



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 5 OF 2019 (O.S)

PATRICK CHOMBA NJAGI

WILSON KABINGA NJAGI

CHARLES MWENDIA NJAGI.....APPLICANTS

VERSUS

DAVID KIURA NJAGI.....1ST RESPONDENT

FLORENCE WANJIRU KANGUIRO.....2ND RESPONDENT

SUSAN MUTHONI MUNENE.....3RD RESPONDENT

CHARITY WANGECHI KIURA.....4TH RESPONDENT

MARY WANJIKU DAVID.....5TH RESPONDENT

ABRAHAM MAGUTA KIURA.....6TH RESPONDENT

PATRICK CHOMBA KIURA.....7TH RESPONDENT

ELIJAH SAMMY MURIMI KIURA.....8TH RESPONDENT

RULING

The application before me is the Notice of Motion dated 14th February 2019 brought under **Order 40 Rule 1, 2 and 3 CPR**. The applicant is seeking the following orders:

(a) Spent.

(b) That the Honourable Court do, by way of mandatory injunction, restore the plaintiffs herein into possession of parcel No. Kabare/Mutige/192 now sub-divided into Kabare/Mutige/961-965.

(c) That an order of injunction do issue, upon order 'b' directed against the defendants herein either by themselves, agents, employees or hirings from illegally evicting, threatening to evict and/or committing any acts of waste, alienating and/or dealing in any way with parcel No. Kabare/Mutige/192 now sub-divided into Kabare/Mutige/961-965 in a manner prejudicial to the possessory rights of the applicants herein until the hearing and determination of this suit.

(d) That the O.C.S Kianyaga do supervise and effectuate through provision of security and enforcement of the order of possession restoration in lieu of co-operation compliance from the defendants.

The application is supported by the affidavit of Patrick Chomba Njagi and grounds shown on the face of that application. The said affidavit is further supported by numerous annexures thereto. On 14th February 2019, the 1st respondent with the authority of his co-respondents filed a replying affidavit in opposition to the said application. The respondents also through the firm of R. Muthike Makworo filed grounds of

opposition in further opposition to the applicants' application.

APPLICANTS CASE

The applicants through the 1st plaintiff's supporting affidavit deponed that he has lived on land parcel No. Kabare/Mutige/192 now sub-divided into Kabare/Mutige/961-965 all his life together with his family. On 30th January 2019, they instructed their advocate to file the suit herein. While they engaged a process server to effect service of the Court processes, the defendants on the night of 2nd February 2019 descended upon their land using brute force including threat of physical harm and pulled down his house, coffee sheds, piggery and destroyed his entire homestead. He annexed photographs of the wanton destructions. He reported the matter to Police who arrested three suspects namely David Kiura, Patick Chomba and Elijah Sammy Murimi. The three were subsequently charged with three counts of malicious damage to property, stealing and creating disturbance in a manner likely to cause a breach of the peace contrary to Sections 339 (1) 268 as read with 275 and 95 (1) (b) of the Penal Code. A copy of the charge sheet is attached to the supporting affidavit.

RESPONDENTS CASE

The respondents through David Kiura Njagi (1st respondent) filed a replying affidavit sworn on 13th February 2019 and another one sworn on 5th March 2019 respectively. In the two affidavits, the 1st respondent deponed that he was the original proprietor of land parcel No. Kabare/Mutige/192 registered in 1958 and that he has been in exclusive occupation together with his co-respondents since he was given by the clan during the land adjudication period. He deponed further that none of the applicants has been living on his land which he has now sub-divided and shared among his children and himself. The 1st respondent also stated that all the applicants live and cultivate on his late father's parcel of land L.R. No. Kabare/Mutige/283 which borders the suit land herein and that they are all beneficiaries of the Estate of their deceased father. The 1st respondent further stated that none of the applicants has neither lived nor developed any of the portions of his land. He stated that the first applicant house which he alleges was demolished belongs to his son the 7th respondent herein. He deponed that the 1st applicant has stated that he was evicted from the suit property but the rest of the applicants have not disclosed where they live.

