



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT MAKUENI

ELC NO. 22 OF 2018

PATRICK NDUNDA D WAMBUA.....PLAINTIFF/RESPONDENT

VERSUS

ALPHONCE NGUNGI WAMBUA..... DEFENDANT/APPLICANT

RULING

1. There is before me a notice of motion application expressed to be brought under order 40 Rule 2 and 4, Order 51 Rules 3 and 10 of the Civil Procedure Rules, Sections 1A, 3A and 63(c) of the Civil Procedure Act, Section 19 of the Environment and Land Court Act and all enabling provisions of the law for orders;

1) Spent

2) Spent

3) That pending the hearing and determination of this application , a temporary injunction does issue restraining the Defendant, his agents, servants, relatives or any such other persons whether acting on their own or on the Defendant's behalf from entering into, interfering with trespassing into, wasting, cutting trees or shrubs developing or in any such other way interfering with Plaintiff's land No. Ukia/Kilala/672 measuring 4.6. Ha (approximately 11.3 acres) duly surveyed, beacons out, title and belonging to the Plaintiff pending the hearing and determination of this application.

4) That the Honourable Court Subsequent to the hearing of this application does confirm the Orders in paragraph 3 above pending the hearing and determination of this suit.

5) That the Honourable Court does give directions as may facilitate the expeditious hearing and determination of this application.

2. The application is dated 16th March, 2018 and was filed in court on 20th March, 2018. It is predicated on the grounds on its face and is supported by the affidavit of Patrick Ndunda Wambua, the Applicant herein, sworn at Nairobi on the 16th March, 2018.

3. Alphonce Ngungi Wambua, the Defendant/Respondent, has opposed the application vide his replying affidavit sworn at Machakos on the 3rd May, 2018 and filed in court on even date.

4. On the 9th April, 2018 the court directed that the application be disposed off by way of written submissions.

5. In his submissions, the Plaintiff's counsel dwelt on the issue of ownership of land parcel number Ukia/Kilala/ 672 by the Applicant and urged the court to grant the order of injunction. On the other hand the Respondent's counsel cited the famous case of ***Giella Vs Cassman Brown and Company Ltd [1973] EA 358*** that has set out the principles for the grant of injunctive orders. I need not repeat those principles herein.

6. On whether or not the Applicant has shown a prima facie case with probability of success, the Respondents counsel submitted that the Respondent has through his replying affidavit demonstrated how he has developed his portion of land by constructing a permanent building and planting mature fruit trees.

7. On whether or not the Applicant has shown irreparable injury which would not adequately be compensated in damages, the Respondent's counsel submitted that the Applicant has not. The counsel went on to submit that if anything, it is the Respondent who stands to suffer irreparable loss if the orders sought are granted. He did not submit on whether or not the Applicant has satisfied the first principle.

8. Regarding the third principle of if the court is in doubt, it will decide on a balance of convenience, the Respondent's counsel submitted that the same tilts towards non issuance of the orders.

9. I do note that the Applicant has in paragraph 3 of his supporting affidavit deposed that he is the owner of land parcel number ukia/Kilala/672 measuring 4.6 hectares.

10. He goes on to depose in paragraph 4 of the affidavit that the Respondent owns land Parcel Number Ukia/Kilala/929 measuring 4.05 hectares. In paragraph 5, he deposes that he purchased the land in the 1970s through his mother but according to the Respondent, the suit land was purchased by their mother. The Respondent goes on to depose in paragraph 6 and of his affidavit that their mother subdivided the land between him and the Applicant and the boundary separating the two portions was a gully and a marked tree. He goes on to attach a copy of his mother's will at paragraph 22 of his affidavit.

11. Whereas I am in agreement with the Applicant's counsel's submissions that prima facie, the Applicant is the registered proprietor of land parcel number Ukia/Kilala/672, the Applicant has not adduced evidence that meets the three principles set out in the **Giella Vs Cassman Browns Case**. However it is clear that both parties herein are brothers who are in agreement that the suit property was bought by their late mother even though they seemed to disagree on who provided the funds. There is no doubt that the Respondent has undertaken some development on a portion which the Applicant says is his part of his land. Given those circumstances, I am of the view that an order of status quo whereby each party continues to occupy their current portions on the ground pending the hearing and determination of the substantive suit is the most appropriate. I, therefore, proceed to issue the order of status quo. Each party will bear their cost.

Signed, Dated and Delivered at Makueni this 2nd day of November, 2018.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Mr. Kyalo for the Defendant/Respondent

No appearance for the Plaintiff/Applicant

Plaintiff/Applicant

Defendant/Respondent

Mr. Muchuku Court Assistant

MBOGO C.G, JUDGE

2/11/2018