



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 358 OF 2015**

**SIMON KIMEMIA MUTHON.....PLAINTFF**

**VERSUS**

**MOSES MUGO MARINGA.....DEFENDANT**

**RULING**

The plaintiff filed this suit on 21st December 2015 seeking an order of permanent injunction restraining the defendant, his servants, agents or employees from committing acts of trespass, waste or other acts with a view to alienating the land parcel No. MBEERE/MBITA/731. He also sought an order for the eviction of the defendant from the said land and that the caution placed thereon by the defendant be removed as well as damages for the trespass and costs. The basis of the claim is that whereas the plaintiff is the registered proprietor of land parcel No. MBEERE/MBITA/731 (the suit land herein), the defendant has wantonly trespassed thereon and continues to commit acts of waste with a view to alienating, damaging and depriving the plaintiff of his title to the same.

Simultaneously with the plaint, the plaintiff filed a Notice of Motion under **Orders 40 and 51 of the Civil Procedure Rules** and **Sections 1A, 1B and 3A of the Civil Procedure Act** seeking the following orders:-

**1. Spent.**

**2. Spent.**

**3. An order of injunction be issued against the defendant, or anyone else purporting to act with authority or instructions of the defendant restraining them or any of them from committing any acts of trespass, waste or any other act with a view of alienating the plaintiff's land known as L.R No. MBEERE/MBITA/731 so as to defeat the plaintiff's legal title pending the hearing and determination of this suit.**

**4. A mandatory injunction be issued against the defendant evicting the defendant from the plaintiff's land known as L.R No. MBEERE/MBITA/731 pending the hearing and determination of this application and the suit, an order be issued removing the caution which the defendant has registered on the plaintiff's land L.R No. MBEERE/MBITA/731.**

**5. An order do issue to the OCS Kiritiri Police Station to supervise and enforce this order.**

**6. Costs of this application be provided for.**

The application is based on the grounds set out therein and supported by the affidavit of the plaintiff. The plaintiff's case is that whereas he is the registered proprietor of the suit land, the defendant and his family

have trespassed thereon and committed acts of waste, damage and alienation. The plaintiff has deponed that he bought the suit land from the defendant on 13th September 1973 for valuable consideration as per the copy of title deed annexed. However, the defendant has put a caution on the suit land yet he has no interest therein and unless restrained by this Court, he will continue to commit acts of waste and damage.

The defendant filed a defence denying those averments and adding that the suit land was allocated to him by his **MUTHIGA CLAN** on 13th September 1973 after which he settled thereon with his family. He added that when he went to collect his title deed in 2000, he found that the plaintiff had been registered as owner of the suit land since 16th January 1978 and a title deed issued to him on 21st December 2000 illegally. That he has been in open, continuous and un-interrupted occupation of the suit land since 1973 and has developed it extensively. The defendant therefore filed a counter-claim seeking a declaration that he has acquired the suit land by adverse possession having been in open, continuous and exclusive occupation thereof since 1973 and that the plaintiff's title to the suit land be cancelled and his suit dismissed.

In response to that application, the defendant filed a replying affidavit dated 7th March 2016 in which he deponed, inter alia, that the suit land was allocated to him by his **MUTHIGA CLAN** on 13th September 1973 and he immediately occupied it and built his home but when he went to collect his title deed, he discovered that the suit land was registered in the plaintiff's names since 16th January 1978 allegedly after he (defendant) had sold the land to the plaintiff. He denied having sold the suit land to the plaintiff nor trespassing on it adding that if the orders sought are granted, it would amount to evicting him. He added further that if the caution is removed the plaintiff will dispose of the suit land thus rendering his counter-claim nugatory.

However, in a supplementary affidavit, the plaintiff repeated that the defendant sold him the suit land in 1975 and annexed thereto copies of agreements. He denied that the defendant has acquired the suit land by adverse possession adding that the defendant had previously filed **EMBU HIGH COURT CASE No. 38 of 2003** which was dismissed.

The Court directed that the application be canvassed by way of written submissions which have now been filed by counsel for both parties.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

It is not in doubt that the suit land is registered in the names of the plaintiff. It is also obvious to me that the defendant is in occupation of the suit land and that is why among the remedies sought by the plaintiff is the eviction of the defendant therefrom. The orders being sought herein are:

- 1. An interlocutory injunction to restrain the defendant from committing acts of trespass on the suit land.***
- 2. A mandatory injunction to evict the defendant from the suit land.***
- 3. An order removing the caution from the suit land.***

An application for temporary injunction has to be determined in line with the now settled principles set out in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A 358*** which are:

- 1. The applicant must show a prima facie case with a probability of success.***
- 2. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages, and***
- 3. If in doubt, the Court will decide the application on the balance of convenience.***

A prima facie case as defined by the Court of Appeal in **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125.**

