



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 170 OF 2017

THOMAS KAMAU MUIRURI - 1ST PLAINTIFF/APPLICANT

ANNA KABOYA KARIUKI KANGETHE - 2ND PLAINTIFF/APPLICANT

VS

JEREMIAH MACHARIA MUIRURI - DEFENDANT/RESPONDENT

RULING

1. On the 14th July 2016 the Applicants filed a Notice of Motion against the Respondent seeking the following orders:-

a). Spent

b). that the Honourable Court be pleased to issue an interim injunction restraining the defendant, by himself, his agents, servants and or employees from entering, trespassing into, interfering with the farming activities, workers, erecting a permanent fence and or dealing in any way manner whatsoever, with the plaintiffs/ quiet and peaceful possession of plot numbers 85 and 86 situate in Gatanga, Thika sub-county pending the hearing and determination of the suit.

c). that costs of this application be provided for.

2. The application is supported by the affidavit sworn by Thomas Kamau Muiruri sworn on his behalf and that of the 2nd applicant. They aver that their mother and mother -in-law respectively, Mary Waithera Muiruri owned 140 shares in Kihoto Farmers Co-operative Society Limited which shares entitled her to two plot numbers 85 and 86, each measuring $\frac{3}{4}$ of an acre. It is stated that in 2012 she transferred Plot No. 85 to the 1st applicant (her son) and plot No. 86 to the 2nd applicant (her daughter- in-law). Each plot is represented by 70 shares in the Co-operative as evidenced by the shares certificates No.s 038 and 352. That they took possession of the plots, fenced and commenced farming activities since 2012 until May 2016 when the Respondent trespassed onto the plots and committed acts of waste, erected a permanent wall and structures across the suit plots using the Applicants materials on site, thus interfering with the farming activities and threatening their workers on site with unspecified actions. Despite the matter being reported to the local chief for arbitration, the Respondent has not stopped the trespass.

3. The application was opposed by the Respondent who swore a replying affidavit on the 14th September 2016. His position is that he has no claim on plot 86 as it has always been registered in the name of Mary Waithira Muiruri, his mother. Invariably his claim is centered on plot 85 which he insists belonged to his deceased father Muiruri Nganga who died on the 5th May 2000. He produced a letter from the Nanga

Kihoto FCS Limited dated the 25th August 2016. Though the said letter stated that the plot was owned by Mr. Muiruri Nganga and was transferred to the 1st Applicant on the 16th January 2013, its veracity cannot be verified unless on trial. The property is subject to a succession cause whose confirmation of grant has been pending since 2001 to date. That as a son of the deceased Muiruri Nganga, he is a lawful beneficiary to plot 85. That the Applicants are not entitled to the suit properties to his exclusion.

4. The question for determination before this Court is whether the Applicants are entitled to the order of temporary injunction pending the determination of this suit.

5. 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 the application on a balance of convenience. The Court of Appeal in ***Mrao 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”.

6. It is clear to the court that the Applicants are holders of a share certificate to demonstrate ownership of 70 shares each which represent plot No.s 85 and 86 respectively. The two share certificates Numbered 038 and 352 issued in the names of Thomas Kamau Muiruri and Anna Kabuiya Kariuki Kangethe respectively is *prima facie* evidence of ownership. Mary Waithira Muiruri, the mother of the 1st applicant and the Respondent has given evidence to corroborate this fact in her affidavit dated 14th July 2016. The Respondent has not adduced any evidence of ownership on the property despite claiming a beneficial interest on plot No. 85 on grounds that it belonged to his deceased father. Whether this property is part of an intestate estate is a matter for the trial court to determine. Be that be the case, it therefore follows that Plot No. 86 is not in dispute. This Court finds that the Applicants have demonstrated a *prima facie* case with a probability of success on grounds of ownership in form of share certificates.

7. This Court is guided by Order 40 Rule 1(a) and (b) of the Civil Procedure Rules which provides as follows;

“Where in any suit it is proved by affidavit or otherwise-

a). that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b). that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act or make such other order for the purposes of staying and preventing the wasting damaging alienation sale removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.

The Respondent's act of trespassing onto the land is an act of endangering the land through waste, damage or alienating it to himself forcefully. This procedural rule then comes in to protect the suit properties in dispute where the property is likely to be wasted damaged or alienated sold removed or disposed of before the suit is heard and determined.

8. In the case of **Muiruri Vs Bank of Baroda (Kenya) Limited (2001) KLR 183 at page 188** it was pointed out that; -

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

In the instant case if the suit properties are to be taken as a gift to the Applicants from their mother and mother-in-law respectively, there would be a sentimental attachment which may not be quantified in damages.

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

a). That the Respondent be restrained by himself, his agents, servants and or employees from entering, trespassing into, interfering with the farming activities, workers, erecting a permanent fence and or dealing in any manner whatsoever, with the Applicants quiet and peaceful possession of plot numbers 85 and 86 situate in Gatanga, Thika sub-county pending the hearing and determination of the suit.

b). The Respondent to pay the costs of this application.

c). The parties to expedite compliance with the provisions of Order 11 of the Civil Procedure Rules and set down the suit for hearing and determination within the next 45 days.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5th MAY 2017.

J. G. KEMEI

JUDGE

Ruling Delivered in open Court in the presence of:

1st Plaintiff/Applicant

Ndegwa Mbue holding brief Oyugi.

2nd Plaintiff/Applicant

Defendant/Respondent-Absent

Susan/Kuiyaki -C/A

J. G. KEMEI

JUDGE