated. In addition, the applicants have deponed that they are the beneficial owners of the suit property and that no one lives there.

5. In support of their case, the applicants have annexed photographs showing the ongoing activities on the suit property marked **CNI**.

6. The application is not opposed.

7. This being an application for temporary injunction, the issue I am required to determine at this stage of the proceedings, is whether the defendants (applicants) have made up a case for being granted the temporary order of injunction sought.

8. With regard to that issue, it is trite law that for this court to grant an order of temporary injunction, the applicants must satisfy the conditions set in the celebrated case of **Giella vs Cassman Brown (1973) EA 358** where it was stated:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. On whether the applicants have established a *prima facie* case with probability of success, I take the following view of the matter; whereas there is evidence that the applicants have been registered as proprietors of the suit property since 2014 and remain so registered to date, there is also evidence that the respondent has been in occupation and use of the suit property for a long period of time. The pleadings filed in this case, show that contrary to what the applicants allege that no one lives in the suit property, the plaintiff/respondent in paragraphs 3 and 4 of his supporting affidavit (to the motion dated 28th April, 2014) and paragraphs 3 and 4 of his supporting affidavit (to the originating summons), depones that he has been in occupation of the suit property for 27 years and is in danger of being evicted by the applicants. This position is confirmed in the demand letter by C. M. King’ori advocate dated 15th March, 2014 where the counsel, (acting for the defendants/applicants), acknowledges that the plaintiff/respondent has occupied the suit property for the last 27 years. In paragraph 3 of the aforesaid letter, he states: -

“That you have been a licensee of our client on the said parcel of land and you have so occupied the land for about 27 years facts whereof are within your knowledge. Our instructions therefore are to demand from you which we hereby do, as follows;

- **That you vacate from our client’s land within the next Thirty (30) days from the date hereof**
- **That you remove your property, structures and fixtures from our client’s land within the above stated period.**

10. Whereas **Section 26** of the Land Registration Act, 2012 (LRA 2012), imposes an obligation on this court to take the applicants, who are the registered proprietors of the suit property, as the *prima facie* owners, it is however noteworthy that the registration of the applicants is subject to all or any of the overriding interests provided under **Section 28** of the LRA, 2012. As can be noted from **Section 28** *supra*, some of the overriding interests to the title held by the applicants include- rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or prescription.

11. As it is not in doubt that the respondent is in occupation of the suit property, I hold in view that since the applicants ownership of the suit property is under challenge and there being evidence that the respondent is and has been in occupation of the suit property for a long period of time, granting the orders as prayed will give the applicants an opportunity to evict the respondent from the suit property before he is given an opportunity to prosecute his case. Under the circumstances, I find there is need to preserve the suit property pending the hearing and determination of the suit. Therefore, in exercise of the powers granted to this court under **Section 3A** of the Civil Procedure Act and **Order 40(1)** of the Civil Procedure Rules, I order that the *status quo* obtaining in respect of the suit property be maintained pending the hearing and determination of the suit. However, to ensure the substratum of the suit does not change, this court restrains the respondent from subdividing, fencing, developing further structures or selling LR No. Konyu (Gakuyu/ 662) pending the hearing and determination of the suit.

Orders accordingly.

12. Costs of the application to abide the outcome of the suit.

Dated, signed and delivered in open court at Nyeri this 17th day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

Charles Maina Muruga – 1st defendant/applicant

Nelius Wangui Mugo – 2nd defendant/applicant

Court assistant - Esther