



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 395 OF 2017**

**ALEXANDER MWANGI KIHARA.....PLAINITFF/APPLICANT**

**VERSUS**

**WAMBUI KIHARA MBURU.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff is the son of the Defendant. The Defendant is the registered owner of LOC 3/GITURU/223 as shown on the copy of the title annexed to the suit. On the 8/6/17 the Plaintiff filed suit against his mother seeking a declaration that the Defendant holds 6.85 acres out of the suit land in trust for him. He claims that he has lived on the suit land since birth and now he is married with children.

2. It would appear from the record that the Defendant has not been served with the summons to enter appearance and file defence and therefore have filed none.

3. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion seeking the following orders;

a) That due to the urgency hereof, service of this application be dispensed with, the same be certified urgent and it be heard exparte in the 1<sup>st</sup> instance.

b) That upon hearing this application ex-parte, this Honourable Court be and is hereby pleased to issue an order of injunction restraining the Defendant/respondent either by herself, servants, agents and/or any person acting through her from evicting, offering for sale, selling, transferring, bequeathing and/or in any other manner interfering with the Applicant's quiet and peaceful occupation of the property known as Title LOC.3/GITURU/223 pending the hearing and determination of the application herein inter-parties.

c) That upon hearing this application ex-parte, this Honourable Court be and is hereby pleased to issue an order of injunction restraining the Defendant/respondent either by herself, servants, agents and/or any person acting through her from evicting, offering for sale, selling, transferring, bequeathing and/or in any other manner interfering with the Applicant's quiet and peaceful occupation of the property known as Title LOC.3/GITURU/223 pending the hearing and determination of the suit herein.

d) That the costs of this application be provided for.

4. The application has been grounded by the grounds annexed to the application. Interlia, that the Defendant holds the suit land in trust for the Plaintiff and she has threatened to evict the Plaintiff from the suit land.

5. The Defendant opposed the application and filed a lengthy replying affidavit in which she denied that she has bequeath the suit land or 6.83 acres to the Plaintiff. She states that she is a mother of 5 children and several grandchildren whom at her age (over 90 years) desires to give land albeit the interference by the Plaintiff who she terms as greedy. She denied that the suit land is trust land. She insists that the land did not belong to the Plaintiff's father therefore the question of trust does not arise. She states that she has no plans to evict the Plaintiff from the suit land.

6. She further disclosed that the existence of a case ELC No 90 of 2015, Nairobi where she sued the Plaintiff and his brother for removal of caution. The suit is still pending and opined that the current suit should be stayed to allow the Nairobi one to be determined to its full conclusion.

7. The parties filed written submissions which I have carefully read and considered.

8. The question for determination before this Court is whether the Applicant is entitled to the order of temporary injunction pending the determination of this suit.

9. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, an applicant must show a prima facie case with a probability of success, secondly 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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

10. The Court of Appeal in **Mbao vs First American Bank of Kenya Ltd & two others C.A. No. 39 of 2003 eK.L.R** defined a prima facie case in the following terms;

“A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

11. It is not in dispute that both the Plaintiff and the Defendant reside on the suit land. The suit land is registered in the name of the Defendant. The Plaintiff has claimed that the land is subject to customary trust for which he has based his claim. Determination of trust is a question of evidence. This is reserved for the trial Court. Whether that will succeed is not a matter for this application. The Plaintiff has not led any evidence, at least at the prima facie stage, to prove a prima facie case. He has stated that the Defendant has threatened him with eviction. No evidence was placed before this Court to support that allegation. The Defendant has stated that she has no intention of evicting the Plaintiff. Her major concern is to share her property in her lifetime amongst all her children, the Plaintiff included. It is also on record that the suit land is encumbered by a caution filed by the Plaintiff that still subsists and is a subject of the pending case in ELC No 90 of 2015. It is not lost on the Court that despite filing suit on 8/6/17, he has not served the Defendants, a period of over one year later. I hold and find that the Plaintiff has not established a prima facie case with a probability of success.

12. Will the Plaintiff suffer any irreparable injury? The Plaintiff has pleaded an alternative prayer for refund of the total sums expended on the developments on the suit land. The import of this is that the injury if any is capable of being compensated in monetary terms subject to valuation. Further the Plaintiff has not placed any material before this Court that he will suffer irreparable injury should the application be declined. Similarly, the application fails on this ground.

13. It is disclosed by both parties on record about the subsistence of ELC No 90 of 2015 filed in Nairobi between the parties and respecting the same suit land. I find that this suit offends section 6 of the CPA. I **order and direct that ELC 395 of 2017 – Muranga be and is hereby stayed pending the determination and disposal of ELC No 90 of 2015**. This is to save judicial time and to avoid embarrassment to the Court in the event of two conflicting decisions in respect to the same parties and same subject matter.

14. The balance of convenience tilts to declining the application. it is not merited and is dismissed with costs to the Plaintiff.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>ST</sup> OCTOBER 2018.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff – Absent

Mbugua HB for Mbabu for the Defendant

Irene and Njeri, Court Assistants