***“..... 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”.***

A party approaching the Court for such an order must do so with clean hands because, being a discretionary remedy, it will not be granted to a party who has himself not done equity. And as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1963 3 ALL E.R 772**, the Court will take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

Taking into account those broad principles, this Court is mindful of the fact that the plaintiff is registered as the owner of the suit land and is therefore entitled to all the rights and privileges that are protected by **Sections 24 and 25 of the Land Registration Act** which are similar to **Section 27 and 28 of the repealed Registered Land Act** under which the title to the suit land was issued. However, such registration is subject to the overriding interests protected by **Section 28 of the Land Registration Act** or **Section 30 of the repealed Registered Land Act**. Such rights include those that have been acquired or are in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. The defendant has pleaded that he has been in exclusive and continuous occupation of the suit land since 1973 and has therefore acquired it through adverse possession. Whether or not he will prove his case to the suit land by virtue of adverse possession is a matter for the trial Court. Counsel for the defendant has referred me to various authorities on how a party can acquire land through adverse possession. However, those authorities are not relevant for purposes of this application because that will be an issue to be proved by evidence during the trial. For now, I have an evenly balanced case between the plaintiff in whose names the suit land is registered but who is not in possession and a defendant who has no title but may very well have a claim thereto by virtue of the long period of occupation. In my view therefore, this application must be determined on the balance of convenience.

As indicated above, the defendant's occupation of the suit land is not really in doubt. If an order for temporary injunction is granted, it will have the effect of evicting the defendant from the suit land where he has lived and developed since 1973. It is not the policy of the Court to issue such orders at an interlocutory stage. Guided by the principle laid down in the **FILMS ROVER INTERNATIONAL CASE** (supra), it is my finding that the lower risk of injustice demands that I decline to issue the order of temporary injunction. After all, though he is the registered proprietor of the suit land, the plaintiff, unlike the defendant, has not been in occupation of the land. It would therefore be in the interest of justice that the status quo now obtaining on the suit land remains until this case is heard and final orders issued. The prayer for a temporary injunction is therefore not appropriate in the circumstances of this case and must be rejected.

The second prayer is that of a mandatory injunction to evict the defendant from the suit land. For the same reasons given above, that prayer is also not available to the plaintiff at this stage. More importantly, it is the law that a mandatory injunction can only be granted in an interlocutory application in special circumstances such as where the Court is satisfied that the case is a clear one. In **KENYA BREWARIES LTD & ANOTHER VS WASHINGTON OKEYO C.A CIVIL APPEAL No. 332 of 2000**, the Court of Appeal said:

***‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which can easily be remedied, or if the defendant attempted to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application’.***

Similarly, in **SHOWIND INDUSTRIES LTD VS GUARDIAN BANK LTD & ANOTHER 2002 1 E.A 284**, Ringera J. (as he then was) stated that:

***“As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant’s case is very strong and straight forward”.***

It is clear from what I have stated above that at this stage, none of the parties can claim to have a **“very strong and straight forward”** or **“clear”** case and therefore, the prayer for a mandatory injunction must also fail.

Finally, with regard to the removal of the caution lodged on the suit land, **Section 73 (1) of the Land Registration Act** grants the Court the power, on application, to remove a caution. In considering an application for the removal of a caution placed on land which is subject of a dispute, the Court will no doubt take into account the circumstances and justification for which the caution was lodged, what interests the person lodging the caution has on the land and what prejudice will be caused to the other party if the caution is removed. In the circumstances of this case, the suit land is registered in the names of the plaintiff but the defendant who has been in occupation thereof since 1973 has laid a claim to the same in adverse possession. Whether or not he will prove his case is not for determination at this stage. However, from the evidence before me, he has a justifiable interest to the suit land which can only be protected if the caution remains in place until this suit is heard and determined. If the caution is removed and the suit land is transferred to third parties, it will compromise the defendant’s case. On the other hand, the suit land remains registered in the names of the plaintiff and the only prejudice he will suffer, at least until this case is heard and determined, is that he cannot register any dealings on it. The title deed was issued to him on 21st December 2000 and until he filed this suit exactly five years later, he had not seen the need to apply to either the Land Registrar or the Court to have the caution removed. Surely he can wait a little longer while this case is heard and determined hopefully in the shortest time possible since a Judge has now been posted to the Environment and Land Court in Embu. I therefore decline to issue an order removing the caution placed on the suit land by the defendant.

The up-shot of all the above is that the plaintiff’s Notice of Motion dated 14th December 2015 and filed herein on 21st December 2015 is dismissed with costs.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**

Ruling dated, delivered and signed in open Court this 1<sup>st</sup> day of February 2017

Mr. Kagio for Hamilton Harrison & Mathews for Plaintiff present

Ms Muthoni Ndeke for Defendant absent.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**