



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 155 OF 2012

GODFREY N MUNGAI.....PLAINTIFF

VERSUS

FRANCIS KAGIYA1ST DEFENDANT

JACKSON NGUGI KARANJA.....2ND DEFENDANT

JAMES NJEGA GACHERE3RD DEFENDANT

(All sued in their personal capacities & as trustees of Mutura Self Help Group)

JEDIDA MURUGE KUNGU.....4TH DEFENDANT

RULING

The matter coming up for determination are two applications. The first is the Notice of Motion dated **10th September, 2012**, filed by the **1st, 2nd and 3rd Defendants** herein against the Plaintiff seeking for orders that;

1. *The 1st, 2nd and 3rd Defendants be authorized to enter upon all that parcel of land known as **Nachu/Ndacha/1513** and possess the said land forthwith for purposes of preservation of the said land and the crop therein pending the hearing and determination of the main suit herein on condition that the 1st, 2nd and 3rd Defendants are simultaneously ordered hereby not to sell **Nachu/Ndacha/1513** or make any registration against the title thereof pending the hearing and determination of the main suit herein.*
2. *The Plaintiff be restrained by way of injunction from entering, harvesting any crop from and/or in any way dealing or interfering with all that parcel of land known as **Nachu/Ndacha/1513** pending the hearing and determination of this suit.*

The application was supported by the grounds set on the face of the application and among these grounds

are:-

- i. *Plaintiff failed to meet the conditions given after an injunction Order was issued on 22nd June 2012, that is to file an undertaking on damages within **thirty (30)** days of the said Order .*
- ii. *That failure to file the said undertaking meant that the injunction Order lapsed by operation of law and therefore the 1st, 2nd and 3rd Defendants are entitled as registered proprietors to peaceful ownership and enjoyment of **Nachu/Ndacha /1513**.*

The application was supported by the Affidavit of **Jackson Ngugi Karanja**, the 2nd Defendant who averred that he had authority and consent of the 1st and 3rd Defendants to swear the affidavit on their behalf. He further averred that on 22nd June 2012, the Honourable Court issued a conditional Order of Injunction in favour of the Plaintiff/Respondent against the 1st, 2nd and 3rd Defendants/applicants over the suit property **Nachu/ Ndacha/ 1513**, as per annexure JNK 1. He deponed that the plaintiff failed to meet the said condition set by the court which was to give an undertaking on *damages*, within 30 days of the said Ruling and as such the said Injunction Order lapsed on 22nd July 2012, by operation of law. He further deponed that the 1st, 2nd and 3rd Defendants are entitled to peaceful ownership and enjoyment of **Nachu/Ndacha /1513**.

The application is opposed by the Plaintiff herein **Godfrey Njogu Mungai**, who filed a Replying Affidavit and averred that the Notice of Motion by the 1st, 2nd, and 3rd Defendants is mischievous, misconceived, and defective and that the same ought to be dismissed with costs.

He further averred that he gave an undertaking in line with the Ruling dated 22nd June, 2012 and in good time but the advocate for the Defendants was not satisfied with undertakings as it had left out the word **damages**. He further averred that the current application seeks for mandatory injunction at the interlocutory stage and the same has the effect of terminating the whole suit even before the same is heard.

The Respondent deponed that he has indeed filed an application to amend the undertaking to include the word **damages** and he has filed the amended undertaking. He further averred that this being a court of substantive justice, it should not rely on mere technicalities to deny the Respondent justice. He further contended that he is ready and willing to give the Defendants any term of undertaking including costs, damages and any other relevant remedy that they may require. It was his further contention that if the injunction order is discharged, the Defendants will forcefully evict him from the suit premises and thus rendering the suit nugatory as they intent to sell the same.

The Respondent also contended that he has been in possession of the suit premises since January 2005 and has been constantly cultivating thereon and he is the one who planted and cultivated the current crop thereon and the same belongs to him. He further averred that without the injunction order, the peace prevailing will not be maintained. The Respondent therefore urged the court to dismiss the application with costs.

The second notice of Motion is dated **21st September, 2012**. The same is filed by the Plaintiff herein and he sought for the following orders.

- a. *That leave be granted to the Plaintiff to amend his undertaking in terms of the amended undertaking annexed thereto.*
- b. *That the amended undertaking thereon be deemed as duly filed and served.*
- c. *That cost of the application be provided.*

The application was grounded on the following reasons;

- a. *That the Plaintiff filed his undertaking on time.*
- b. *The 1st, 2nd and 3rd Defendants feel that the undertaking is not sufficient as it left out the word damages and that the omission was occasioned by inadvertenc., due to a typographical error and there is therefore need to amend the undertaking.*
- c. *That the amendment will not prejudice the Defendants at all as the Plaintiff intends to give a comprehensive undertakings for costs and any other remedy that the Defendants may become entitled to.*
- d. *That the Defendants intend to use the typographical error to forcefully evict the plaintiff from the suit premises and the said eviction will occasion the Plaintiff irreparable loss and damages and renders the whole suit nugatory. The applicant urged the court to allow the amendment as prayed.*

The said Notice of Motion was opposed by the 1st, 2nd, and 3rd Defendants. Again, **Jackson Ngugi Karanja**, swore an affidavit on his behalf and on behalf of the 1st, and 3rd Defendants. He averred that he has been advised by his advocates which advice he verily believed to be true, that the Plaintiff's Notice of Motion dated **21st September, 2012** is bad in law, fatally defective, an afterthought and abuse of the court process and should be dismissed with costs. That since the Injunction lapsed by operation of the law, then the same cannot be reinstated and allowing the instant application is futile as the same will not reinstate the lapsed Orders of injunction. He further averred that the Plaintiff's instant application is just meant to frustrate and defeat the 1st, 2nd, and 3rd Defendant's Notice of Motion dated 10th September, 2012 and it should be dismissed and the latter's application allowed

The two applications were canvassed together and the parties filed their written submissions. I have carefully considered the two filed Notices of Motion and the written submissions and I make the following findings.

