



REPUBLIC OF KENYA
IN THE E.L.C. COURT OF KENYA AT EMBU

ELC NO. 325 OF 2015

WANJIRU NJUGUNA.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH KARIUKI WANGONDU.....1st DEFENDANT/APPLICANT

FRANCIS NDUNGU NJUGUNA.....2nd DEFENDANT

RULING

1. By a Plaint dated and filed on 25th August 2015, the Plaintiff filed suit against the 1st and 2nd Defendants alleging that they had fraudulently caused the transfer of Title No. KAGAARI/WERU/396 to the 2nd Defendant. It was pleaded that the Plaintiff's deceased husband was the rightful owner of the suit property.
2. The Plaintiff therefore prayed for judgement against the Defendants for a permanent injunction restraining the Defendants from invading, trespassing, occupying, cultivating, utilizing, remaining upon or from any way interfering with the suit property; costs and any other relief the court may deem fit to grant. It is not clear why the Plaintiff did not specifically seek a prayer for cancellation of the title deed of the suit property which she claims was fraudulently acquired by the 1st Defendant.
3. While the suit was pending, the 1st Defendant filed a Notice of Motion dated 7th June 2016 under certificate of urgency for an order of interlocutory injunction under Order 40 of the Civil Procedure Rules and an order for maintenance of the status quo pending the hearing and determination of the suit.
4. The said application was based upon the grounds shown on the face of the Notice of Motion and the supporting affidavit of the 1st Defendant. It was alleged that the Plaintiff had forcibly entered the suit premises and commenced cultivating it with a view to planting some crops thereon without a court order. The 1st Defendant attached a copy of his title deed to the supporting affidavit which indicated that he was registered as proprietor or about 30th August 1994.
5. The Plaintiff opposed the said application for injunction and filed a replying affidavit dated 24th June 2016 to that effect. In her said affidavit, she denied having entered and cultivated the suit property and stated that the 1st Defendant's application was merely meant to frustrate her effort to get back her property which had been fraudulently transferred.
6. The said Notice of Motion was fixed for hearing on 1st March 2017 when the same was canvassed before me. The 1st Defendant's counsel prosecuted the 1st Defendant's application while the Plaintiff's

counsel opposed the same. It is common ground that the 1st Defendant is in possession of the suit property. This was confirmed by both counsels. The Plaintiff's counsel informed the court that her client resides in Mwea.

7. The main issue for consideration is whether the 1st Defendant has met the requirements for the grant of an order of injunction as set out in the case of ***Giella Vs Cassman Brown & Co [1973] EA 358***. Has the 1st Defendant established a *prima facie* case with a probability of success? The 1st Defendant has established that he is the current registered proprietor of the suit property; he has established that he is in possession; and he has established that his right to peaceful enjoyment and use of the property has been interfered with or threatened with violation by the Plaintiff, her agents, servants or other persons acting through her. It is my considered view that the 1st Defendant has met the first requirement for the grant of an order of interlocutory injunction.

8. The second principle for consideration is whether the damage 1st Defendant may suffer as a result of violation of his right to property can be adequately compensated by an award of monetary damages. Given the nature of the alleged violation and the subject matter of the suit which is land, it is doubtful if an award of monetary damages may be adequate compensation in this case. It may even be difficult to quantify with any reasonable precision the quantum of losses. I am, therefore, satisfied that the 1st Defendant has satisfied the requirements of the 2nd principle.

9. The fulfillment of these two requirements are sufficient to entitle the 1st Defendant to the order of interlocutory injunction. Even if I were to consider the balance of convenience, the same would still tilt in favour of the 1st Defendant who is and who has been in possession for a long time.

10. The upshot of the foregoing is that the 1st Defendant's Notice of Motion dated 7th June 2016 is granted in terms of prayer No. 3 thereof pending the hearing and determination of the suit. In view of the granting of this order, it is not necessary to grant an order for maintenance of status quo as prayed. The costs of the application shall be in the cause.

11. I have noticed from Paragraph 7 of the Plaint that the Plaintiff caused a restriction to be entered against the suit property restricting any dealings with the property. It is hereby ordered that said restriction shall remain in force until this suit is concluded.

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **8th** day of **MARCH, 2017**

In the presence of Ms Migwi for the 2nd Defendant/Applicant and in the absence of the Plaintiff and the 2nd Defendant.

Court clerk Njue

Y.M.ANGIMA

JUDGE

08.03.17