



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI
ELC CASE NO. 605 OF 2010(OS)

DOUGLAS MUINDI KANGETHE.....1ST PLAINTIFF

JAMES KAMAU KANGETHE.....2ND PLAINTIFF

-VS-

MICHALE KARUKU GATURA.....DEFENDANT

RULING

The matter coming for determination before me is the Plaintiffs/Applicants Notice of Motion dated 19th August, 2013 brought under **Section 63 (9),(c), (e), Order 40 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking for these orders.

- a. That pending the hearing and determination of this suit, the **Status Quo** be maintained restraining the Defendant from evicting, or in any other form in any way dealing with the property herein referred to as **Dagoretti/Mutuini/1139**.*
- b. That pending the hearing and determination of this suit an interim orders be issued restraining the Defendant from subdividing, selling, transferring or in any way other dealing with the property herein referred to as **Dagoretti/Mutuini/1139**.*
- c. That costs be in the cause.*

The application was supported by the grounds stated on the face of the application and the annexed affidavits of **Hannah Kabura Kangethe, Douglas Muhindi Kangethe** and **James Kamau Kangethe**. These grounds are:

- 1. In the year 1965, the Plaintiff's mother brought a portion of the piece of land known as **Dagoretti/Mutuini/68** which the Defendant has since subdivided into **Dagoretti/Mutuini/1139** and **Dagoretti/Mutuini/1140**.*
- 2. The Plaintiffs and their mother and sisters have always lived on that piece of land and have not known any other home.*
- 3. The Defendant is now threatening to evict the plaintiffs and their families from the piece of land herein which aspect is likely to cause the plaintiffs irreparable loss and damage.*

4. That it has also come to the knowledge of the plaintiffs that the Defendant has obtained Land Control Board Consent allowing him to subdivide the suit property herein.

5. That the Defendant intends to sell the suit property upon subdivision which aspect will seriously prejudice the plaintiffs herein.

6. That it is for the interest of justice that the present application should be allowed .

Hannah Kabura, the mother to the Plaintiffs herein swore a supporting affidavit and averred that in the year 1965, she bought a portion of land from a piece of land known as **Dagoretti/Mutuini/68** and has since been living on the said piece of land with her family, the plaintiffs included. That in the year 1994, she was issued with a decree from the High Court ordering that **0.9 acres** of the piece of land then known as **Dagoretti/Mutuini/68** be transferred to her as evidenced by **annexture HK-1**.

Further, that after the decree she fell sick and became bed-ridden and the Judgment Debtor then **George Gatura**, fraudulently transferred the suit property to his son, **Michael Karuku Gatura** the Defendant herein, in an effort to avoid the judgment as per **annextured H.K II**. She further averred that the said **George Gatura** later died and his son, the Defendant proceeded to subdivide the piece of land into two pieces of land known as **Dagoretti/Mutuini/1139** measuring 0.77 acres and **Dagoretti/Mutuani/1140** as per **annextures HK III**. The deponent also averred that she had lodged caution on **Dagoretti/Mutuini/68** but with the fraudulent dealings and the subsequent subdivisions, there was no caution on the piece of land where they live on which is **Dagoretti/Mutuini/1139** evidenced by **annexture HK IV**. That since she is bedridden to-date, she has now authorized the Plaintiffs herein who are both her sons to pursue this piece of land. She further deposed that the Defendant has threatened to evict her and her family from the piece of land as evidenced by **annexture HKV**. She also deposed that the Defendant plans to subdivide and sell the suit property which action will cause irreparable loss and damage to her family as her family stand to be thrown out of the suit premises, the only home they know. **Douglas Muhindi Kangethe** and **James Kamau Kangethe** also swore their supporting affidavit and reiterated the contents of their mother's affidavit. They further averred that the Defendant has served them with a demand letter from **Kituo cha Sheria**, demanding them to vacate the suit property as per **annexture DMK-1**. They further deposed that they appeared together with the Defendant before the District Officer, Waithaka Division and the Defendant disclosed that he had obtained Land Control board consent to subdivide the piece of land herein with intention of selling it. **Annexture DMK II** refers. From the disclosure in the said meeting, the District Officer wrote a letter to the Ministry of lands requesting for a caveat restraining the Defendant from dealing with the suit land in any way as per **annexture DMK -III**.

That since the Ministry of Lands had not yet replied to that letter, it is imperative for them to seek for the instant orders for the interest of justice.

