



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 16 OF 2019

ALBANUS HARRISON MUTEMWAH PLAINTIFF/APPLICANT

VERSUS

TEKELA LAIBATI WALYA 1ST DEFENDANT/RESPONDENT

PRISCILAR KAVULI WAMBUA 2ND DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff's/Applicant's Notice of Motion application expressed to be brought under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 Rule 1 and Order 51 Rule of the Civil Procedure Rules and all other enabling provisions of the law of orders.

1. Spent

2. That this Honourable court be pleased to grant an order restraining the Defendant/Respondents by themselves, their servants, agents and anyone claiming under them or through them from entering, trespassing or interfering with any plant or structure on the Applicant's portion on land parcel No. Kitaingo/Uvete/1519.

3. That this Honourable court be pleased to issue an order restraining the Defendant/Respondent from interfering with the Plaintiff's use of and possession of suit land pending hearing and determination of this application.

4. That this Honourable court be pleased to issue an order that the Officer Commanding Station, Kilome Police Station do enforce the interim orders.

5. That the Defendants/Respondents bear the costs of the application herein.

2. The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of Albanus Harrison Mutemwah, the Plaintiff/Applicant herein, sworn at Machakos on 11th March, 2019 and 7th June, 2019 respectively.

3. The Defendants/Respondents have opposed the application vide the replying affidavit of Priscilla Kavuli Wambua, the 1st Defendant/Respondent herein, sworn at Machakos on undisclosed date and filed in court on 29th May, 2017.

4. The Plaintiff/Applicant has deposed in paragraph 2,3,4,5 and 6 of his supporting affidavit that he is the beneficial owner of an identified portion of land parcel number Kitaingo/Uvete/1519 having purchased the portion from the Defendants/Respondents, led by one Peter J.K Walya who was the family head back in 1992 as can be seen from copies of sale agreements dated 20/9/1992 and 25/9/1992 marked as AHM 1(a) and AHM 1(b) respectively, that he has been using the land and has developed it since 1992 without interference from anyone, that the 2nd Defendant/Respondent herein is the 1st Defendant's/Respondent's daughter in law and has been inciting her sons to trespass into the suit land, damage crops and cut down trees as can be seen from the chief's letter dated 17/9/2018 and marked AHM 2" and that the Defendants/Respondents have on several occasions trespassed into his portion of land and have uprooted crops and cut down trees as can be seen from bundle of photos taken on 4/3/2019 showing the 2nd Defendant/Respondent uprooting crops, the bundle is marked as AHM3".

5. In his further affidavit, the Plaintiff/Applicant has deposed in paragraphs 3, 4, 5, 6, 7 and 8 that he is advised by his advocates which advise he verily believes to be true that the replying affidavit is full of hollow averments, that the land parcel number Kitaingo/Uvete/1519 was sold to him by the clan led by Mr. Peter J.K Walya who was the head of Walya family at the time, that the Defendants/Respondents have confirmed in paragraph 13 of their replying affidavit that the said Peter J.K Walya is a son of Mr. Walya Ndoo, the father of the 2nd Defendant/Respondent, therefore he is part of the family, that the first and second wife registered or made to be registered the land parcel Kitaingo/Uvete/1519 in their names without the knowledge of the Plaintiff/Applicant despite knowing that he was a bonafide purchaser of a

portion thereof, that he has made requests on several occasions to the 1st Defendant/Respondent to subdivide and transfer the portion into his name, but the latter kept on promising to make good his claim and that he has fenced, used, cultivated and developed the said portion of land since 1992 without any interference until recently in September, 2019 when the 2nd Defendant/Respondent started trespassing into the land and destroying crops therein.

6. On the other hand, the 2nd Defendant/Respondent has deposed in paragraphs 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 16, 17, 24, 26 of her replying affidavit that the 1st Defendant/Respondent is the registered legal owner of land parcel number Kitaingo/Uvete/1519, that the 1st Respondent is the biological mother of her husband (Lucas Wambua Laibati), that the 1st Defendant/Respondent did not sell her land parcel number Kitaingo/Uvete/1519 to anyone, that the purported sale agreements dated 20th September, 1992 and 25th September, 1994 of a Mr. Albanus Harrison Mutemwa, the Plaintiff/Applicant and a Mr. Peter J.K Walya is unknown to the family of the 1st Defendant/Respondent, that this Peter J.K Walya the purported seller of part of parcel Kitaingo/Uvete/1519 is not a son of the 1st Defendant/Respondent that the late Mzee Walya Ndoo of Kitaingo Mukaa Subcounty of Makueni County had three(3) wives namely;

i. Mrs Munyiva Walya

ii. Mrs Nthilani Walya

iii. Mrs Mutheu Walya

who are all deceased that the late Mzee Walya Ndoo had subdivided his land amongst his three wives, that the 1st Defendant/Respondent is of the first wife of Walya Ndoo, that Peter J.K Walya has no right of entering into the land of his step mother, that the Plaintiff/Applicant avers that he bought this portion of land on 20th September, 1992 and on 25th September, 1994 before the land was adjudicated a reason of which could have necessitated the Plaintiff/Applicant to have been issued with a separate title deed if it were true that he bought the land as he has deposed, that the Plaintiff's/Applicant's claim of being a beneficial owner of identified portion of land parcel No. Kitaingo/Uvete/1519 in paragraph 2 of his supporting affidavit, that all along the Plaintiff/Applicant has not addressed the court to on the registration of his purported land parcel in Kitaingo/Uvete/1519 of the 1st Defendant/Respondent ever since 1994 hence not a bonafide purchaser and that the bundle of photos filed by the Plaintiff/Applicant as proof of trespass in paragraph 6 of the supporting affidavit should be discredited (sic).

