



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 885 OF 2014

MARTIN MUHINDI.....PLAINTIFF/APPLICANT

(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE

OF **GRACE MUHINDI - DECEASED**

VERSUS

PETER MBUTI1ST DEFENDANT/ RESPONDENT

EMBAKASI RANCHING COMPANY LIMITED....2ND DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 3rd July 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendants/Respondents from trespassing on, wasting, constructing on, alienating or otherwise interfering with the property known as Plot No. V804 and V805 situated at Ruai (hereinafter referred to as the “suit plots”) pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for an order to exhume the body of Miriam Wambui Mbuti which was interred in the suit plots.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Martin Muhindi, sworn on 3rd July 2014 in which he averred that on 10th June 2014, he obtained Limited Grant of Letters of Administration Ad Litem for the estate of his late mother Grace Muhindi, a copy of which he annexed. He further averred that sometimes in the year 1999, his late mother purchased the suit plots from the 2nd Defendant/Respondent and was issued with share certificates, copies of which he annexed. He further averred that in March 2014, he visited the suit plots and was shocked to find them fenced by unknown people. He further averred that while he was in the process of investigating who had fenced off the suit plots, he found some people digging a grave on the suit plots and that on 19th April 2014, a body of one Miriam Wambui Mbuti was buried therein by the 1st Defendant. He averred further that upon visiting the offices of the 2nd Defendant to enquire as to the ownership of the suit plots, he was issued with a letter dated 25th April 2014, a copy of which he annexed, wherein the 2nd Defendant confirmed in writing that Plot No. 805 was registered in the name of his late mother Grace Muhindi. He added that the acts of the 1st Defendant/Respondent of fencing off the suit plots and burying his late wife therein has subjected him and the estate of his late mother to much loss

and damage. On those grounds, he sought for this Application to be allowed.

The Application is not contested.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. I will also determine whether or not to issue an order of exhumation. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. The Plaintiff/Applicant asserted that the suit plots belong to his late mother, Grace Muhindi, who purchased them from the 2nd Defendant/Respondent. In proof of that assertion, he annexed copies of two Non-member Certificates of Plot Ownership for the suit plots, both in the name of his late mother, Grace Wairimu Muhindi. He further annexed a copy of a letter dated 25th April 2014 written by the 2nd Defendant confirming that Plot No. V805 belongs to Grace Wairimu Muhindi, the Plaintiff’s late mother. The 1st Defendant/Respondent filed no documents or reply to controvert this position. That being the position, I have no difficulty in arriving at the finding that the Plaintiff/Applicant has demonstrated to this court that his late mother, Grace Muhindi, is the owner of the suit plots. He has established a prima facie case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of possession over the suit plots pending the hearing and determination of this suit.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”

Apart from the existence of a grave on the suit plots, there is no evidence that the 1st Defendant is in physical possession of the suit plots. In these circumstances, I have no difficulty in holding that the balance of convenience also tilts in favour of the Plaintiff/Applicant. I will however not issue an order of exhumation at this juncture as the issue of the ownership of the suit plots may only be determined with finality after the full hearing of this suit and delivery of judgment.

In light of the foregoing, I hereby allow this Application with the exception of the exhumation order with costs to the Plaintiff.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JULY 2017.

MARY M. GITUMBI

JUDGE