



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 211 OF 2014**

LOISE MABUTI.....PLAINTIFF

VERSUS

NANCY WAMBUI.....1<sup>ST</sup> DEFENDANT

HESBON KIAMBATI.....2<sup>ND</sup> DEFENDANT

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 23rd February 2016 and filed herein on 25th February 2016. That application which is founded on ***Order 40 Rules 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act*** seeks the following orders:-

***1. Spent.***

***2. Spent.***

***3. That the defendants by themselves, their agents and/or servants be restrained by way of a temporary injunction against entering, trespassing, destroying crops or committing any acts of waste on the plaintiff's land parcels No. NGARIAMA/NGIRIAMBU/1036 and 1037 original NGARIAMA/NGIRIAMBU/135 pending the hearing and determination of the main suit.***

***4. Spent.***

***5. That this Honourable Court do issue a prohibitory order on land parcels No. NGARIAMA/NGIRIAMBU/1036 and 1037 pending hearing of the main suit.***

***6. That costs be provided for.***

The application is based on the grounds set out therein and supported by the affidavit of **LOISE MABUTI** the plaintiff herein.

It is the plaintiff's case that whereas the defendants are the registered proprietors of the land parcels No. **NGARIAMA/NGIRIAMBU/1036** and **1037** (the suit land), they (defendants) have never been in occupation of the said land whose registration was obtained fraudulently in 1979. That the defendants in the company of intoxicated youths forcefully entered the suit land on 17th November 2015 and again on 22nd February 2016 and cut down her crops and if not enjoined, this forceful entry will be a recipe for mayhem.

In opposition to that application, the 1st defendant **NANCY WAMBUI** swore a replying affidavit also on behalf of the 2nd defendant **HESBON KIAMBATI** in which she deponed, inter alia, that they are the registered proprietors of land parcel No. **NGARIAMA/NGIRIAMBUI/1037** as per the copy of search certificate (annexture **NWI**). That the said land parcel is also jointly owned together with others who are not parties in this suit and in any event, this application and suit have been filed over thirty years after the cause of action occurred. The defendants deny trespassing onto the plaintiff's land adding that they are the ones trespassing onto their land parcel No. **NGARIAMA/NGIRIAMBUI/1037**.

The application was canvassed by way of written submissions which have been filed by the firm of **IKAHU NGANGAH Advocate** for the plaintiff and **VICTOR ANDANDE Advocate** for the defendants.

I have considered the application, the rival affidavits together with the annexures thereto and the submissions by council.

In **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358**, the conditions for the grant of an interlocutory injunction were set. First, the applicant must show a prima facie case with a probability of success and 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. If the Court is in doubt, it will determine such an application on the balance of convenience.

A prima facie case on the other hand was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 K.L.R 125** as follows:-

***“A prima facie case in a civil application includes 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”.***

Being an equitable remedy, a party seeking an interlocutory injunction must do so with clean hands and such an order is issued at the discretion of the Court and not as a matter of course.

It is clear from the affidavit and annexures herein that the original land parcel No. **NGARIAMA/NGIRIAMBUI/135** was registered in the joint names of one **MUCHIRA NJERU** and **MABUTI W/O KARIUKI** in equal shares. That title was closed on 2nd February 1978 when that parcel was sub-divided to give rise to the suit land. It is the plaintiff's case as per the suit herein that the said sub-division was obtained fraudulently. That will be a matter to be determined at the trial by evidence. What is clear however is that apart from the two defendants herein, land parcel No. **NGARIAMA/NGIRIAMBUI/1037** is also registered in the names of **JAMES MURIITHI, BETH KARIMI NYAGA** and **JOHN KATHURI NYAGA** who are not parties to this suit. The record shows that an application to enjoin them in this suit was filed on 28th September 2015 but it has not been prosecuted to-date for reasons that are not clear. It would be improper to issue injunctive orders against registered owners of land parcel No. **NGARIAMA/NGIRIAMBUI/1037** when they are not parties to this suit. Similarly, it would not be equitable to issue any prohibitory orders with respect to the same land parcel without according the other joint owners an opportunity to be heard. In my view, there can be no prima facie case established where a party is seeking orders affecting persons who are strangers to the suit, In **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012**, the Court of Appeal while describing what a prima facie case entails observed as follows:

