



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 127 OF 2015

NYAGA NJAI.....PLAINTIFF/RESPONDENT

VERSUS

ANTHONY MUNENE NYAGA.....1ST DEFENDANT/APPLICANT

AMOS KINYUA NYAGA.....2ND DEFENDANT/APPLICANT

ALBERT NJAI NYAGA.....3RD DEFENDANT/APPLICANT

MARY NJERI NYAGA.....4TH DEFENDANT/APPLICANT

LUCY MURINGO NYAGA.....5TH DEFENDANT/APPLICANT

WINNIE WANJIRA NYAGA.....6TH DEFENDANT/APPLICANT

ANN ROSE WAKUTHII NYAGA.....7TH DEFENDANT/APPLICANT

RULING

This suit was originally filed at the Principal Magistrate's Court Wanguru as Civil Case No. 18 of 2015 before being transferred to this Court.

The plaintiff is the father to the defendants and claims to be the legal owner of the following properties as per his plaint filed in the subordinate Court on 10th February 2015:-

- 1. MWEA/TEBERE/B 346, 347, 348 and 1186.**
- 2. Plot No. 74A at NGURUBANI Town**
- 3. Rice holding No. 2602 Thiba Section Unit 6 Mwea Settlement Scheme**
- 4. LAIKIPIA/SOSIAN/SOSIAN/D 2528.**

It is the plaintiff's case that whereas he is the registered owner of the above properties, the defendants have jointly attempted to unlawfully and forcefully evict his wife therefrom. He therefore filed this suit seeking a permanent injunction to restrain them from cultivating, trespassing, blocking access, leasing, alienating or in any way interfering with his control management possession and enjoyment of the aforesaid properties.

Simultaneously with the filing of that plaint, the plaintiff also filed a Notice of Motion seeking temporary injunctive orders. However, that application appears not to have been canvassed by the time this suit was transferred to this Court.

The 1st, 2nd, 3rd, 4th, 5th and 7th defendants filed a defence and counter-claim, which was later amended, in which they pleaded, inter alia, that they jointly contributed towards the development of the suit properties and that differences arose following the demise of their mother. They denied the claim against them adding that the plaintiff holds the following properties in trust for them:-

- 1. INOI/KARIKO/2742**
- 2. MWEA/MAKIMA/644**
- 3. EMBAKASI SHARE NO. 1556.**

They also averred that they are beneficial owners of the following properties which are ancestral and have passed from generation to generation:-

- 1. Rice holding No. 2602**
- 2. L.R INOI/KARIKO/2742.**

The defendants similarly pleaded that they contributed directly and indirectly to the acquisition and development of the following properties:-

- 1. LR No. MWEA/TEBERE/B 346, 347, 348 and 1186**
- 2. LAIKIPIA/SOSION/SOSION/ D 2528**
- 3. NGURUBANI PLOT NO. 74.**

It is the defendants case therefore that the plaintiff holds the aforementioned properties (the suit properties) in trust for them, a determination of the said trust so that the plaintiff and defendants each get one ninth share and a permanent injunction restraining the plaintiff from selling, charging or transferring the said properties.

The defendants have also filed a Notice of Motion dated 12th April 2016 seeking a temporary injunction restraining the plaintiff from interfering with their use, utilization and enjoyment of the suit properties pending the hearing and determination of this suit.

That application which is the subject of this ruling is supported by the affidavit of **MARY NJERI NYAGA** the 4th defendant herein sworn on behalf of the other defendants in which she has deponed, inter alia, that the suit properties are ancestral properties acquired through their joint efforts and which the plaintiff holds in trust for himself and the defendants. That they have all utilized the suit properties for many years and only recently has the plaintiff become hostile after getting another woman called **MONICA WAIRIMU KUNIARA** and has now restrained them from accessing or utilizing the suit properties.

The application is opposed and the plaintiff has filed grounds of opposition raising the following:-

- 1. That the defendants have no proprietary rights over the suit properties and therefore the application is misconceived and is an abuse of the Court process.***
- 2. That the defendants cannot injunct the plaintiff from making use of his properties nor purport to inherit him while he is alive.***

3. That the suit properties are not ancestral properties nor were they jointly acquired as they exclusively belong to the plaintiff.

