



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1263 OF 2014

MUMBI KAMAU..... PLAINTIFF

VERSUS

MARGARET WAITHIRA WAMBUI.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 26th September 2014 in which the Plaintiff/Applicant seeks for a temporary injunction restraining the Defendant/Respondent from trespassing, selling, transferring or in any way interfering with the parcel of land known as Plot No. 139/614 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. She also seeks for the costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Mumbi Kamau, sworn on 26th September 2014 in which she averred that she is the registered proprietor of the suit property being the holder of Share Certificate No. 1662 issued to her by Mararui Farmers Company Ltd way back in 1989. She stated further that she has been residing on the suit property since the year 1989. She then stated that the Defendant/Respondent is the widow of her late son called John Kiarie Kamau (the “Deceased”). She further averred that she gave permission to the Deceased to reside on the suit property with the Defendant until his demise on 17th November 2005. She then stated that since the year 2013, the Defendant became disrespectful to her and her son one Stephen Ngige Kamau and has been hurling insults to her and threatening her with dire consequences. She added that she is of advanced age and the conduct of the Defendant/Applicant is aggravating her health conditions of High Blood Pressure and ulcers. She then stated that the Defendant/Respondent is a mere licensee on the suit property and has abused the terms upon which she was permitted to reside thereon, necessitating this suit to remove her therefrom.

The Application is contested. The Defendant/Respondent, Margaret Waithira Wambui, filed her Replying Affidavit sworn on 14th October 2014 in which she averred that it is true that the Plaintiff/Applicant is her mother in law and the mother of her late husband John Kiarie Kamau who died on 17th November 2005. She further averred that she has lived on the suit property since January 1990 together with her late husband and that the Plaintiff/Applicant joined them later the same year. She conceded that the suit property belongs to the Plaintiff/Applicant while a neighbouring plot being plot number 139/615 is in the name of her late father in law Kamau Njoroge. She further averred that the Plaintiff/Applicant had promised the Deceased that she would transfer to him the suit property but she did not. She stated that her

late husband had paid surveys fees for the suit property. She then averred that her brother in law Stephen Ngige Kamau has over the years insulted her and the Plaintiff/Applicant would side with him. She confirmed having reported this to the Njathaini Police Post. She stated that the sole aim of the Plaintiff/Applicant is to evict her out of the suit property to enable her to sell off the same which is now valued at Kshs. 6 million. She added that she is resisting the sale of the suit property until her interest and the interest of her surviving son is taken into account.

In response thereto, the Plaintiff/Applicant filed her Supplementary Affidavit sworn on 7th November 2014 in which she stated that she was the first one to build on the suit property after which the Defendant/Respondent and her husband joined her. She further disputed the allegation that the Deceased is the one who paid survey fees for the suit property and averred that she is the one who made that payment. She concluded by stating that the suit property belongs to her and she has every right to deal with it as she deems fit.

In response thereto, the Defendant/Respondent filed her Further Affidavit sworn on 19th January 2015 in which she averred that if the orders sought are granted, she would remain condemned unheard as she would be forced out of the suit property without her interest and the interest of her children taken into account.

Both the Plaintiff and the Defendant filed their written submissions.

The issue that I am called upon to determine is whether or not to grant the Plaintiff/Applicant the temporary injunction that she seeks. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

I would appear that there is general consensus between the parties thereto that the suit property belongs to the Plaintiff. The Defendant/Respondent has admitted this and confirmed that she came to start living in the suit property as the wife of the Deceased in the year 1990. The Plaintiff/Applicant confirms this assertion. That being the case, I find that the Plaintiff/Applicant has established her ownership rights over the suit property and therefore has a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

In whose favour does the balance of convenience tilt? On this point, I take note that the Defendant/Respondent has asserted that she has lived and continues to live on the suit property from the

year 1990 to date. She confirmed that she came to live on the suit property with her late husband with permission from the Plaintiff/Applicant. This fact is not disputed by the Plaintiff/Applicant. In light of this, it is clear to me that issuing the temporary injunction sought after by the Plaintiff/Applicant will have the effect of evicting the Defendant/Respondent out of the suit property at this interlocutory stage of the proceedings, even before she has been heard by this court after a full trial. In light of this, I find that the balance of convenience tilts in favour of the Defendant/Respondent

In light of the foregoing, I find that the Plaintiff/Applicant has not satisfied all the three conditions for the grant of an interlocutory injunction and I hereby dismiss her Application. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 19TH DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE