



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
E.L.C NO. 138 OF 2017
AMBROSE KIMANI MWANGI & 30 OTHERS - APPLICANTS

VS

STEPHEN IRUNGU - 1ST RESPONDENT
EDWARD MWANGI - 2ND RESPONDENT

RULING

1. This Ruling refers to the Notice of Motion dated 8/2/17 filed by the Applicants against the Respondents seeking the following orders:

- a) That this honourable Court be pleased to certify the current application as extremely urgent and that the same may be heard exparte in the first instance due to its urgency.
- b) That this honourable Court be pleased to issue a temporary order of injunction against the defendants, their servants, agents or any other person(s) acting for or on behalf of the defendants from sub-dividing, alienating, evicting or in any manner whatsoever affecting the plaintiff quiet possession of all that suit property known as LOC.12/SUB-LOC 1/1221/19 at Gakira market pending the hearing and final determination of this application and/or suit.
- c) That the costs of application be borne by the respondents.

2. The application is premised on the grounds stated thus;

- a) That the Applicants have been in actual possession and use of the suit property since the year 1958.
- b) That the Applicants have developed the suit property and derives from the same their only means of livelihood.
- c) That the applicants have been paying ground rent for the suit property for over 57 years to the Murang'a County Council and Murang'a County Government.
- d) That the respondents have never been in occupation of the suit property.

3. It is also supported by the affidavit of Ambrose Mwangi sworn on his behalf and on behalf of 30 others dated 8/2/17. In it he deponed that the applicants have been in actual use and occupation of the suit property LOC.12/SUB-LOC.1/1221/19 since 1958: by themselves and through their fathers. That by a

grant dated 25/8/10 the Respondents were allocated ½ Share of the suit property and being aggrieved by the grant the applicants filed cases in the High Court and Court of Appeal only to be told that their right would well be ventilated through a Civil suit. That the Respondents have embarked on subdivision of the suit property which if it succeeds may lead to eviction of the applicants and irreparable damage visited on them; That the applicants have for 57 years invested in the suit property and any interference with their quite possession and use will only be highly prejudicial to the applicants. They have annexed the grant dated 25/8/10 and the Judgment dated the 2/7/15 and that of Court of appeal dated 19/12/16.

4. The Respondents in their Replying Affidavit sworn by Stephen Irungu on his behalf and that of Edward Mwangi opposed the application and stated as follows; That it is not true that the applicants have been in sole use and occupation of the suit property since 1958. That they succeeded the ½ share of the property which was held by their grandfather Zabron Mwangi Gaga; that the applicants have had a history of filing cases in respect to the suit property to wit: Nyeri ELC 46/2011 & NBI HCCC 98 of 1981 for which proceedings in these cases have been annexed to the affidavit; that the current suit is therefore *resjudicata* and a non-starter and cannot form a basis for injunction.

5. Further the Respondents aver that the claim for the Applicant cannot succeed because it is time barred; that indeed Zabron Mwangi Gaga never sold his share of the property nor invited the applicants to take up shares. It is his contention that their claim is limited to the ½ share of Mwangi Ngari. He urged the Court to dismiss the application as being unmeritorious.

6. The parties have duly filed their written submissions which I have duly considered in determining this application. They have also cited case law which I have considered as well. The question for determination by this Court is whether the Applicants are entitled to the interlocutory injunction as prayed in the application.

7. In the celebrated **Giella v. Cassman Brown and Co. Ltd (1973) EA 358** and must meet the test set as thus;

“The conditions for the grant of an interlocutory injunction are now, I think well settled in Africa. First, an applicant must who 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 could 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.”

In ***Mrao Limited vs. First American Bank of Kenya Ltd and 2 others C.A No. 39 of 2002 (2003 eKLR)*** a *prima facie* case is defined as;

“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.”

8. Have the applicants demonstrated a prima facie case with the probability of success?. The applicants have submitted that they have been in occupation of the property since 1958, developed the property and are deriving income from the rental of the building and have also been paying ground rent for the suit to the Murang’a County for over 57 years. They have attached receipts from Town Council of Kangema and later Murang’a County Council and currently Murang’a County Government. The payers in the receipts go by different names and different titles i.e. Mwangi Ngori and Zabron Mwangi, Mwangi Ngori & Partners, Mwangi Ngori & others etc. I presume these are the names of the registered owners of the suit property.

9. Incidentally no evidence has been tendered by the Applicants to demonstrate ownership of the property, albeit at interlocutory stage, or any evidence to confirm their claim of actual possession and use of the suit property from 1958. Neither have they presented evidence of rental income (if any) from the suit property to demonstrate that they derive an income from the same. It is common ground that the

respondents are now the owners of ½ of the suit property by virtue of a grant issued on 25/8/10. The applicants have not demonstrated, at least at this stage, that the ownership can be challenged on any grounds.

10. I have seen a handwritten extract of a shareholder register for lack of a better term to use, which contains names but the Applicants have not tendered any explanation as to the nexus between their claim and the alleged list. I am unable to comment on it at this stage. I have also not seen any evidence to support the Applicants claim of development of the suit property in form of monetary contributions.

11. Empowered by the provisions of Order 40 rule 1 of the Civil Procedure rules to preserve the subject matter of the suit and in the interest of justice, I order status quo in terms of prayer i) of the application for purposes of preserving the suit land for a period of 60 days within which time the parties must fix the matter for hearing. In default the orders shall lapse at the expiry of the 60 day period.

12. The costs be in the cause

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF SEPTEMBER 2017.

J. G. KEMEI

JUDGE