



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 183 OF 2013

LYDIA WANGUI WAIRIMUAPPLICANT

VERSUS

FRANCIS MWANGI WAMUGUNDA 1ST DEFENDANT

NAOMI WANJIRU MWANGI.....2ND DEFENDANT

PETER KIMEMIA MWANGI.....3RD DEFENDANT

RULING

1. This ruling is in respect of the notice of motion dated **28th January, 2015** brought by the 2nd defendant (hereinafter referred to as the Applicant). The application seeks to restrain the plaintiff (hereinafter referred to as the Respondent) from trespassing into the parcel of land known as LOC.2/Kangari/4634 (hereinafter referred to as the suit property), committing acts of waste and picking tea bushes thereon pending the hearing and determination of the application and the suit.
2. The application is supported by the affidavit of the applicant (Naomi Wanjiru Mwangi) and is premised on the grounds that the applicant is the registered proprietor of the suit property; that the respondent brought the suit herein seeking cancellation of the title issued to her and the 3rd defendant and that on 10th September, 2013 the respondent obtained an order restraining the 3rd defendant and herself from selling, leasing and/or charging the suit properties pending the hearing and determination of her application.
3. The applicant explains that the suit property is a sub- division of Loc.2 Kangari/4450 which was registered in the name of the 1st defendant and that she bought it for valuable consideration from the 1st defendant.
4. Contending that the respondent has never been in actual possession and/or occupation of the suit property, the applicant explains that armed with the court order referred to herein above, the respondent has entered the suit property and began picking the tea bushes in the suit property.
5. Explaining that the conduct of the respondent of trespassing into the suit property and picking tea bushes therein is against her right to enjoyment of the suit property, the applicant contends that the order relied on by the respondent to trespass into suit property and to commits the acts complained about did not allow her to trespass into the suit property.

6. The applicant's contends that the respondent should be restrained from entering into the suit property and committing acts of waste therein.
7. In the affidavit sworn in support of the application, the grounds thereon are reiterated. The following documents are annexed to the affidavit sworn in support of the application:-
- a) Official search certificate and title deed issued to the applicant on 16th May, 2013; marked A and B;
 - b) Sale agreement executed between the applicant and the 1st defendant dated 29th December, 2011; marked C;
 - c) Order issued to the respondent on 23rd September, 2013; marked D;
 - d) Charge sheet in Kigumo Law Courts Criminal Case No. 1306 of 2013 where the respondent was charged with creating disturbance in a manner likely to cause a breach of the peace contrary to **Section 95(1)(b)** of the Penal Code; marked D.
8. Explaining that the orders issued to the respondent were meant to preserve the suit property from third parties, the applicant contends that the respondent wrongly interpreted it and began committing acts of waste on the suit property.
9. In the her further affidavit sworn on **20th May, 2015**, the applicant denies the allegations that she illegally or unprocedurally obtained interest to the suit property and explains that the respondent entered the suit property after she obtained the orders referred to herein above. She maintains that the said orders did not allow the respondent to trespass into the suit property.
10. Even though from the applicant's further affidavit it appears the respondent replied to the issues raised in the applicant's supporting affidavit, at the time of writing this ruling no reply was in the court file.
11. That notwithstanding, I note that what is sought in this application is an interpretation of the order issued to the respondent on 23rd September, 2013 and which allegely the respondent has relied on to commit the alleged act of waste and trespass.

That order was in the following terms:-

“That the 1st, 2nd and 3rd defendants/respondents Mr. Francis Mwangi Wamugunda, Naomi Wanjiru Mwangi and Peter Kimemia Mwangi be and are hereby restrained by themselves, their agents and/or servants from selling, leasing and/or charging the new titles born out of the suit premises to wit Peter Kimemia Mwangi and Naomi Wanjiru Mwangi who obtained title deed under fraud from the first defendant Respondent to wit Mr. Francis Mwangi Wamugunda who sold the suit premises secretly and fraudulently without the knowledge of the plaintiff/applicant and to preserve the property pending the hearing of the application and until this case is finally heard and determined.”

12. A plain reading of the order cited herein above, reveals that the court recognised the existence of the titles issued to the respondents and only sought to protect the suit property from the acts mentioned therein, to wit, selling, leasing and/or charging the new titles pending the hearing and determination of the suit.
13. In my view, the order was not a determination that the applicant had no interest to the suit property capable of protection by law.

Clause 7 of the sale agreement executed between the applicant and the 1st defendant, provided that the applicant was to acquire physical possession of the suit property after paying the full purchase price.

14. The evidence in the court file shows that the caution placed by the respondent and the title held by the respondent was removed through a court process in which the respondent was a party. There is evidence that the consent to transfer the suit property was obtained through a court sanctioned process. There was no appeal to the orders of the court sanctioning the transfer of the suit properties to the applicant and the 3rd defendant.

15. From the documents, I also gather that prayer 5 of the respondent's notice of motion dated 10th september, 2013 on which the order referred to herein above was issued was denied. That prayer was in the following terms:-

“That the 1st 2nd and 3rd defendants/respondents and their servants have been trying to illegally evict the plaintiff/applicant and her family from the said land parcel number loc 2/kangari/4450 where the plaintiff/applicant got married to her husband Francis Mwangi Wamugunda the (1st defendant) and that the plaintiff /applicant and her children be accorded police protection and that the status quo be maintained until final hearing and determination of the main suit.”

16. In her supporting affidavit, the respondent only claims entitlement to a share of the suit properties. In her statement filed on 10th September, 2013 the Respondent suggests that the applicant is on the suit property for she states as follows:-

“...therefore I request the honourable court to issue orders that they be removed from the suit land and permanently restrained from selling or charging the new titles until the case is determined.”

17. The only reasonable conclusion that this court can arrive at from the documents filed in this suit and the averments by the respective parties is that the applicant is in possession of the suit property. Since the order herein did not restrain her from enjoying the suit property, I agree that the respondent should be restrained from trespassing into the suit property pending the hearing and determination of the suit.

Costs in cause.

Dated, signed and delivered at Nyeri this 30th day of June, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kimunya h/b for Mr. Waweru Macharia for the plaintiff/respondent

N/A for 1st & 3rd defendants/applicants

N/A for 2nd defendant/applicant

Court assistant - Lydia