The Defendant/Respondent opposed the Notice of Motion through the filed grounds of opposition where it was stated that:-

i. The application is an abuse of the process of court.

ii. That there has been inordinate delay in filing this application which delay has not yet been explained.

iii. The conditions for grant of injunction have not been met.

iv. That the applicants have no locus standi to sue in the matter as they are riding on the back of their mother who is not a party to the suit and therefore the suit is incompetent.

The Respondent also swore a Replying Affidavit where he deposed that neither his father nor himself ever sold any part or portion of **LR Dagoretti/Mutuini/68** as alleged by the applicants. He further averred that the Decree referred to by the Plaintiffs was irregularly obtained by the Plaintiffs as they were licensees on **Dagoretti/Mutuini/68**. Further, the Respondent averred that he has severally issued notices

to the Plaintiffs to vacate the suit property and they cannot claim they have been in continuous uninterrupted stay on the said parcel of land. He also deposed that the plaintiffs averments are engulfed with falsehoods and should not be tolerated by this court. The Defendant justified his threat to evict the plaintiff out of the suit land and stated that the orders sought by the plaintiffs cannot be granted as there is a fundamental material non-disclosure on the part of the Plaintiffs.

The parties herein consented to canvass the instant application by way of written submissions which I have now carefully considered. I make the following findings.

The instant application is basically brought under **Order 40 Rule 1 of the Civil Procedure Rules**. The above Order empowers the court to grant temporary injunction. Of importance to the instant motion is **Order 40 Rule 1(c)** which provides as follows;-

“The court may by order grant a temporary injunction to restrain such act or make such other order for the purposes of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the property as the court thinks fit, until the disposal or until further orders”.

In support of their submissions, the counsels herein relied on various authorities. The applicants’ counsel relied on the case of **Mayungu Ltd C/O Kiarie Kariuki Vs Municipal Council of Malindi (2005) eKLR**, where the court restated the principles to be considered by the court before granting a temporary injunction as was laid down in the case of **Giella Vs Cassman Brown & Ltd (1973) EA 358**, where it was held as follows;-

“This being an interlocutory application, the court is only concerned with the applicant showing a prima-facie case, the applicant must also show that an award of damages will not be adequate compensation should the court grant injunctive orders sought. It is only when the court is in doubt that it will decide the application on a balance of convenience”.

Since the applicants herein are seeking for injunctive relief, they must satisfy the principles laid down in the case of **Giella Vs Cassman Brown**.

Firstly the applicants must satisfy that they have a prima –facie case with chances of success. The court of Appeal in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125**, held that

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

Have the applicants herein been able to establish that they have a prima-facie case with high probability of success?. From the Replying Affidavits filed in court and the annexures therein, there is no doubt that one **George Gatura Karuku** was the registered owner of **Dagoretti/Mutuini/68**. There was allegation from the Plaintiffs and one **Hannah Kabura**, the mother to the Plaintiffs that she bought a piece of land from **Dagoretti/Mutuini/68** in 1965 and she has lived on this land with her family since then. There is also evidence that in 1989, the said **Hannah Kabura Kangethe**, filed a Civil Suit No.280 of 1989, against **George Gatura**, the proprietor of **Dagoretti/Mutuini/68**. Subsequently the court issued a decree on 29th April, 1993, and among the orders given was order No.2 :- That the Defendant (George Gatura) do transfer one acre from his **LR Dagoretti/Mutuini/68** to the Plaintiff (**Hannah Kabura Kangethe**). The Respondent herein in his paragraph 4 of the Replying Affidavit, has acknowledged existence of that Decree. However, he averred that the same was obtained irregularly by the Plaintiffs who were licenses on the subject land. There is no evidence that the said **George Gatura**, or the Respondent ever appealed against that Decree nor whether was the said Decree set aside. If the Decree has not been set aside, then the said **Hannah Kabura Kangethe** was entitled to one acre from **Dagoretti/Mutuini/68**.

There is also evidence from annexure HK 2, that on 5th May, 1997, **George Gatura Karuku**, did transfer **LR No. Dagoretti/Mutuini/68** to **Michael Karuku Gatura**, the Defendant herein. The said **George Gatura** did not transfer the one acre to **Hannah Kabura** as per the Court Decree of 29/4/1993. The said **Hannah Kabura** placed a caution on **Dagoretti/Mutuini/68** claiming beneficial interest as a decree holder. It is evident by this time; the subject land had been transferred to **Michael Karuku Gatura** and **Kamau Manga** as evident from annexure HK 3. Subsequently, the Defendant subdivided the land to give rise to **Dagoretti/Mutuini/1139 and Dagoretti/Mutuini/1140**. The Plaintiffs have alleged that their portion of land lies on **Dagoretti/Mutuini/1139**. The Plaintiffs are the sons of Hannah Kabura who was the Decree holder. George Gatura the Judgment debtor died in the year 2006 before fulfilling the Decree of the Court. The Plaintiffs alleged that they have lived on this piece of land since they were born. Though the Defendant alleges that the Plaintiffs were mere licensees, there is an existence of a court Decree which was not set aside. The Plaintiffs have therefore been able to establish that they have a prima – facie case with probability of success.

