



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 59 OF 2017

JOHN NYEKI KATIKU.....PLAINTIFF/APPLICANT

VERSUS

SIMON MUINDE W. KATIKU.....DEFENDANT/RESPONDENT

RULING

1. There is before me a notice of motion application dated 5th April, 2017 and expressed to be brought under Order 51 Rule 1, Order 40 Rules 1 and 4 of the Civil Procedure Rules and all enabling provisions of the law for orders:-

1) Spent

2) That this honourable court do issue temporary orders of injunction against the defendant by himself, his servants and/or employees and or agents restraining them from interfering with, evicting the Plaintiff, denying the Plaintiff installation of power lines to connect power to his house and/or interfering in whatever manner with the Plaintiff's peaceful and quiet enjoyment on parcel of land namely Mukaa/KonzaKiimaKiu Block 1/82 until this application is heard and determined.

3) That this honourable court do issue permanent orders of injunction against the defendant by himself, his servants and/or employees and or agents restraining them from interfering with, evicting the Plaintiff, denying the Plaintiff installation of power lines to connect power to his house and/or interfering in whatever manner with the Plaintiff's peaceful and quiet enjoyment on parcel of land namely Mukaa/KonzaKiimaKiu Block 1/82 until the present suit is heard and determined.

4) That this honourable court be pleased to order cancelation and nullification of title deed for parcel No. Mukaa/KonzaKiimaKiu Block 1/82 issued in the name of the defendant and subsequently order subdivision, distribution of the said property among the family members the Plaintiff included.

5) That the costs of the application be provided for.

2. The application is supported by the affidavit of John Nyeki Katiku, the Applicant herein, sworn on 5th April, 2017.

3. It is opposed by the Defendant/Respondent vide his grounds of opposition dated 3rd October, 2017 and filed in court on 4th October, 2017. In his grounds of opposition, the Respondent has stated that:-

1) That the defendant is the registered owner of the suit property known as Mukaa/KonzaKiimaKiu Block 1/82 with absolute rights to the exclusion of any other person including Plaintiff.

2) That the Plaintiff is a trespasser in the suit property.

3) That being trespasser, the Plaintiff has not come to court with clean hands and cannot therefore purport to seek injunctive orders against the defendant.

4) That the Plaintiff's prayers are underserved and the application ought to be dismissed with costs.

4. On the 23rd April, 2018 the court directed that the application be disposed off by way of written submissions.

5. The Applicant's counsel in his submissions stated that the application meets the three principles set out in famous case of ***Giella Vs Cassman Brown and Co. Ltd [1973] EA 358*** for the grant of injunctive orders. I need not repeat the three principles herein.

6. Regarding the principle of whether or not the Applicant has shown a prima facie case with probability of success, the Applicant's counsel submitted that the father of both the Applicant and the Respondent was a member of Kalembwani and Ngaamba Farmers Ltd prior to his death. That upon his demise, the gratuity/pension that was paid to his family was used to acquire the suit property from the said Kalembwani and Ngaamba Farmers Ltd. That the Respondent being the first born in the family, had his name registered to hold the property in trust for the rest of the family.

7. The counsel further submitted that in or about the year 1999 the Respondent caused title deed number Mukaa/KonzaKiimaKiu Block 1/82 to be issued in his name without the consent from the rest of the family members. The counsel submitted that the Applicant has a prima facie case with probability of success in the sense that the suit property was fraudulently registered in the name of the Respondent. On the other hand, the Respondent's counsel has submitted that assertions of fraud are not plausible as they are mere allegations without proof and cannot form the basis of granting an injunction against the Respondent. The counsel submitted that the Applicant has failed to establish a prima facie case with probability of success and added that it is the Respondent who is entitled to the suit property since he is the registered owner with a good title.

8. On the issue of whether or not the Applicant will suffer irreparable loss that cannot be compensated by an award of damages, his counsel submitted that the Applicant has lived on the suit property for many years since 1974. He went on to submit that the Applicant has developed the suit property and put up permanent structures. The counsel further submitted that the Respondent has threatened to evict the Applicant and has gone further to refuse him to install electricity power thus interfering with the Applicant's quiet possession and hence occasioning the Applicant great loss and damage.

9. The counsel for the Respondent submissions were that the Applicant has never owned the suit property and that he cannot expect to benefit from his actions of trespass. The counsel was of the view that there is no foreseeable loss that the Applicant stands to suffer if the orders sought are not granted.

10. As for the third principle of if the court is in doubt, it will decide on a balance of convenience, the Applicant's counsel's submissions were that the Respondent having not responded to the application then that is an indication that he stands to suffer no harm if the orders sought are granted to which the Respondent's counsel replied that it was not the duty of the Respondent to prove at this stage that the granting of the orders will inconvenience him. The counsel added that it is clear that the one who is likely to suffer most if the orders sought are granted is the Respondent.

11. I have read the application and the affidavit in support as well as the grounds of opposition. I have also read the submissions that were filed by the counsel on record for both parties. I do note that in paragraph 4 of the supporting affidavit, the Applicant has deposed that in 1971, the two widows of his father received their husband's pension which they used to purchase two parcels of land at Marwa Co-operative Society -Ngaamba. He goes on to depose that the widows were requested to register the two parcels in the names of their sons. Thus the name of Simon Muinde W. Katiku and Michael Kimweli Katiku were registered to hold the two parcels in trust for the other family members. The Applicant goes on to depose in paragraph 5 of his affidavit that in 1974, each house of his deceased father settled in its respective parcel of land thus the Applicant's family settled in Mukaa/KonzaKiimaKiu Block 1/82. He further deposes in paragraph 12 that when he visited the Land Registry, he realized that the Respondent had caused the suit property to be registered in his name leaving out the other family members.

12. The Respondent has in ground one of his grounds of opposition stated that he is the registered owner of the suit property known as Mukaa/KonzaKiimaKiu Block 1/82 with absolute rights to the exclusion of any other person including the Applicant. Prima facie that is the position in law. I do note that however, the Respondent has not controverted the averments of the Applicant as to how he came to be registered as the owner of the suit property or how it was acquired.

13. Given the above circumstances and guided by practice direction number 32 of the Environment and Land Court Practice Directions, my finding is that this is a matter that is fit for an order of status quo given the fact that the litigants herein are all relatives who are fighting to retain the suit property which appears to have been acquired through the proceeds from their late father's pension. I, therefore, order that there be an order of status quo as at the time of filing this suit. This order will remain in force pending the hearing and final determination of the substantive suit.

It is so ordered.

Signed, dated and delivered at Makueni this 30th Day of October, 2018

Mbogo C.G.

Judge

IN THE PRESENCE OF:

Prof. Kiema Wangai holding brief for Mrs. Wambua for the Plaintiff

M.M. Kimuli & Co. Advocate for the Defendant/Respondent absent

Kwemboi- Court Assistant

Mbogo C.G.

Judge