DISPOSITION

The applicants are seeking a mandatory injunction order restoring them into possession of the suit property parcel No. Kabare/Mutige/192 which is now sub-divided into Kabare/Mutige/961-965. The applicants have stated that they instructed their advocate to file the instant suit on 30th January 2019 and on the night of 2nd February 2019, the respondents descended on his land and using brute force pulled down his house, his coffee, shed, piggery thereby destroying his homestead generally. The respondents have not specifically denied the 1st applicant's averments but in an evasive way at paragraph 11, the 1st respondent stated as follows:

"11. That as per the affidavit in support of the Notice of Motion, it is only the 1st applicant who has deponed that he was evicted from the suit land, the co-applicants have not disclosed where they live".

The respondents are indeed admitting that the 1st applicant was living in the suit property. Again in a letter attached to the affidavit in support of the Originating Motion which is the substratum of this suit dated 18th December 2018, the firm of Okubasu & Munene Advocates wrote to the 1st applicant Patrick Chomba Njagi in reference to plot L.R. No. Kabare/Mutige/963 as follows:

".....That without any colour of right whatsoever, you have encroached on our client parcel of land and erected a semi-permanent/temporary house on our client land and you have vowed that you are not going to vacate the subject matter. We wish to bring to your attention that your actions are not only illegal but which attracts the sanctions of the law.

.....Our adamant instructions are therefore to demand that you demolish your temporary house sitting on our clients parcel of land and to vacate our client's land within one (1) month from the date of this notice and not later than the 20th day of January 2019".

If the 1st respondent admitted in writing on 18th December 2018 that the 1st applicant had built a semi-permanent house on his land parcel No. Kabare/Mutige/963, how can he swear on oath that none of the applicants have lived or developed on any of the portions of his land? The photographs attached to the affidavit in support of the Notice of Motion demonstrates a chilling destruction of property. The respondents have been linked to the wanton destruction and have even been charged in a criminal case now pending before Court. One thing for me is clear; the 1st respondent through his lawyers wrote a demand letter directing the 1st applicant to demolish his house which was sitting on his land parcel No. Kabare/Mutige/963 within one (1) month from 18th December 2018. On the night of 2nd February 2019, the 1st applicant's house was demolished. That cannot be a coincidence. The principles for the grant of a mandatory order at interlocutory stage must be clear. It can only be issued in clear circumstances where the respondent attempts to steal a march over his opponent. That was aptly put by the Court of Appeal in the case of *Kenya Breweries Limited & another Vs Washington O. Okeyo (2002) e K.L.R* where it was held:

"The test whether to grant a mandatory injunction or not is correctly stated on Vol. 24 Halsbury's Laws of England 4th Edition paragraph 948 which reads:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. If the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application".

The 1st respondent wrote a demand letter asking the 1st applicant to demolish structures which he had built on his land parcel No. Kabare/Mutige/963 within 30 days from the date of the said letter. The plaintiff/applicant had instituted this suit for adverse possession. For a claim of adverse possession, the claimant must demonstrate that he has been in continuous occupation of the suit property. By descending on the 1st applicant in the night of 2nd February 2019, and demolishing his house and other developments thereon, the respondents were attempting to steal a march on the applicants. I find that this is classical case where a mandatory injunction at an interlocutory stage is called for. The respondents in their response to those allegations have stated that the house that the 1st applicant alleges was demolished belongs to his son, the 7th respondent herein. The respondents have not explained why the house of the 7th respondent had to be demolished. Since there is criminal case against the respondents which is pending, I leave it to the relevant authorities to conduct their investigations. My analysis and evaluation of the evidence and the applicable law leads me to one conclusion that this is appropriate case to issue the orders sought.

In the result, I find the application dated 14th February 2019 merited and the same is allowed as prayed. The costs of the application shall be borne by the respondents jointly and severally.

READ and SIGNED in open Court at Kerugoya this 15th day of March 2019.

E.C. CHERONO

ELC JUDGE

15TH MARCH, 2019

In the presence of:

- 1. Mrs. Makworo for the Defendants**
- 2. Mr. Karweru for the Plaintiffs**
- 3. Ms Catherine Court clerk – present**