7. The application was canvassed by way of written submissions.

8. The counsel for the Plaintiff/Applicant submitted that in determining whether not to grant the injunctive orders sought, the guiding principles are as set out in the celebrated case of **Giella V Cassman Brown Co. Ltd [1973] EA 358**. I need not repeat the three principles herein save to say that with regard to whether the Plaintiff/Applicant has a *prima facie* case with probability of success, the counsel pointed out that the following facts are poignant.

a) The Plaintiff/Applicant is in actual possession of the disputed portion of land.

b) The Plaintiff/Applicant is in possession of a sale agreement of the purchase price of the disputed portion of land.

c) The Plaintiff/Applicant has developed the disputed portion of land.

9. The counsel went on to submit that the glaring facts establish a *prima facie* case in favour of the Plaintiff/Applicant and that it is evident that from the replying affidavit that the Defendants/Respondents do not dispute the fact that the Plaintiff/Applicant is in actual possession of the disputed land for over 20 years. It was further submitted that the Defendants/Respondent in their replying affidavit have not addressed the court on how the Plaintiff/Applicant came into actual possession of the disputed portion of land and why they have never challenged his occupation in a court of law or any other legal office. The fact that the Plaintiff/Applicant has developed the land for over 20 years despite the Defendants/Respondents living just across the land and nonetheless allowing him to continue developing it is a reason that this court should be guided by in finding that he has a *prima facie* case.

10. On the other hand, the Defendants/Respondents submitted that the Plaintiff/Applicant has failed to establish a *prima facie* case with probability of success. The Defendants/Respondents contend that it is not in dispute that the 1st Defendant/Respondent is the registered proprietor of land parcel number Kitaingo/Uvete/1519. Regarding the sale agreement between the Plaintiff/Applicant and one Peter J.K Walya that the Plaintiff/Applicant relies on, the Defendants/Respondents contend that the seller had no proprietary rights to the property and thus could not pass any legal title to the Plaintiff/Applicant.

11. On the principle that an interlocutory injunction will not normally be granted unless the Plaintiff/Applicant right otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages, the Plaintiff's/Applicant's counsel submitted that the energy that the Plaintiff/Applicant has spent to develop the suit land for over 20 years is priceless in addition to fact that he is in occupation of the said suit property. On their part, the Defendants/Respondents submitted that the Plaintiff/Applicant has not exhibited any proof of occupation of the suit property and that paragraph 30 of their replying affidavit clearly show that they have been in occupation of it since 1969.

12. Regarding the principle that if the court is in doubt, it will decide the application on a balance of convenience the Plaintiff's/Applicant's counsel submitted that the fact the Plaintiff/Applicant has brought a sale agreement duly executed and witnessed and which document remains unchallenged should warrant the court to make a finding that the balance of convenience tilts in favour of the Plaintiff/Applicant.

13. The counsel urged the court to take into consideration that the Defendants/Respondents have never challenged the Plaintiff's/Applicant's

occupation of the suit property.

14. The counsel conducted by urging the court to grant the orders sought.

15. On their part, the Defendants/Respondents submitted that the balance of convenience tilts in their favour and that the status quo should not be disturbed.

16. Having carefully read the application together with the supporting and further affidavits as well as the replying affidavit and the submissions filed, my finding is that whereas it is not in dispute that the 1st Defendant/Respondent is the registered owner of land parcel number Kitaingo/Uvete/1519, the fact that the Plaintiff/Applicant is in actual possession of the disputed portion of what he claims to have purchased from one Peter J.K Walya has not been discounted or controverted.

17. The Defendants/Respondents and especially the 2nd Defendant/Respondent has not disputed the disposition in paragraph 6 of the supporting affidavit that she is the one who is seen uprooting crops and cutting down trees. In my view therefore the Plaintiff/Applicant has established a *prima facie* case against the Defendants/Respondents with probability of success.

18. Secondly, I would agree with the Plaintiff/Applicant that his long occupation of the portion of the suit land that he claims and the subsequent developments that he has carried out herein is priceless taking into consideration the sentimental value he has attached to his portion is a clear demonstration that he stands to suffer irreparable injury which cannot adequately be compensated by an award in damages.

19. Arising from the above, it clear that the court is not in doubt as to what side the balance of convenience tilts that is to say, the same is in favour of the Plaintiff/Applicant.

20. The upshot of the foregoing is that the application has merits and I hereby proceed to grant prayers 2, 4 and 5 of the application.

It is so ordered.

Dated, Signed and Delivered at Makueni this 28th Day of February, 2020.

Mbogo C.G Judge

28/2/2020

In the presence of:

Mr. Hassan holding brief for Mr. Masaku for the Applicant

2nd Respondent

Ms. C. Nzioka – Court Assistant

MBOGO C.G

JUDGE