Secondly, the applicants needed to establish that they stand to suffer irreparable loss which cannot be compensated by way of damages. The Plaintiffs have alleged that they have lived and they continue to live on subject piece of land since they were young. They now married and have families and have established their known homes on this piece of land. There is no doubt that now the piece of land is registered in the names of the Defendant. There is evidence that the Defendant has issued them with **Demand Notices**, demanding them to vacate the piece of land. The Defendant also admitted in a meeting before the District Officer, Waithaka Division, that he has obtained consent to sub-divide the land. This is also very clear from annexures DMK-3. The Defendant is the registered owner of this piece of Land and he can deal with it as he wishes.

Section 24(1) of the Land Registration Act 2012 grants such power to the registered owner.

24. Subject to this Act—

(a) “ the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and”

If the Defendant is allowed to evict the Plaintiffs and or subdivide the land as per the Land Control Board Consent, **DMK-2**, then the Plaintiffs will be uprooted from the home they have known all along. In the event the court rules in their favour. In the main suit, the plaintiff's loss and damages would not be adequately compensated by an award of damages. The Defendant has not denied that he has actually demanded from the Plaintiffs to vacate or move out of the piece of land. There is eminent danger or threat that if not enjoined, the Defendant would certainly evict the Plaintiffs and proceed to subdivide the suit property into seven portions. Applicants have been able to establish that they stand to suffer irreparable damages not capable of being compensated by an award of damages.

The third issue to consider is whether the court is in doubt and on whose favour the balance of convenience tilts to. The applicants have alleged that they have been in occupation of the suit land since 1965. The Defendant has not denied that he intends to subdivide the suit property into seven portions and maybe sell them to 3rd parties. The applicants have claimed they are in actual occupation of the suit land and that is the reason the Defendant is threatening to evict them. Defendant has not claimed in any way that he is in actual possession of the suit land. In the case of **James Ndeda Vs Dorine Alouch Civil Case No. 136 of 2007**, the court held that the balance of convenience would tilt in favour of the Defendant who is in actual occupation of the suit land rather than the Plaintiff who may be in occupation by ‘ remote control’.

Equally, in the instant suit, I find the balance of convenience shifts in favour of the plaintiffs who are in actual occupation. Though the Defendant alleged that there is undue delay in bringing the present application, it is evident that the Defendant sent a Demand Notice to the Plaintiffs mother on 11th June, 2013 and consent to subdivide the suit Land was issued on 4/10/2012. The District Officer wrote a letter to land Registrar on 8/07/2013 to lodge a caution on the suit land. The instant application was filed in

August, 2013 and it is clear that there was no inordinate delay on the part of the Plaintiffs.

Again, the Defendant alleged that the Plaintiffs have no **locus standi**, to bring this suit. However, the applicants alleged that they have lived in the suit land since their childhood. The issue of **locus standi** would be interrogated and adequately dealt with during the trial of the main suit.

The applicants and their mother claim that they were born and lived on the suit property. Further, they are now married and their families live and depend on the suit land for a living. The above allegations have not been denied by the Defendant. All that the Defendant claims now is the fact that Plaintiffs were mere licensees. That is an issue to be determined during the determination of the Originating Summons filed herein. For now, the court ought to maintain the **Status Quo**. The **Status Quo** persisting at the moment is that Plaintiffs are in occupation of the suit property. The court will not hesitate to maintain that **Status Quo**.

In light of the foregoing, the Court finds that the applicants' Notice of Motion dated 19/8/2013 is merited and the same is allowed in terms of **prayers No.4, and 5**.

Since the Defendant issued **Demand Notice** dated 11th June, 2013 during the subsistence of this suit, the Defendant is condemned to pay costs of this application.

It is so ordered.

Dated, signed and delivered this **21st day of March, 2014**

L.N. GACHERU

JUDGE

In the Presence of None attendance for the 1st Plaintiff

None attendance for the 2nd Plaintiff though notified.

Nyangao for the Defendant

LukasCourt Clerk

L.GACHERU

JUDGE