



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC No. 306 OF 2013**

**EDWARD WANDIA KUNYANGA.....PLAINTIFF**

**VERSUS**

**NAOMI MUTHONI MWANGI.....DEFENDANT**

**RULING**

Following the ruling delivered by this court on 12/7/2013, the Defendant brought this an application dated 24/7/2013 seeking orders that:

1. *Spent*
2. *Spent*
3. *The orders of the Court given on 12/7/2013 be varied and substituted with an order restraining the both the Plaintiff and Defendant by the themselves, their servants, employees, tenants, occupiers, and or agents from accessing, remaining on, occupying or taking possession of all that suit plot No. 730 Residential Ongata Rongai also referred to as Plot No. 303, Business Ongata Rongai Trading Centre pending the hearing and determination of the suit.*
4. *In the alternative, the order for prayer No. (d) in the Plaintiff's application dated 27/2/2013 granted by this court on 12/7/2013 be varied and discharged pending the hearing and determination of the suit.*
5. *There be an order restraining both the Plaintiff and the Defendant by themselves, their agents, servants or whomsoever from disposing off, offering for sale, selling, further constructing on, charging and or in any other way alienating the suit plot No. 730 Residential Ongata Rongai also referred to as Plot No. 303 Business Ongata Rongai Trading Centre pending the hearing and determination of the suit*
6. *The main hearing of the suit be fast-tracked, the parties do undertake and or comply with Order 11 of the Civil Procedure Rules within the next 21 days from the date of the order*
7. *The parties do a fix a hearing date for full trial within the next 60 days from the date of this order*
8. *The County Government of Kajiado, the predecessor of the County Council of OlKejuado and*

*Duncan G. Kaihuri be joined in the suit as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, respectively.*

9. *The proposed Defendants do file responses to both the Plaintiff and counterclaim within 10 days of service of the order.*

The application is premised on grounds outlined on the face of the application and supported by an affidavit sworn by the Defendant on 23/7/2013. The Defendant deposed that the Court delivered a ruling on 12/7/2013 wherein the Plaintiff was granted prayers (c) and (d) being a temporary and mandatory orders of injunction, respectively, where the effect of the latter order would be the demolition and removal of structures thereon. The Defendant deposed that she has documents attesting ownership of the suit property which she availed to the court through her Replying Affidavit. It was her disposition that demolition and removal of the structures from the suit property will not only cause great injustice and hardship upon her but also amount to disposal of the suit at an interlocutory stage hence rendering the counter-claim impotent, nugatory and of no consequential effect. Further that she will suffer irreparable loss as she has sentimental and emotional attachments to the premises.

The Defendant also deposed that with the demolition and the Plaintiff having exclusive possession, the Plaintiff is likely to dispose off the property to third parties and further rendering her claim of no practical purpose. She deposed that it is in the interest of both parties that the court does order the preservation of the suit property by maintaining the status quo pending the conclusion of the suit when the bonafide owner thereof will be determined. In respect to the proposed Defendants, the deponent stated that their presence and evidence in the suit will assist the court in determining the physical location and ownership of the suit property viz. the parties' documents of ownership.

The Plaintiff swore a Replying Affidavit on 29/7/2013 in opposition to the application. The Plaintiff refuted the claim that he intends to dispose off the suit property deposing that his intention is to develop the plot permanently. It was the Plaintiff's disposition that the order of the court of 12/7/2013 was grant on the basis of law and facts and also that there was nothing that had changed to warrant a review, variation and setting aside of the orders. The Plaintiff deposed that there was no legal justification to restrain him from continuing in possession of Plot No. 303 Ongata Rongai Shopping Centre pending the determination of the suit. He deposed that the application is unmerited, incompetent and bad in law and thus should be dismissed with costs.

The application was canvassed by way of written submissions. Milimo Muthomi & Co. Advocates for the Defendant filed submissions dated 18/10/2013 wherein counsel submitted the mandatory order of demolition will in effect alienate the Defendant from the suit property whereas she has a counter-claim through which she seeks to entrench her proprietary rights over the suit property. Counsel submitted that until the Plaintiff's claim and the Defendant's counter-claim has been heard and determined, both litigant's rights remain competing and therefore the status quo which ought to be determined is that which does not prejudice or disadvantage either party. Further that to demolish the Defendant's premises at the interlocutory stage will create an unequal playing field as against the Defendant and that conversely, no prejudice shall be occasioned to the Plaintiff if the suit property is preserved pending the determination of the suit.

In support of this submission counsel cited the case of **Abel Ondimu Sagini v Meridian Amsco Limited & 3 Others Milimani HCCC No. 651 of 2006** where the court faced with a situation where both parties claimed ownership of the suit property and were in possession of the title held as follows:

**Suffice to state, that prima facie the probability of either party being the holder of a genuine title is 50 – 50. It is evident that should the 2<sup>nd</sup> Defendant proceed to dispose off the suit property the Applicant's suit will be compromised as the substratum of the suit will be lost. Should the Applicant turn out to be the holder of the genuine title, he stands out to suffer irreparable loss if the suit property is already transferred to a 3<sup>rd</sup> Party.**