I propose to deal with Notice of Motion dated **10th September, 2012**, first and then embark on the one dated 21st September, 2012. From the court's records, there is no doubt that on 22nd June, 2012, this Honourable Court issued an injunction against the Defendants (1st, 2nd, and 3rd) herein. The said Defendants are the applicants in the instant suit. The said Orders restrained the Defendants by way of injunction from entering, or interfering with the Plaintiff/Applicant's possession and enjoyment of **LR No. Nachu/Ndacha/1513**, until the suit is heard and determined. However, the said Orders were conditional upon applicant giving an undertaking on **damages**, within 30 days from the date of the Ruling. The Ruling was delivered on 22nd June, 2012 and therefore the 30 days were to expire on 22nd July 2012. I have also considered that Ruling by Justice Ougo and I have noted that in the said Ruling, the Judge did not indicate that failure to file the said undertaking, the injunction order would automatically lapse. It is also evident that the applicants did not come back to court to discharge the said injunction order. Instead the applicants filed the instant application.

One of the grounds in support of the application is that the Plaintiff failed to file the stated undertaking of the damages within a period of 30 days. I have however noted that on **20th July, 2012**, the Plaintiff/Respondent filed an Undertaking for Costs. That Notice was filed two days before the expiry of the 30 days. The Plaintiff alleged that the said Undertaking omitted the word damages, due to inadvertent error on the person typing the Undertaking. He further submitted that he indeed filed the undertaking on time but the word damages, was left out inadvertently.

From the available documents in court, the Plaintiff did file an Undertaking on 20th July, 2012 but the said Undertaking was on costs. However, the applicant has now filed an application to amend the Undertaking to include the word **damages**.

The applicants have filed this Notice of Motion on the grounds that the Plaintiff /Respondent failed

to meet the condition set by the Court in its Ruling dated 22nd June 2012.

The applicants have sought for Orders that they be allowed to enter upon the suit land and that the Plaintiff be restrained. The claim herein is over the suit land. The Plaintiff herein had obtained Orders of restraint against the Defendants on 22nd June 2012. The said Orders have not been discharged. The applicants are seeking to be allowed to enter the suit land. In essence the applicants are seeking for mandatory orders which are capable of disposing off this suit.

The court's in Kenya have variously held that the requirements for grant of mandatory interim injunction are very strict as the grant of such an injunction almost decides the whole suit on affidavits which is not to be encouraged. See the case of **Belle Maisons Vs Yaya Towers, Nairobi High Court, Civil case No. 2225 of 1992.**

In the present suits, there are injunctive orders that were issued in favour of the Plaintiff. The Defendant's ought to have sought for discharge of the said orders instead of seeking for mandatory injunction.

In the case of **Kenya Breweries Ltd and another Vs Washington O.Okeyo , Civil Appeal No. 332 of 2000,** the court held that:-

“A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances it will not normally be granted. However, 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 in an interlocutory application . (See Volume 24 Halsbury Laws of England 4th Edition paragraph 948.)

In the instant case, the applicants claim that the Plaintiff failed to meet the conditions that were issued by the Court on 22nd June 2012. This court finds that failure to meet the said conditions is not a special circumstance and this is not a simple case that ought to be decided at once. What the applicants ought to have done is to quickly comply with **Order 11** of the **Civil Procedure Rules** so that the underlying issues are decided expeditiously. Filing of another interlocutory application only served the purpose of clogging the justice system and that is against the spirit of **Sections 1A and 1B of the Civil Procedure Act** which deals with overriding objective of the Act.

Having now carefully considered the 1st, 2nd and 3rd Defendants' Notice of Motion and the written submissions therein, I find that the said application is not merited and I dismiss it accordingly with costs to the Plaintiff/Respondent.

On the second application dated 21st September, 2012, the Plaintiff/Applicant has sought to be allowed to amend the undertaking to include the word **damages**. The applicant alleges that the word **damages** was omitted inadvertently and that was a typographical error which can be excused.

The said application is opposed by the Defendants. I have noted that the Plaintiff filed the undertaking on 20th July, 2012 indeed the undertaking is on costs but not damages. The order of the court was for filing of an undertaking for damages. The application is brought under **Order 8 Rules 3, 5 and 7** of the **Civil Procedure Rules**.

I have considered the provisions of **Order 8 Rule 5** which states as follows:-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”.

The said Order gives the court discretion to allow an amendment of any document in such manner as it directs for purposes of determining the real question in controversy.

The applicant herein is seeking to amend the Undertaking to include the word **damages**. That would be in conformity with the Court Order issued on **22nd June 2012**. Allowing the said amendment would not prejudice the defendants herein at all. As was held in the case of **British India Assurance Vs Par Mar (1996) EA 172**,

“ Amendments should be allowed if no injustice is caused”.

The court is also guided by the provisions of **Article 159** of the Constitution of Kenya 2010, which stipulates that justice should be administered without undue regard to technicalities.

For the above reasons, I find that the Plaintiffs/Application dated **21st September 2012** is merited. I allow the said application entirely with costs in the cause.

It is so ordered.

Dated, Signed and delivered this **20th** day of **June, 2014**

L. GACHERU

JUDGE

In the Presence of:-

None Attendance for the Plaintiffs/Respondents

Wamiti for 1st ,2nd 3rd for the Defendants/Applicants

Kabiru: Court Clerk

L. GACHERU

JUDGE