



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELC CASE NO. 64 OF 2015

JEAN WAMARWA NYAMUPLAINTIFF

VERSUS

FRANCIS MBUNGU NJAGI1ST DEFENDANT

CHARITY WANJIRA NJAGI2ND DEFENDANT

PILISILA WANJIRU NJAGI 3RD DEFENDANT

RULING

This is in respect to the Plaintiff/Applicant's Notice of Motion dated 26th May 2015 seeking the substantive prayer that the Defendants/Respondents by themselves, their servants, agents, and/or family be restrained by a temporary injunction from entering, remaining, cultivating, committing acts of waste by land parcel NGARIAMA/NGIRIAMBU/4039 or hindering the Plaintiff/Applicant from entering, remaining or leasing or in any way interfering with the Plaintiff/Applicant's use of land parcel No. NGARIAMA/NGIRIAMBU/4039 pending the hearing of this suit.

The application which was argued orally by Mr. Muchira for the Plaintiff/Applicant and the Defendants/Respondents in person is premised on the grounds, inter alia, that the Plaintiff/Applicant is the registered proprietor of the land NGARIAMA/NGIRIAMBU/4039 which she purchased from one DUNCAN MURIITHI NJAGI who put her in possession in January 2014 and which she has developed but on 18th March 2015, the Defendants/Respondents jointly and severally trespassed upon the same and buried the body of one DUNCAN MURIITHI NJAGI thereon. The application was supported by the Plaintiff/Applicant's seventeen (17) paragraph affidavit to which were annexed the official Certificate of search in respect of the parcel NGARIAMA/NGIRIAMBU/4039 (hereinafter the suit land), the Sale agreement between the Plaintiff/Applicant and DUNCAN MURIITHI NJAGI, a membership card from KANJUU FARMERS CO-OP SOCIETY and a demand letter from Plaintiff/Applicant's advocate asking the Defendant/Respondent to exhume the body of the said DUNCAN MURIITHI NJAGI from the suit land.

The application is opposed and by the replying affidavit of the 1st Defendant/Respondent FRANCIS MBUNGU NJAGI, it is deponed, inter alia, that the application is frivolous vexatious and lacks merit as he has never interfered with the land of DUNCAN MURIITHI NJAGI who is his later brother and neither have the 2nd and 3rd Defendants/Respondents who are his sisters. He adds that the Plaintiff/Applicant has been having issues with the wife of the late DUNCAN MURIITHI NJAGI and a caution was placed on the land. He says that the Plaintiff/Applicant has issues with the wife and children of the late DUNCAN MURIITHI NJAGI and that these orders are being sought through the back door.

Annexed to his replying affidavit is the official search in respect of the said land dated 2nd July 2013 showing the land was registered in the names of the late DUNCAN MURIITHI NJAGI – Annexure FMN 1.

As stated earlier, the application was canvassed orally because the Defendants/Respondents are in person.

I have considered the application, the rival affidavits, the respective annexures and the oral submissions by Mr. Muchira for the Plaintiff/Applicant and those of the 1st Defendant/Respondent.

This being an application for injunction, it has to be determined in accordance 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, an interlocutory injunction will not normally be granted unless the applicant demonstrates that he might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages, and,***
3. ***If in doubt, the application will be determined on a balance of convenience.***

And what is a prima facie case? This was defined by the Court of Appeal in **MBAO VS FIRST AMERICAN BANK OF KENYA LTD AND 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”

Similarly, being an equitable remedy, it will not be granted where it can be demonstrated that the applicant has not come to Court with clean hands.

From the pleadings herein, the following appears not to be disputed at least as at this stage.

1. ***That as at 2nd July 2013 the suit land was registered in the names of the late DUNCAN MURIITHI NJAGI***
2. ***That by an agreement dated 10th July 2013, the late DUNCAN MURIITHI NJAGI sold the suit land to the Plaintiff/Applicant at a consideration of Ksh. 1,800,00***
3. ***That as at 24th March 2015, the suit land had been transferred into the names of the Plaintiff/Applicant and a title issued accordingly***
4. ***That the Defendants/Respondents have not raised any claim over the land. Indeed in paragraphs 5 and 6 of his replying affidavit, the 1st Defendant/Respondent has deposed as follows:-***
5. ***“That at no one time, have I ever interfered with my younger brother’s land, the now late DUNCAN MURIITHI NJAGI either when he was alive or after his death ...”***
6. ***“That my sisters the 2nd and 3rd Defendants/Respondents are married far from home and have never interfered with the land”***

In view of those averments by the 1st Defendant/Respondents, I asked counsel for the Plaintiff/Applicant why the Defendants/Respondents were in Court and where the wife of the late DUNCAN MURIITHI NJAGI was and Mr. Muchira informed me that she does not live on the suit land and instead it is the Defendants/Respondents who are interfering with it.

That suit land is registered in the names of the Plaintiff/Applicant following a Sale agreement and in view of that registration which is under the repealed **Registered Land Act**, the Plaintiff/Applicant enjoys all the rights and privileges that go with that registration as provided under **Section 27** of the said **Registered Land Act**. There is no suggestion as at now, that the Plaintiff/Applicant obtained the said registration

through fraud or other illegal means. Her right to the suit land is therefore protected under the relevant legislation and also under Article 40 of the Constitution which protects her right to own property of any description anywhere in Kenya.

It is further instructive to note that the Defendants/Respondents lay no claim to the suit land and infact the replying affidavit of the 1st Defendant/Respondent suggests that they are strangers to this case and that the Plaintiff/Applicant's complaint, if any, should be addressed to other parties.

Taking all that into account, it is my finding that the Plaintiff/Applicant has established a prima facie case with a probability of success.

On adequacy of damages, it is deponed that the Defendants/Respondents have buried the body of the late DUNCAN MURIITHI NJAGI on the suit land which the Plaintiff/Applicant wants exhumed. That will be a matter for trial though it is also not denied. That is an un-warranted intrusion into the property of another and a blatant violation of the law and I would agree with WAKI J. (as he then was) when in MOHAMMED VS COMMISSIONER OF LANDS AND FOUR OTHERS K.L.R (E & L) 1 he observed that it cannot be an answer to a prayer for injunction that the applicant may be compensated in damages where there is a clear transgression of the law. In this case now before me, the Plaintiff/Applicant will always live with the knowledge that someone else is buried on her land. I don't know how that can be atoned in damages even if that body is eventually exhumed.

Ultimately therefore and upon considering all the evidence herein, I find that the Plaintiff/Applicant's Notice of Motion dated 26th May 2015 is well merited. The same is accordingly granted with costs being in the cause.

B.N. OLAO

JUDGE

28TH JULY, 2015

28/7/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Muchira for Plaintiff/Applicant – present

Defendants/Respondents – present

COURT: Ruling delivered this 28th day of July, 2015 in open Court

Mr. Muchira for Plaintiff/Applicant present

Defendants/Respondents present in person.

B.N. OLAO

JUDGE

28TH JULY, 2015