



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 255 OF 2014

MAINA MACHIRA NGARI PLAINTIFF

VERSUS

PETER MURIMI1ST DEFENDANT

ELIZABETH WANJIRU2ND DEFENDANT

CATHERINE NJOKI3RD DEFENDANT

MONICA WAKINI4TH DEFENDANT

TABITHA WANJIKU5TH DEFENDANT

DAVID IRUNGU6TH DEFENDANT

STEPHEN MAINA7TH DEFENDANT

RULING

The plaintiff/applicant filed this suit seeking orders, amongst others, that the defendants/respondents are illegally interfering with his use and enjoyment of half share of land parcel No. KIINE/GACHARO/56 and a permanent injunction restraining the defendants/respondents, their agents or servants from interfering with that land.

Simultaneously with the filing of that claim, the plaintiff/applicant filed a Notice of Motion under **Order 40 Rule 1(A) and (B) of the Civil Procedure Rules** and other relevant provisions of the law seeking a temporary injunction restraining the respondents by themselves, their agents and/or servants from entering into the said parcel of land or interfering with his quiet possession and/or utilization of half share of the said land. The said application which is the subject of this ruling was supported by the plaintiff/applicant's affidavit in which he deponed, inter alia, that he owns half share of land parcel No. KIINE/GACHARO/56 (hereinafter the suit land) having acquired the same by way of adverse possession and that the defendants/respondents who are sons and daughters of the late MWANGI MAKARI who was the registered proprietor of the suit land have threatened to evict him from a portion that he occupies and even up-rooted his crops. The plaintiff/applicant has also deponed that he has filed KERUGOYA ELC No. 802 OF 2013 against MWANGI MAKARI seeking a declaration that he is entitled to half share out of the suit land which case is still pending. Further, that the late MWANGI MAKARI filed Baricho Civil Case No. 70 of 2013 seeking his eviction from the suit land which case is also still pending.

The application is opposed and in her replying affidavit sworn on behalf of the other

defendants/respondents, the 2nd defendant/respondent (ELIZABETH WANJIRU) has deponed, inter alia, that the suit property belonged to their late father MWANGI MAKARI and that the plaintiff/applicant who is their uncle has no share in the suit land and has taken advantage of the loss of their parents to disturb them and he has no prima facie case to warrant the orders sought.

Submissions have been filed by counsels of both parties which I have considered together with the application, the rival affidavits and the annexures thereto.

This being an application for injunction, it must be determined in light of the well known principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***The applicant must satisfy the Court that he has a prima facie case with a probability of success***
2. ***That he would otherwise suffer irreparable loss which is incapable of compensation by damages if the order for injunction is not granted and,***
3. ***If in doubt, the Court will decide the matter on a balance of convenience.***

A prima facie case was defined by the Court of Appeal in the case of **MBAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS 2003 K.L.R 125** as follows:-

“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”

It is clear from the pleadings and other annexures herein that the suit land is registered in the names of one MWANGI MAKARI who is the father of the defendants/respondents and that they have been utilizing the land since his demise. The plaintiff/applicant on his part claims that he has a crop of bananas on the suit land which the defendants/respondents have cut down. He claims ownership of half share of the suit land having acquired the same by way of adverse possession. Does the plaintiff/applicant have a prima facie case with a probability of success to warrant the orders sought?

The plaintiff/applicant's claim to the suit land is that he has acquired the same by way of adverse possession. However, that claim is the subject of KERUGOYA ELC NO. 802 of 2013 in which he has sued the late MWANGI MAKARI seeking orders that he be declared to have become entitled to half share of the suit land by way of adverse possession. That case is yet to be heard and determined perhaps following the death of the said MWANGI MAKARI who died in 2014. Before KERUGOYA ELC NO. 802 of 2013 is heard and determined, the plaintiff/applicant cannot be heard to say that he has acquired half share of the suit land by adverse possession. Only the Court can make such a declaration after hearing that case but as at now, the plaintiff/applicant's claim to the land, if any, is yet to crystallize. On the other hand, the defendants/respondents are working on the land by virtue of the fact that it belonged to their late father. In those circumstances, I am un-able to see what prima facie case with a probability of success the plaintiff/applicant herein has established to warrant the grant of the injunctive reliefs sought. The plaintiff/applicant has not surmounted the first test in the **GIELLA** case (supra).

On the issue of irreparable loss, the plaintiff/applicant has deponed that if the defendants/respondents are not restrained by way of injunction, he will be rendered homeless. However, part of the annexures to the replying affidavit of ELIZABETH WANJIRU is the Certificate of Search attached to the replying affidavit of the late MWANGI MAKARI in KERUGOYA ELC Case No. 802 of 2013 (**annexture MK 2**) showing that the plaintiff/respondent is infact the registered proprietor of a parcel of land known as KIINE/GACHARO/2866. He therefore has other land of his own and cannot be rendered homeless as he alleges.

In the circumstances, I find that the plaintiff/applicant's Notice of Motion filed herein on 15th September 2014 is lacking in merits. The same is hereby dismissed with costs.

B.N. OLAO

JUDGE

24TH APRIL, 2015

24/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Abubakar for Mr. Magee for Plaintiff – present

Mr. Rurigi for Ms Mogana for Defendants – present

COURT: Ruling delivered this 24th day of April, 2015

Mr. Abubakar for Mr. Magee for Plaintiff present

Mr. Rurigi for Ms Mogana for Defendants present.

B.N. OLAO

JUDGE 24TH APRIL, 2015