



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 212 OF 2016

MARY MABUTI MAGONDU.....1ST APPLICANT

PHYLLIS WANJIRA MAGONDU.....2ND APPLICANT

VERSUS

ANN GRACE WAIRIMU.....1ST RESPONDENT

KAMORI MAGONDU.....2ND RESPONDENT

RULING

This is in respect to the plaintiffs' Notice of Motion dated 30th November 2016 in which they seek the following orders:

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to issue an injunction restraining the 1st defendant from evicting, transferring to any other party, building or in any way interfering with LOCKUP TMP/267/76 RWAMBITI pending the hearing and determination of the main suit.

4. That the costs of this application be provided for.

The application is founded on the grounds set out therein and is also supported by the affidavit of the 1st plaintiff **MARY MABUTI MAGONDU**.

The gravamen of the application is that the property known as LOCKUP TMP/11/267/76 (the suit property) is family land where the 1st plaintiff has lived for over 30 years with her mother the 2nd defendant who is aged over 90 years and is senile and unable to carry out any transaction. That the suit property has now been transferred to the 1st defendant who has issued the 1st plaintiff with a notice to vacate hence this application.

The application is opposed and in a replying affidavit by the 2nd defendant, she has averred that the plaintiffs are her daughters and she is aged 81 years (not 90 years as claimed) and neither is she senile. That she has other property including a 10 acre parcel of land in **MBEERE** while the 1st plaintiff has her own land measuring 3 acres in **NGARIAMA** and that she informed the plaintiffs about selling the land to the 1st defendant which transaction does not require the consent of the Land Control Board.

On her part, the 1st defendant has also filed a replying affidavit confirming that she purchased the suit property from the 2nd defendant in May 2016 and took possession. That she operates a hotel while the 1st plaintiff only occupies a small structure at the rear and both the 1st plaintiff and 2nd defendant have other properties elsewhere. That the orders being sought will amount to evicting her through the back door since she is already on the property and further, that she cannot be enjoined from dealing with her own property.

The application has been canvassed by way of written submissions which have been filed both by **MS MAKWORO** advocate for the plaintiffs and **MR. KAGIO** advocate for the defendants.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

An order for temporary injunction pending trial will only be granted where the Applicant satisfies the principles laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:

- 1. The Applicant must show the existence of a prima facie case with a probability of success at the trial.**
- 2. A temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which cannot adequately be compensated by an award of damages and;**
- 3. If in doubt, the Court will determine the application on the balance of convenience.**

In the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)**, a prima facie case was defined as:

“..... 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”.

In **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012**, the Court said the following:

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation” Emphasis added

Finally, as was stated in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILM SALE LTD 1986 3 ALL E.R 772**, a Court considering such an application should take the route or course that appears to carry the lower risk of injustice should it turn out to have been **“wrong”**.

This application will therefore be considered in accordance with the above principles.

I must confess I do not understand the plaintiffs claim to the suit property as per the plaint filed herein on 30th November 2016. It is conceded that the suit property belonged to the 2nd defendant who has now transferred it to the 1st defendant. I do not see any pleading in the plaint to suggest that the 2nd defendant held the suit property in trust for the plaintiffs or what other interest the plaintiffs have therein. All that is pleaded in paragraph 6 of the plaint is that the 1st plaintiff has lived on the suit property for over 30 years and has nowhere else to call home. However, the plaintiffs may as well be licencees. I must however be cautious, at this stage, not to **“examine the merits of the case closely”** – **NGURUMAN LTD** (supra).

Having said so, my view of this application is that it will be determined on the balance of convenience as

I am in doubt about the proof of the first two principles set out in the **GIELLA** case (supra). It is clear to me that the 1st plaintiff is in occupation of at least some portion of the suit property. This is conceded in paragraph 7 of the 1st defendant's replying affidavit in which she has deponed as follows:

“That the 1st plaintiff only occupies a small structure which is at the rear of the plot”

Indeed that is why on 24th November 2016, counsel for the 1st defendant addressed a notice to her to vacate within 30 days failure to which a suit for her eviction would be filed (annexture **MMM 3**). In circumstances where the Applicant is in possession and is threatened with eviction as is the case herein, the Court will be persuaded to grant a temporary injunction pending trial because the denial of that remedy would have the effect of dispossessing him of the suit property – **GEORGE ORAGO VS GEORGE JAGALO & OTHERS C.A CIVIL APPEAL No. 62 of 2009 (2010 e K.L.R)**. Bearing in mind that the purpose of a temporary injunction is to preserve the suit property pending trial and also taking the route that appears to carry the less risk of injustice, I am persuaded that this is a proper case to warrant the grant of orders of temporary injunction sought.

In the circumstances, I find that the plaintiffs Notice of Motion dated 30th November 2016 is well merited and I allow it in the following terms:

- 1. An order of temporary injunction is issued restraining the 1st defendant from evicting, transferring to any other party, building or in any way interfering with LOCKUP TMP/267/76 RWAMBITI pending the hearing and determination of this suit.***
- 2. Costs shall be in the cause.***
- 3. The parties to comply with the pre-trial directions so that this case is heard and determined in the next twelve (12) months.***
- 4. This suit appears to me to be within the jurisdiction of the subordinate Court and I intend to make orders transferring it there. Before I do so, I would like to hear what counsels have to say. This matter shall therefore be mentioned on 27th November 2017 for appropriate orders.***

B.N. OLAO

JUDGE

24TH NOVEMBER, 2017

Ruling delivered, dated and signed in open Court at Kerugoya this 24th day of November 2017

Mr. Ombachi for Ms Makworo for Plaintiffs present

Ms Kiragu for Mr. Kagio for Defendants present.

B.N. OLAO

JUDGE

24TH NOVEMBER, 2017