



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CIVIL CASE NO. 50 OF 2016

GEOFFREY MUGO KARIMI PLAINTIFF

-VERSUS-

JOSEPH KARIMI KABIRU..... DEFENDANT

RULING

1. The notice of motion before me for determination was filed on **29th March, 2016** by the plaintiff (“applicant”) seeking a temporary injunction to restrain the respondent from interfering with the applicants rightful ownership and or occupation of the parcel of land known as Land Reference No. **106** (“suit property”) situate within Mwichwiri Farmers Company Limited (“Company”) in Kieni area within Nyeri County pending the hearing of the application interparties.
2. The application is premised on the grounds on its face and is supported by the affidavit of the applicant sworn on **29th March, 2016**. He depones that he has been in possession and occupation of the suit property from 1976 and has developed it extensively. He avers that he entered the suit property pursuant to an agreement between himself and the respondent on 4th August, 1976 where the parties agreed that the applicant occupies the suit property on condition that he (applicant) refunds the respondent the money he had paid in purchase of the suit property to the Company.
3. He contends that he became entitled to the suit property after paying the respondent all his money; upon the respondent surrendering to him all the receipts issued to him from the company and upon presentation of these receipts to the company which substituted the respondent’s name with his in their records as the owner of the suit property.
4. That sometime in March 2016, the respondent conspired with some directors of the company to revoke his registration as the owner of the suit property; that his registration was revoked and ownership of the suit property reverted back to the respondent.
5. After his ownership to the suit property was revoked, the respondent in the company of surveyors entered into the suit property wanting to subdivide the same and in the process they demolished the fence. The applicant is now apprehensive that he may be evicted and rendered destitute if the orders sought are not granted.
6. The application is opposed through the replying affidavit of the respondent, sworn on **20th April, 2016**. The respondent denies entering into any agreement or dealings with the plaintiff over the suit property at anytime, but admits having allowed the plaintiff to utilise the suit property as his child. He

depones that he was allotted the suit property by the company and has reserved the land for his three wives and 19 children including the applicant.

7. Terming the applicant's contention that he (applicant) had acquired title to the suit property to be false and fraudulent, the respondent explains that whereas the applicant's entry into the suit property was permissible, the title initially issued in the applicant's name was issued irregularly after the applicant presented himself to the company and claimed that the respondent was dead and that he was the only heir and possessor of the land. It is as a result of these actions, that he wrote to the company informing them that he was the sole owner of the suit property and the company promptly reversed the irregular entries in their records and issued him with a letter dated 8th March, 2016 (J3) that he was the sole owner of the suit property.

8. It is his contention that the respondent has not made up a case for being granted the orders sought because he has approached the court with unclean hands and with an unlawful claim based on fraudulent actions on his part. He urges the court to dismiss the application.

9. When the matter came up for hearing, both counsels chose to rely on the pleadings filed in support of the clients cases which I have carefully considered.

I find the issue for determination to be whether the applicant has made up a case for being granted the orders sought.

Analysis and determination

10. It is trite law that for this court to grant an order of temporary injunction, the applicant(s) must satisfy the conditions set out in the celebrated case of **Giella vs Cassman Brown (1973) EA 358**; that 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.

11. So has the applicant established a *prima facie* case with a probability of success?

Both parties agree that the plaintiff has been in occupation and use of the suit property for a long period of time. They also agree that he was at one point registered as the owner of the suit property but that registration was revoked. It is also not in contention that the respondent instigated the aforesaid cancellation and is now registered as the owner of the suit property in the company's records. What the two parties do not agree on is, who is the rightful owner of the suit property.

12. The question of ownership is not an issue that can be determined at this interlocutory stage, as it requires the calling of witnesses and production of documents during trial as stated in the case of **American Cyanamid Co. v Ethicon Limited (1975) 1 ALL ER 504** at 509 thus;

"It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

13. Since the respondent's ownership of the suit property is under challenge and there been no dispute that the plaintiff is and has been in occupation of the suit property for a long period of time, this court has a duty to preserve the suit property and protect the applicant from being evicted therefrom pending the hearing and determination of the suit. Under the circumstances, I find the order that best commends itself to be an order of status quo, which I hereby issue pending the hearing and determination of the suit.

14. Costs of the application to abide the outcome of the suit.

Orders accordingly.

Dated, signed and delivered at Nyeri this 27th day of March, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Ms Nderitu h/b for Mr.King'ori for the defendant/respondent

Mr.Wamahiu h/b for Mr. Warutere for the plaintiff/applicant

Court clerk - Esther