



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 136 OF 2017

BETH WAIYEGO SAMSON

APPLICANT/PLAINITFF

VS

JEMIMMAH WANJIRU KARANJA

RESPONDENT/ DEFENDANT

RULING

1. On 9th February 2017, the Applicant filed a suit against the Respondent defendant, seeking orders that land parcel No. **Loc.11/Muchungucha/782**, be divided into two equal portions with separate titles for the Applicant and the Respondent and in default the Deputy Registrar be authorized to execute all the documents. The Applicant's claim is based on the fact that she together with the Respondent are registered joint owners over a piece of land which was transferred to them by their late father. The Respondent is the Applicant's sister. The land is 2 acres and each one of them is supposed to own 1 acre. She states that the Respondent has encroached on her ½ acre portion and is carrying out farming activities as well as cutting down trees, depriving her of income from the said ½ acre portion. Resultantly she states that the Respondent is holding 1 ½ acres instead of 1 acre.

2. Simultaneously the Applicant filed a Notice of Motion seeking the following orders; -

a) Spent

b) That an order for temporary injunction be issued against the defendant, her agents, servants, employees and or anybody claiming at their behest from alienating, clearing and cutting trees, or any way interfering with the ½ acre part of land parcel No. Loc. 11/MUCHUNGUCHA/782 that is in contention pending hearing of this application.

c) That an order of temporary injunction be issued against the defendant, her agents, servants, employees and or anybody claiming at their behest from alienating, clearing and cutting trees or any way interfering with the ½ acre part of land parcel No. Loc. 11/MUCHUNGUCHA/782 that is in contention pending hearing of this suit.

d) That costs of this application be provided for.

3. The application was supported by the affidavit of the Applicant dated the 9th February 2017 and based on the grounds stated therein. The Applicant contents that the Applicant and Respondent should hold 1 acre each. She deposed that she has tried to have the suit property partitioned into 1 acre each portions but the Respondent has been un-cooperative.

4. In resisting the application, the Respondent acknowledged that the suit property is owned jointly with

her sister, the Applicant but insists that in 2007 the Applicant agreed to transfer to her ½ acre whereupon she fenced and started doing farming on the portion. That the Applicant's intention was to transfer to her, her whole 1 acre but was stopped through caution by her daughter who resides on the remaining ½ acre of the land. She states that that is the reason why she has been in full and interrupted occupation of 1 ½ acres since 2007 planting crops and trees.

5. It was agreed that the application be canvassed by way of written submissions which both parties have filed. I have carefully considered the application, rival affidavits and annexures as well as written submissions and now proceed to determine the application.

6. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, an applicant must show a prima facie case with a probability of success, 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, and thirdly, if the court is in doubt, it will decide an application on a balance of convenience. The Court of Appeal in **Mbao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 eK.L.R)** defined a prima facie case in the following terms;

“A prima facie case in a civil application include 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”.

7. It is not in dispute that the Applicant and the Respondent are registered proprietors of the suit land in common measuring 2.0 acres. Section 26 of the Land Registration Act, 2012 states that; -

“the certificate of title issued by the Registrar upon registration, or to a purchaser of the land upon a transfer or transmission by proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except; -

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, and un procedurally or through a corrupt scheme”.

The Certificate of Official search dated 18th May, 2016 states on the proprietorship section that the proprietors are **BETH WAIYEGO SAMSON** and **JEMIMAH WANJIRU KARANJA**, the Applicant and Respondent in this application. There is no evidence in the certificate of official search to indicate that either of them hold title in the suit property in trust for the other. There is no evidence of a sale agreement or other document to indicate that there was a transfer of the Applicant's ½ acre to the Respondent. There is no evidence to rebut the tenancy in common between the Applicant and the Respondent and the contention by the Respondent that the Applicant agreed to transfer to her ½ acre for consideration is a triable issue that will be heard and determined on merit in the main suit. In the circumstances, therefore, this court holds that the Applicant has demonstrated a *prima facie* case with a probability of success.

8. In respect to adequacy of damages as compensation the Court of Appeal in the case of **Muiruri Vs Bank of Baroda (Kenya) Ltd 2001 e K L R 183** had this to say;

“besides, disputes over land in Kenya evoke a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”.

This is such a case that damages may not compensate the Applicant adequately.

9. If I was in doubt, (for which am not), the balance of convenience still tilts on the side of the Applicant.

10. In the upshot, this Court makes the following orders; -

(a) That a temporary injunction do issue against the Respondent/Defendant, her agents, servants, employees and or anybody claiming at her behest from alienating, clearing and cutting trees or any way interfering with the ½ acre part of land parcel No. Loc. 11/MUCHUNGUCHA/782 that is in contention pending hearing and determination of this suit.

(b) The parties being sisters, each party to meet their cost.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 7TH APRIL, 2017.

J. G. KEMEI

JUDGE

Coram

Before Hon. Jemutai – G Kemei

Court Assistant: Susan/Maureen

Plaintiff/Applicant: Mr. Ndegwa for Muchoki

Defendant/Respondent: Mr. Mbuthia

Mr Ndegwa: We are here for the ruling.

Ruling delivered in open court in the presence of Coram as above.

Mr. Ndegwa: May we have copies of the ruling.

Mr. Mbuthia: Same here.

Court: Copies of the ruling to be provided subject to the payment of the requisite fees.

J.G. KEMEI

JUDGE