***“The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed”.*** Emphasis added

I am conscious of the caution that at this early stage of the trial, I should not make definitive and final

conclusions which must await the hearing of the witnesses' evidence and subjecting it to cross-examination. However, that does not mean that this Court should grant orders, even interlocutory ones, whose effects would be to curtail proprietary rights of strangers. In a situation such as this one, it cannot be said that the plaintiff's case "**is more likely than not to ultimately succeed**" – see NGURUMAN's case (supra). Clearly, unless the other registered proprietors of land parcel No. **NGARIAMA/NGIRIAMBUR/1037** are enjoined in this suit, the plaintiff's suit is unlikely to succeed. In my view therefore, the plaintiff has not made it a prima facie case with a probability of success with respect to the injunctive relief sought against the land parcel No. **NGARIAMA/NGIRIAMBUR/1037**. For the same reasons, there would be no justification in issuing prohibitory orders in respect to the same parcel of land.

With respect to land parcel No. **NGARIAMA/NGIRIAMBUR/1036**, the Green Card shows that it is registered in the names of **MABUTI KARIUKI** since 20th June 1979 although a caution was lodged by the 1st defendant on 8th February 2011. It is not clear if the said **MABUTI KARIUKI** who is named in the Green Card to land parcel No. **NGARIAMA/NGIRIAMBUR/1036** as the registered proprietor thereof is the same person as the plaintiff herein. However, the 1st defendant in her statement filed herein concedes that land parcel No. **NGARIAMA/NGIRIAMBUR/1036** belongs to the plaintiff and in the replying affidavit, the defendants deny having trespassed onto that land and allege instead, that it is the plaintiff who has always trespassed onto the land parcel No. **NGARIAMA/NGIRIAMBUR/1037**. In those circumstances, there would be no need to issue any prohibitory orders with respect to land parcel No. **NGARIAMA/NGIRIAMBUR/1036** which the defendants concede belongs to the plaintiff.

With regard to the interlocutory relief sought in respect to land parcel No. **NGARIAMA/NGIRIAMBUR/1036**, the defendants admit that it belongs to the plaintiff but deny trespassing thereon. The plaintiff has however deposed in her supporting affidavit that the defendants forcefully entered onto that parcel of land on 17th November 2015 and destroyed her crops and again on 22nd February 2016 when the 2nd defendant cut her (plaintiff's) son **SIMON MUCHIRA** on the head. Photographs of the damaged crops were annexed to that affidavit – annexure **LM 2**. A party seeking orders of interlocutory injunction must show the following:

- 1. That he has a prima facie case with a probability of success at the trial.**
- 2. That he will otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages; and,**
- 3. If in doubt, the Court will determine the application on the balance of convenience – *GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.***

A prima facie case as stated in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)**: is,

***"..... 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".***

From the circumstances of this case, I am satisfied that the plaintiff has made out a case for the grant of the interlocutory relief sought against the defendants with respect to land parcel No. **NGARIAMA/NGIRIAMBUR/1036**. The plaintiff's ownership of that land is conceded by the defendants and the photographs evidence suggests that indeed a crop growing thereon has been destroyed which amounts to acts of trespass which is in itself a clear violation of the law. I would agree with **WAKI J.** (as he then was) that where there is a clear transgression against the law, it cannot be argued that damages will be a sufficient remedy – **MOHAMED VS COMMISSIONER OF LANDS & OTHERS K.L.R (E & L) 1, 217.**

The plaintiff's prayer seeking a temporary injunction restraining the defendants, their agents and/or servants from entering, trespassing, destroying crops or committing any acts of waste on the plaintiff's

land parcel No. **NGARIAMA/NGIRIAMBU/1036** is therefore well merited and is allowed.

Ultimately therefore, after considering the plaintiff's Notice of Motion dated 23rd February 2016 and filed herein on 25th February 2016, I make the following orders:-

***1. The defendants themselves, their agents and/or servants are restrained from trespassing, entering, destroying crops or committing any acts of waste on the plaintiff's land parcel No. NGARIAMA/NGIRIAMBU/1036 pending the hearing and determination of this suit.***

***2. Costs in the cause.***

***3. The parties are directed to comply with the pre-trial directions so that this suit is heard and determined in the next twelve (12) months.***

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2017**

Ruling delivered, dated and signed in open Court this 31<sup>st</sup> day of March 2017

Plaintiff - absent

1<sup>st</sup> Defendant - absent

2<sup>nd</sup> Defendant - present

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2017**