



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 43 OF 2017 (ORIGINATING SUMMONS)

JAMES NJIRUPLAINTIFF

VERSUS

NICASIO NJIRU M'NJERI1ST DEFENDANT

PAUL MUGO THEOPHILO.....2ND DEFENDANT

AGNES WAVETI ANDREW.....3RD DEFENDANT

SEVERINA KIRIGI NDWIGA.....4TH DEFENDANT

RULING

1. By a notice of motion dated 2nd March 2017, the Plaintiff sought various orders against the Defendants but the material ones for purposes of this ruling are as follows:

a. A temporary injunction to restrain the Defendants from offering for sale, transferring, alienating, dealing with or interfering with or evicting him from a portion of 0.173 ha which falls within Title No. Gaturi/Nembure/13633 and 13634.

b. An order of inhibition to inhibit any dealings with Title Nos. Gaturi/Nembure/13633 and 13634 (hereinafter known as the 'suit properties').

2. The said application was supported by an affidavit sworn by the Plaintiff on 2nd March 2017 in which it was stated that his late mother had bought a portion of 0.30 ha from the original owner of the suit property (originally part of *Title No. Gaturi/Nembure/1820*) and that both she and the vendor passed on before a transfer could be effected. It was further stated that various requests for transfer to the 1st Defendant who had acquired the suit property from the original owner through succession had borne no fruit.

3. The Plaintiff further stated that sometime in 2013, the 1st Defendant sub-divided the original land *Title No. Gaturi/Nembure/1820* into 8 parcels thereby giving rise to parcel Nos. 13633 – 136340 and that the portion he occupied fell wholly within parcel No. 13633 and partly within parcel No. 13634. The 1st Defendant thereafter transferred parcel No. 13633 jointly to the 2nd, 3rd and 4th Defendants.

4. The said application was opposed by the 1st Defendant who swore a replying affidavit dated 26th April 2017 on his own behalf and on behalf of the 2nd, 3rd and 4th Defendants. The 2nd Defendant is the Plaintiff's nephew while the 3rd and 4th Defendants are the Plaintiff's sisters.

5. The 1st Defendant denied knowledge of the alleged sale of the suit properties to the mother of the Plaintiff and challenged him to produce documentary evidence thereof. He conceded having acquired the original Title No. Gaturi/Nembure/1820 from his late grandfather through succession in 1977.

6. The 1st Defendant stated that the Plaintiff's mother was allowed to build a temporary house on part of the suit property in 1968 since she had worked for the original proprietor for many years and not on account of a sale transaction. He further stated that out of humanitarian grounds he offered the Plaintiff and the 2nd, 3rd and 4th Defendants parcel No. 13633 as a gift but the Plaintiff refused to cooperate in availing his documents with the consequence that he proceeded to transfer the said parcel to the said Defendants to the exclusion of the Plaintiff. The 1st Defendant therefore considered that the Plaintiff had filed the instant suit and application in bad faith. He further stated that the Plaintiff's house falls solely within parcel No. 13633.

7. I have considered the Plaintiff's said application, the supporting affidavit, the replying affidavit in opposition thereto and the oral submissions of the parties herein. It is common ground that the Plaintiff has been residing on a portion of the suit properties for a very long period of time. What is unclear, however, is the acreage of land he currently occupies. It is also not clear whether such occupation was hostile or adverse to the registered proprietor of the properties. These are matters which can only be conclusively determined at the trial of the suit.

8. On the basis of the material on record, the court is satisfied that the Plaintiff has made out a *prima facie* case with a probability of success as set out in the case of *Giella v. Cassman Brown & Co Ltd ([1973] EA 358)*. In the circumstances, the court is inclined to grant an order of injunction in his favour. Whereas the Plaintiff claimed that his portion of land traverses both parcels 13633 and 13634, the 1st Defendant's replying affidavit indicated that his house is confined to parcel No. 13633. This was not disputed or controverted by the Plaintiff by a further affidavit. The court shall therefore restrict its orders to parcel No. 13633.

9. The court is also satisfied that in the circumstances of this case, the Plaintiff may suffer irreparable loss and damage if he is evicted from the land he occupies before the suit is heard and concluded. The court, therefore, considers that the Plaintiff has satisfied the second principle for the grant of an order of interlocutory injunction.

10. The upshot of the foregoing is that the Plaintiff's notice of motion dated 2nd March 2017 has merit and the same succeeds in the following terms.

a. An interlocutory injunction is hereby issued restraining the 2nd, 3rd and 4th Defendants from offering for sale, transferring, alienating *Title No. Gaturi/Nembure/13633* or from evicting the Plaintiff therefrom pending the hearing and determination of the suit.

b. An order of inhibition is hereby issued inhibiting any deals with *Title No. Gaturi/Nembure/13633* only pending the hearing and determination of the suit.

c. The prayers sought against the 1st Defendant with respect to *Title No. Gaturi/Nembure/13634* are hereby declined.

d. Costs of the application shall be in the cause.

11. Orders accordingly.

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

In the presence of Ms Rose Njeru for the Plaintiff and the 1st, 2nd, 3rd and 4th Defendants in person.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

26.09.17