



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

E.L.C NO 154 OF 2013

GLADWELL WAIRIMU MATHENGE.....PLAINTIFF

VERSUS

TERESIA WANJIRU WANDURUA.....DEFENDANT

RULING

1. This ruling is on a notice of motion by the plaintiff dated **11th February, 2013** seeking among other orders; that this honorable court be pleased to issue a temporary injunction and restrain the respondent, her servants, agents and/or any other person at all on her behalf or claiming through her from grazing, cutting down trees and vegetation, cultivating the land, from entering or remaining or in any other way, interfering with the interests of the applicant herein. She also seeks that they vacate from the suit land pending the hearing and determination of the suit.
2. Grounds in support of the application are stated on its face and there is a supporting affidavit sworn by the plaintiff on even date. She depones that sometime in the year 2006, she purchased **Plot No 479** of the **Ngai Ndeithia Squatter Settlement Scheme** (“hereinafter referred to as the suit property”) measuring 0.25 hectares from one **Hannah Wambui**, who being old and sickly executed a consent deed (**GWM1**) effectively authorising her son, **Joseph Wandarua Kinyua** to attend, witness and sign the sale agreement on her behalf.
3. On **21st February, 2006** a sale agreement (**GWM2**) was executed between Joseph Wandarua Kinyua on behalf of his mother, Hannah Wambui on the one hand and the plaintiff on the other after payment of the full purchase price of Kshs 210,000/-. The Plaintiff then took possession and planted trees thereon.
4. On **19th October, 2007** the plaintiff was issued with a letter of offer from the Ministry of Lands (Land Adjudication and Settlement Department), (**GWM3**) for plot number 479 measuring 0.25 hectares to which she paid the outright purchase price of Kshs.2,426/= (**GWM4**).
5. It is the plaintiff's contention that on **11th February, 2011** the defendant (owner of Plot 209, from which the suit property was excised and a sister to the Hannah Wambui), entered into the suit property and erected a fence thereon. The Plaintiff reported the encroachment to the local administration to which the area Chief, wrote a letter to the defendant dated **11th February, 2011** (**GWM5**) to the affect that the defendant was the owner of plot No. 209 not the suit property. The defendant however has continued with the encroachment of the suit property to date.
6. In a rejoinder, the defendant opposes the application. She has filed an elaborate Replying Affidavit dated **4th July, 2013**. In summary, she depones that she is the daughter of the original registered owner of plot No. 110, one **Wandarua Mugo** who passed on in October 1973 (**TWW1**) and the sole heir to his

estate; that Plot No. 110 was allocated to her father as a member of Ngai Ndeithia Squatter Scheme for which she paid the allocation fees to the District Land Adjudication and Settlement Scheme as well as survey fees (TWW2); that she has been in exclusive occupation, has been using of the suit property since 1970 and has planted trees which are now mature (TWW 3); that the plaintiff is a total stranger; that she only learnt of the subdivision and disposal of the suit property through **Criminal Case No 2012 of 2011, (TWW5)** where she had been charged with the offence of causing malicious damage to property but was later acquitted for lack of evidence.

7. It is the defendant's contention that no succession proceedings towards the administration of the deceased estate have been instituted, therefore the subdivision and sale of plot No. 110 is illegal and a nullity abinitio; that she has made several requests to the District Land Adjudication and settlement office to reinstate original plot No. 110 under the names Wandurwa Mugo for proper administration through succession proceedings; that the said Joseph Wandurua Kinyua was not the registered owner of plot 110, therefore he had no capacity to dispose of the suit property; that it was only by conniving with her brother who was the secretary of the Ngai Ndeithia Squatter Settlement Scheme that the plaintiff managed to get registered as the owner of plot 149.

8. In reply, the plaintiff filed a further supporting affidavit on **14th November, 2013**. She deponed that Retire Ngai Ndeithia scheme was unregistered at the time of the death of Wandurwa Mugo in 1973 who had been temporarily allotted the said plot similar to all the members of Retire Ngai Ndeithia scheme; that since the said plot had not been formally allocated to Wandurwa Mugo (father to both parties), the committee Ngai Ndeithia scheme found it wise to enter the names of both the plaintiff and the defendant in their registers which was done purely in good faith; that the defendant had not singlehandedly catered for all the expenses towards acquiring the original plot 110 as the plaintiff had also contributed Kshs. 3000/= on 10th March, 2005 for survey fees; that since purchasing the suit property together with the trees thereon, she had been developing the same without interference from the defendant, had in her possession a letter of offer and that if the injunction sought was not granted, the respondent would continue wasting the suit property which loss would not effectively be compensated by way of damages.

9. when the matter came up for inter parties hearing on **13th October 2014**, **Mr Njuguna** appeared for the plaintiff and **Mrs Mureithi** for the defendant. Both counsels reiterated what was contained in their clients affidavits. In addition both counsels acknowledged that the respondent was in occupation of the suit property.

10. A mandatory injunction, at interlocutory stage, is normally granted in the clearest of cases and where there are special circumstances. See **Halsbury's Laws of England Vol. 24 (4th edition) para. 848**. This was also the holding in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) All ER pg. 901** wherein the court stated;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction”.

11. The Courts have also held that granting a mandatory order or injunction may have the effect of bringing the litigation to an end at the interlocutory stage. This was echoed by the Court of Appeal in the case of **Trinity Prime Investment Ltd vs Savings & Loan and another Civil Appeal No. 90 of 1998** that **“where the Court has granted an interlocutory injunction prayed for, it should not grant a mandatory injunction whose effect shall bring the litigation to an end.”**

12. In the instant case, the applicant seeks to restrain the defendant from **"entering or remaining or in any other way interfering with the interests of the applicant herein and directing them to vacate from the suit land"** This in my view is not a clear case to warrant the Court to grant an interlocutory

mandatory injunction. I say this because, despite the applicant having a letter of offer from the Land adjudication and settlement department to plot No. 479, there are allegations by the respondent that she has lived on the suit property for over 30 years and the manner in which the land was subdivided and sold to the plaintiff by persons who were not the registered owners and without any evidence of succession proceedings was illegal and fraudulent.

13. The defendant has poked enough holes in the plaintiff's case by alleging some element of illegality and fraud. The extent of this, however, will be canvassed at the main trial where the plaintiff will adduce enough evidence as well as be subjected to cross-examination to enable the court make a final determination on the merits of the suit.

14. It is apparent that the respondent is in occupation of the entire plot 110, subdivided into plots 209 and 479 which fact has been admitted by both parties. A permanent injunction therefore restraining the respondent from entering, remaining and vacating the suit property would amount to an eviction order and consequently ending the suit at an interlocutory stage extinguishing her beneficiary interests. The issue before this court is not direct and simple and there are no special circumstances adduced by the applicant to warrant a mandatory injunction. From the affidavit evidence the applicant does not occupy any portion of the suit land at the moment. It is therefore in the interest of justice that the status quo be maintained pending the hearing and determination of the suit.

15. To this end, I find that the applicant has failed to meet the threshold for grant of interlocutory relief. In the result I decline to grant the orders sought in the Notice of Motion dated 11TH February, 2013 and dismiss the same with costs to the respondent.

Dated and Signed at Nyeri this 16th day of February 2015.

L N WAITHAKA

JUDGE

Dated and delivered in open court at Nakuru this 25th day of February, 2015.

A. MSHILA

JUDGE