

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 24 OF 2014

BERNARD MBUTI KANGOROTIPLAINTIFF

VERSUS

NJAGI GIKUNGI.....1ST DEFENDANT/APPLICANT

LUCY WANJIKU MAGONDU.....2ND DEFENDANT/APPLICANT

RULING

1. By a notice of motion dated 25th September 2017, the 2nd Defendant seeks an order of injunction to restrain the Plaintiff from burying the remains of his deceased daughter on the disputed parcels of land ie Mbeti/Gachuriri/1831, 1832, 1833, 1834 and 1835 pending the hearing and determination of the suit. She also seeks to have the OCPD Mbeere North Division to enforce compliance with such orders.
2. The said application was supported by the supporting affidavit of the 2nd Defendant who swore that she was the registered proprietor of parcel Nos 1833 and 1834 in respect of which the Plaintiff is seeking adverse possession among other parcels.
3. The said application was opposed by the Plaintiff on the basis of the grounds of opposition dated and filed on 26th September 2017 in which seven grounds were raised the first of which was that the 2nd Defendant's application has no basis because there was no counterclaim in the suit on which the same could be based.
4. I have considered the said notice of motion dated 25th September 2017, the supporting affidavit, the grounds of opposition as well as the oral submissions of the advocates for the Plaintiff and the 2nd Defendant. The main question for determination is whether or not the 2nd Defendant or both Defendants have met the requirements for the grant of an order of interlocutory injunction.
5. There is no dispute that the Defendants are the registered proprietors of the several parcels of land the subject of the instant application. *Prima facie*, they appear to have a right to enjoy all the rights of proprietors known to law. In my view, the Defendants have a good case with a probability of success at the trial notwithstanding the fact that the Plaintiff has claim for adverse possession against them.
6. The 2nd aspect relates to whether or not the Defendant may otherwise suffer irreparable loss or damage should the orders sought be denied. I have perused the 2nd Defendant's supporting affidavit and I am not persuaded that any irreparable loss or damage has been demonstrated. The apprehension that her cause of action may be altered would not constitute irreparable loss and neither would the Plaintiff's mistaken view that the burial of her deceased daughter would cement his claim to the suit properties.
7. The court is of the view that should the Plaintiff's claim ultimately fail, the successful Defendants may still obtain orders for removal of the body from the suit properties. The Defendants do not have to undertake the actual exhumation. They could apply for an order for the Plaintiff himself to undertake the removal if he decided to bury the body of his daughter there during the pendency of the suit. In the end, it is possible for the Defendants to obtain the suit properties without a grave thereon.
8. Finally, I have considered the balance of convenience in this matter. It is evident from the record that

the Plaintiff has been in occupation of parts of the suit properties for a considerable period of time and has some buildings erected thereon. It would cause greater inconvenience and hardship to the Plaintiff if he were prevented from going ahead with the burial pending the hearing and determination of the suit which may take several months before conclusion.

9. In the circumstances of this case, the prayers of injunction sought are declined on account of the 2nd and 3rd principles articulated in the case of *Giella v. Cassman Brown & Co Ltd [1973]EA 358*. The costs of the application shall be in the cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **26th** day of **SEPTEMBER, 2017**

In the presence of Mr Guantai for the 2nd Defendant and holding brief for Ms Wairimu for the 1st Defendant and in the absence of the Plaintiff.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

26.09.17