4. That the defendants are now adults and educated and have their own properties and their intentions are to frustrate the plaintiff and send him to the grave.

Submissions to that application have been filed by both **Mr. OMBACHI** advocate for the plaintiff and **Mr. KAGIO** advocate for the defendants.

I have considered the application, the supporting affidavit, the grounds of opposition thereto and the submissions by counsel.

This application seeks the grant of a temporary injunction pending the hearing and determination of the suit herein. This application will therefore be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. Firstly, the applicant must show a prima facie case with a probability of success.

2. Secondly, such an application will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

1. Thirdly, if in doubt, the Court will decide such an application on the balance of convenience.

A prima facie case was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002** in the following terms:-

“A prima facie is in a civil application 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 from the latter”.

Further, a party seeking such a remedy must do so with clean hands and as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS SALES LTD 1986 3 ALL ER 776**, the Court considering such an application should take the course that appears to carry the lower risk of injustice if it should turn out to have been wrong. I must however bear in mind that at this stage, I cannot make definitive findings of fact particularly where the affidavit evidence is contradictory.

I shall therefore consider the application in light of those broad principles.

The plaintiff's claim to the suit properties is that they all belong to him as he holds the legal title to the same. The defendants who are his children have however deponed that not only does their father hold the suit properties in trust for them but also that they are ancestral properties whose acquisition and development they have contributed to. At this stage, the Court is not in a position to determine the issue of trust or the contributions, if any, that the defendants may have made towards the acquisition of the suit properties. Those are issues that will be determined at the trial on the evidence that will be adduced. It is instructive to note that at this stage, none of the parties have availed any documents of ownership of the suit properties or evidence of contribution towards their acquisition and development. And on the issue of irreparable injury that cannot be adequately compensated by an award of damages, nowhere in her supporting affidavit has the 4th defendant **MARY NJERI NYAGA** alluded to any such damage that the defendants will otherwise suffer if the Court does not grant the orders of temporary injunction. This Court is therefore in doubt on whether the defendants have met the first two principles set out in the **GIELLA** case (supra).

This application will therefore be determined on the balance of convenience.

According to the supporting affidavit of the 4th defendant **MARY NJERI NYAGA**, the plaintiff and defendants have all along utilized and enjoyed the suit properties for many years and the plaintiff has only become hostile after getting another woman. That the defendants utilize the suit properties has not really been rebutted. As indicated earlier in this ruling, the defendants claim to the suit properties is a matter that will be determined at the trial. However for now, and in view of the evidence of the defendants' occupation and utilization of the suit properties, it would serve the broader interests of justice to maintain the status quo pending the hearing and determination of the suit. That status quo will be protected by the grant of the interlocutory injunction sought and direct further that all the parties herein do continue utilizing the suit properties in the manner that they have been doing pending the hearing of this suit.

Ultimately therefore and upon considering the Notice of Motion dated 12th April 2016, I allow it in the following terms:-

a. A temporary injunction is issued restraining the plaintiff/respondent by himself, his servants, agents, relatives or anybody else claiming through him from interfering with the defendants/applicants use, utilization and enjoyment of the following properties pending the hearing and determination of this suit i.e.

1. L.R No. MWEA/TEBERE/B/346, 347, 348 and 1186

2. Rice holding No. 2602

3. Maendeleo Plot No. 2602

4. Laikipia/Sosion/Sosion/D 2528

5. Embakasi 1556

6. Makima 644

7. INOI/KARIKO/2742

8. Wanguru Market Plot No. 74A.

b. Each party to meet their own costs.

c. The parties to expedite compliance with the provisions of the Civil Procedure Rules relating to pre-trial and have this suit heard and determined in the next 12 months.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016

Ruling delivered, dated and signed in open Court this 4th day of November 2016.

Mr. Ombachi for the Plaintiff/Respondent present

Mr. Miano for Mr. Kagio for the 1st, 2nd, 3rd, 4th, 5th and 7th Defendants/Applicants present.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016