



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. E034 OF 2021

JOSEPH KING'ORI GATUNGU (*Suing as the Legal Representative of the Estate of EVA WAMBUI THEURI (Deceased Plaintiff)*).....**APPELLANT/APPLICANT**

-VERSUS-

CATHERINE MUTAHI THEURI.....**1ST RESPONDENT**

JOHN WANJOHI MATHINJI.....**2ND RESPONDENT**

RULING

1. By the Notice of Motion dated and filed herein on 4th October 2021, Joseph King'ori Gatungu suing as the Legal Representative of the Estate of the late Eva Wambui Theuri (*the Applicant*) prays for orders of injunction to issue restraining the two Respondents from destroying the buildings constructed by the deceased, selling, dealing with, interfering, alienating, disposing of or otherwise altering the possessory interest of the estate of the deceased in all that parcel of land known as Muhito/Muyu/847 pending the hearing and determination of the Appeal filed herein.

2. In addition, the Applicant prays for an order of inhibition to issue preventing any dealing over the said Title No. Muhito/Muyu/847.

3. The application which is supported by an Affidavit sworn by the Applicant is premised on the grounds:

(a) *That Judgment was delivered in Nyeri MCL & E Miscellaneous 38 of 2018 on 30th September, 2021 dismissing the Applicant's suit seeking to uphold and enforce a customary trust binding on the suit land;*

(b) *That the Estate of the Deceased stands to suffer irreparable loss as the Respondents are likely to destroy the buildings which were constructed by the deceased on the suit land or to dispose of the same;*

(c) *That unless the Respondents are restrained as sought there will be nothing to stop the Respondents from disposing off the same to third parties;*

(d) *That the Applicant has an arguable appeal with overwhelming chances of success;*

(e) *That unless the orders sought are granted, the Appeal will be rendered nugatory as the estate of the deceased will not have any recourse against any acquiring the suit land from the 2nd Respondent;*

(f) That the Applicant is ready and willing to abide by such conditions and to furnish such security as this Court shall order for the due performance of such decree or order as may ultimately be binding upon him; and

(g) That the application has been brought without delay and in the interest of justice to preserve the suit property pending appeal.

4. The application is opposed. In a Replying Affidavit sworn on 3rd November, 2021, on his own behalf and on the behalf of the 1st Respondent, John Wanjohi Mathinji (*the 2nd Respondent*) avers that the application lacks merit, is misconceived and an abuse of the Court process. The Respondents aver that by the Judgment delivered on 30th September 2021, the Magistrates Court had dismissed the Applicant's case for failure to prove the same on a balance of probabilities.

5. The 2nd Respondent further avers that he is the registered owner of the suit property having exchanged the same with the 1st Respondent. The 2nd Respondent further asserts that he has been in occupation of the suit land since it was transferred to his name and that neither the Applicant nor any other person claiming an interest has ever utilised the same.

6. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

7. **Order 42 Rule 6(6) of the Civil Procedure Rules** empowers this Court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from the subordinate Court has been complied with. It provides as follows:

“(6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the subordinate Court or tribunal has been complied with.”

8. Under **Section 79 G of the Civil Procedure Act**, an appeal from the subordinate Court to this Court ought to be filed within thirty days from the date of the decree or order appealed from. A perusal of the material placed before me reveals that the said section was complied with by the Applicant as the decision being appealed was rendered on 30th September, 2021 and the Applicant lodged his Memorandum of Appeal herein some 4 days later on 4th October, 2021. Accordingly this Court has jurisdiction to entertain the application for injunction.

9. The power to grant an order of injunction is however discretionary and such discretion must be exercised judiciously on the basis of the law and evidence (**See Mrao -vs- First American Bank of Kenya Limited & 2 Others (2003) eKLR**). The principles applicable in considering an application for an injunction pending appeal were pronounced by Visram J. (*as he then was*) in **Patricia Njeri & 3 Others -vs- National Museum of Kenya (2004) eKLR** as follows:

“a. An order of injunction pending appeal is a discretion which will be exercised against an applicant whose appeal is frivolous.

b. The discretion should be refused where it would inflict greater hardship than it would avoid.

c. The applicant must show that to refuse the injunction would render the appeal nugatory.

d. The Court should also be guided by the principles in Giella -vs- Cassman Brown (1973) EA 358.”

10. In the locus classicus case of **Giella -vs- Cassman Brown (Supra)**, the Court stated thus:

“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 would decide the matter on a balance of convenience.”

11. As to what constitutes a *prima facie* case in a matter such as this, the Court of Appeal offered guidance in **Mrao Limited -vs- First American Bank of Kenya & 2 Others** (*Supra*) as follows:

“A prima facie case in a civil case includes but is not confined to a “genuine” or “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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

12. In the matter before me, the Applicant had sought an order in the lower court that Title No. Muhito/Muyu/847 is ancestral and that the 1st Respondent’s husband the late Mutahi Theuri had held the same in trust for the other family members. The Applicant further sought a declaration that the transfer of the said property from the 1st to the 2nd Respondent was irregular, unprocedural, illegal and fraudulent. Accordingly the Applicant also sought to have the register rectified by cancellation of the 2nd Respondent’s name and for the claimed customary trust to be noted thereon.

13. A perusal of the material placed before me reveals that the suit property was at all material times since 6th January, 1982 been registered in the name of the 1st Respondent’s husband Mutahi Theuri. Following the death of the said Mutahi Theuri, his widow instituted Mukurweini PM’s Court Succession Cause No. 26 of 2018 and was thereafter registered as the proprietor of the property before she exchanged the same for another parcel of land with the 2nd Respondent on 23rd March, 2019.

14. On the surface of it, it was apparent that no customary trust had ever been registered on the title and that the suit land remained in

the possession and occupation of the 1st Respondent until she transferred the same to the 2nd Respondent who, to-date, remains in exclusive possession thereof.

15. As the Court of Appeal stated in **Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR**:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion ...”

16. In the matter before me, it was clear that the Respondents are the ones who have had possession and occupation of the land since the year 1982. I was unable to see any unmistakable right of the Applicant which required urgent protection of the Court. Given that the Applicant and his predecessor in the suit herein had never been in occupation of the land, it was clear to me that they stood to suffer no material injury which could not be adequately compensated by an award of damages.

17. Arising from the foregoing, I was persuaded that the balance of convenience tilts in the Respondents favour and that the Motion dated 4th October, 2021 lacks a sound basis in law. The same is dismissed with costs to the Respondents.

Ruling dated, signed and delivered in open Court at Nyeri this 24th day of March, 2022.

In the presence of:

Mr. Mwangi Muthoni for the Appellant/Applicant


Mr. Gichuki for the Respondents

Court assistant - Kendi

.....

J. O. Olola

JUDGE

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