



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CIVIL CASE NO. E038 OF 2021**

**SIMON GITHENDU NJUGUNA.....APPLICANT**

**-VERSUS-**

**ELIAS MUIRURI.....1<sup>ST</sup> DEFENDANT**

**MARGARET WAITHERERO.....2<sup>ND</sup> DEFENDANT**

**EKIRA WANJIKU.....3<sup>RD</sup> DEFENDANT**

**NJANTHI MUIRURI.....4<sup>TH</sup> DEFENDANT**

**RULING**

This ruling is on the Notice of Motion dated 18<sup>th</sup> May, 2021. The said motion which is under **Article 40** of the **Constitution, Section 3 (1)** of the **Trespass Act, Sections 26 and 60** of the **Land Registration Act, Orders 40 and 51** of the **Civil Procedure Rules** and all enabling provisions of law seeks three orders namely;

1. The Respondents to be restrained from managing, controlling or collecting rent from the suit property namely NGONG/NGONG/8868 pending the hearing and determination of the suit.
2. The Court orders the creation of a neutral bank account for the purposes of collecting rental income from the property pending the determination of the suit.
3. Costs be provided for.

The application is supported by four grounds which are that the applicant is a joint owner of the suit property with his deceased mother Beth Nyambura Njuguna, that he is now the legal owner under the doctrine of Survivorship, that the Respondents have wrongfully trespassed and taken possession and that the suit property is the main source of income for the Applicant and his right to enjoy his property is affected by the Respondents action.

The supporting affidavit by the Applicant reiterates the above grounds. He adds that he has tried to settle the matter amicably with the Respondents to no avail. He has no source of income for now and he cannot pay fees for his children.

Annexed to the Applicant's affidavit are a demand letter 6/5/2021, copy of Certificate of official search dated 30/3/2021, copy of title deed, copy of unpaid electricity bill and copy of vacate notice dated 16<sup>th</sup> February, 2020.

The application is opposed by Respondents and Elias Muiruri the first Defendant has sworn a replying affidavit on his own behalf and that of his co-defendants.

In brief, he says that the value of the suit property is within the jurisdiction of the Chief Magistrate as it is below Ksh. 20 million and that it is also subject to proceedings before Kandara Magistrates Court in succession cause no. 301 of 2020.

The respondents also say that the applicant is not entitled to all the rent from the suit premises as he obtained registration thereto fraudulently and in any case, he is collecting rent from a half of the houses on the suit premises.

Counsel for the parties filed written submissions on 15/10/2021 and 8<sup>th</sup> December, 2021 respectively.

The Respondents submissions are to the effect that the applicant has not made a prima facie case with a probability of success or shown that the balance of convenience tilts in his favour. The case of ***Mohammed Ahmed Noor and 3 others –vs- Bora Developers Limited and 2 others eKLR*** (2012) where the old prerequisites to the grant of an injunction were restated is relied upon.

Finally, since the Plaintiff's registration as proprietor of the suit land is under challenge, the Respondents urging that he should not be granted the orders sought.

On the other hand, the Plaintiff urged that since the demise of his mother the joint owner, he is now the sole. He cited several authorities in this regard. As the sole owner of the suit property, he urged that he should be granted the orders sought.

I have carefully considered the application in its entirety including the affidavits, grounds, annexures and submissions by both sides. I find that since the application is primarily on injunctive orders, the principles of grant of an injunction come into play namely a prima facie case with a probability of success and if the Court is not sure of these two principles, then it should consider the balance of convenience.

I find that the applicant has not made out a prima facie case with a probability of success for the following reasons;

Firstly, the applicant's ownership of the suit property is in doubt owing to the challenge by the Defendants including a report to the authorities alleging fraud in the applicant's registration.

Secondly, the existence of another suit at Kandara Magistrates Court and failure by the Applicant to disclose this and to even go to the extent of averring at paragraph 11 of the plaint that there is no other suit between the parties over the same subject matter seriously undermines his credibility as a witness.

The averment in the replying affidavit that the Applicant is already collecting rent from half of the suit land when he says that he earns nothing therefrom further weakens his claim.

Finally, the balance of convenience does not favour the applicant as the prevailing status quo seems to be fair to both sides.

For the above stated reasons, I find no merit in the application dated 18<sup>th</sup> May, 2021 and I dismiss it. Costs in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31<sup>ST</sup> DAY OF JANUARY, 2022**

**M.N. GICHERU**

**JUDGE**