Gitonga Kamiti, Kairaria & Co. Advocates for the Plaintiff filed submissions dated 18/10/2013 wherein counsel submitted that mandatory injunction as an interlocutory relief is granted in exceptional

circumstances when the dictates of justice and equity justify it, which was the case in the present suit. It was submitted for the Plaintiff that there was no basis upon which those orders would be vacated and that it was not unusual for the courts to grant an order of mandatory injunction at an interlocutory stage in deserving cases. Further that the status quo to be maintained would be the status quo that obtained before 17/2/2012 when the Defendant unlawfully trespassed onto the suit property. In support of this submission, counsel referred the court to the case **Kamau Muchuha v Ripples Limited C.A. Civil App. No. NAI 186 of 1992** which cited with approval the case of **Thomson v Park (1944) 2 All ER 477 at Pg. 479** wherein the Court observed that:

**The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the Defendant. It is a strange argument to address to a court of law that we ought to help the Defendant, who has trespassed and got himself into these premises in the way in which he has done and say that, that would be preserving the status quo and that it would be a good reason for not granting an injunction.**

Having now considered the written submissions, the court finds as follows, on the joinder of parties the Defendant sought an order that the County Government of Kajiado, the predecessor of the County Council of Olkejuado and Duncan G. Kaihuri be joined to the suit, on the basis that the 2<sup>nd</sup> proposed defendant is the original owner of the suit plot and the 3<sup>rd</sup> proposed defendant sold the suit to her. The Defendant averred that pursuant to Order 1 Rule 10, the 2<sup>nd</sup> and 3<sup>rd</sup> proposed Defendants are necessary parties to the suit so as to assist the court determine the issue of ownership. The Plaintiff in response submitted that there was no basis in law for the Defendant to make an application for persons to be joined as Defendants to the suit and that she could only seek to join any person as third parties under Order 1 Rule 15 of the Civil Procedure Rules.

**Order 1 Rule 10 of the Civil Procedure Rules** is in respect to substitution and addition of parties, the sole purpose being to assist the court effectually and completely adjudicate upon and settle all questions involved in the suit. Whereas **Order 1 Rule 15** is in respect to when the Defendant claims against a person not party the suit that he/she is entitled to (a) contribution or indemnity, (b) relief or remedy or (c) the issues in dispute are substantially the same as those arising between the Plaintiff and Defendant and that it is only property that the same between the Plaintiff, Defendant and the 3<sup>rd</sup> party.

I have perused the prayer as drafted and the basis upon which the Defendant desires joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> proposed Defendants. The Defendant contends that their presence will assist the court to adjudicate over the dispute on ownership. Their joinder therefore falls within the precincts of Order 1 Rule 10 and not Order 1 Rule 15 as proposed by the Plaintiff. The question is whether the proposed parties are necessary to be joined herein.

I have perused the contents of the Defendant's affidavits in response to the application for injunction wherein her depositions are such that only the County Council of Kajiado, the custodians of the maps and register of the original allottees of the council land that can adequately make responses thereto. It is therefore my conviction that the County of Kajiado is a necessary party to the suit herein. In respect to the proposed Duncan G. Kaihuri, the alleged previous owner of the Plot No. 730 A, it is my view that he need not be a party to the suit. Nevertheless, his evidence may assist the Defendant in proving her case. Thus, the said proposed 3<sup>rd</sup> Defendant's presence as a witness will be sufficient.

The review of the Court Order delivered on 12/7/2013 is the crux of this application. The Defendant requests this court to review its orders delivered on 12/7/ 2013. The Defendant brought the application under **Order 40 Rule 7 of the Civil Procedure Rules** which provides that an order of injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. As captured hereinabove the Defendant contends that the said orders of the court are prejudicial since they afford the Plaintiff an edge over her yet they both claim ownership of the property in dispute.

I have carefully read the ruling I delivered on 12/7/2013 wherein I granted prayer (d) of the Plaintiff's

application dated 27/2/2013. The same was informed by the affidavit evidence before the court that the Defendant encroached onto the Plaintiff's property and constructed a temporary structure having found the Plaintiff already in possession thereof. It is indeed a fact that a dispute over ownership can only be conclusively decided on trial. However, in the meantime, the status quo must be maintained and such status quo is as at the date prior to the wrongful action as was stated in the **Ripples Limited Case (Supra)**. See also **Belle Maison Limited v Yaya Towers Limited (1992) LLR 1702 (HCR)**. Consequently, I decline to discharge, vary or review the Court's order of 12/7/2013.

The upshot of this ruling is that the Plaintiff's application succeeds in part. I make orders as follows:

1. ***The County Government of Kajiado, the predecessor of the County Council of OlKejuado be made a party to the suit herein, as a 2<sup>nd</sup> Defendant.***
2. ***The Defendant to serve the 2<sup>nd</sup> Defendant with this order within 7 days from the date hereof.***
3. ***The 2<sup>nd</sup> Defendant to file a response to the pleadings within 21 days from the date of service of this order.***
4. ***Parties to adhere to the provisions of Order 11 of the Civil Procedure Rules take steps to set the suit down for hearing without delay.***
5. ***Costs of the application be in the cause.***

It is so ordered.

Dated, Signed and Delivered this 25<sup>th</sup> day of July 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mr.Kairaria for the Plaintiff/Respondent

M/s Githanga holding brief Mr Millimo for the Defendant

Kamau: Court Clerk

**L.N GACHERU**

**JUDGE**