



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMAN HIGH COURT**  
**ENVIRONMENT & LAND DIVISION**  
**ELC SUIT NO. 306 OF 2013**

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

**VERSUS**

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

**RULING:**

There are two applications herein filed by the Plaintiff/Applicant *Edward Wandia Kunyanga*. The first application is dated 27<sup>th</sup> February, 2012 brought against the Defendant herein. The applicant sought for restraining order against the Defendant herein, Naomi Muthoni Mwangi. He sought to restrain the Defendant by herself, her agents, servants or employees from trespassing, further construction or any other dealing and/or interfering with the Plaintiff's ownership, possession of plot 303 Business Ongata Rongai Trading Centre pending the hearing and determination of this suit.

The applicant also sought for an Order of Mandatory Injunction against the Defendant requiring immediate demolition and removal of two roomed semi-permanent structures. That she or her agent erected on **Plot No. 303 Business Ongata Rongai Trading Centre** failing which the Plaintiff /Applicant be authorized to demolish and remove the semi- permanent structures at the Defendant's expense.

The application was premised on the grounds on the face of the application and also on the annexed affidavit of Edward Wandia Kunyanga. The Plaintiff contended that he is the registered proprietor of all that property known as **Plot No. 303 Business Ongata Rongai Trading Centre**. He averred that the Defendant and/or her agents trespassed on the Plaintiff's **Plot No 303 Business Ongata Rongai Trading Centre** on 17<sup>th</sup> February, 2013 and has constructed thereon two roomed semi-permanent structures.

That further the Defendant and her agents have threatened the Plaintiff's tenants in the suit premises and given them up to end of this month to vacate the premises. That the Defendant despite demand has continued to trespass on the Plaintiff's **Plot No. 303 Business Ongata Rongai Trading Centre**, and continues to do so unless restrained by this Court. The second Notice of Motion is dated 19<sup>th</sup> March, 2013 and the applicant brought it under Order 40 Rule 3(1) of the Civil procedure Rules.

The applicant sought for these orders:-That the Defendant/Respondent be detained in prison for a term of six months for disobeying the orders of the court issued on 28/2/2013 and extended on 13<sup>th</sup> March 2013. The applicant also sought for costs of this application. The Notice of Motion was premised on the grounds stated on the face of the application and on the annexed affidavit of *Edward Wandia Kunyanga*.

The applicant contended that the Defendant/Respondent's agent had continued to trespass onto the Plaintiff/Applicant **Plot No 303 Ongata Rongai Shopping Centre**, despite the courts Orders made by the Court on 28/2/2013.

He further contended that on 18<sup>th</sup> March, 2013, the Defendant's agent tore a copy of the Court order served at Plot No. 303 and threw the pieces upon the Plaintiff/applicant caretaker. The Defendant agent has been demanding rent from the Plaintiff's tenants and asking them not to pay rent to the Plaintiff's caretaker. Further the defendant has been threatening the Plaintiff's tenants and has given them notice to vacate the premises. That the Defendant and her agent were served with both the Court orders and the Penal Notice but have persistently disobeyed the same and the conduct of the Defendant is contempt of this Court. Both applications were opposed. The first application was canvassed orally in Court. The first Application was canvassed through written submissions. The Defendant also put in her replying affidavit. On the 2<sup>nd</sup> Application, the Respondent contended that she was not served with the order extended on 7<sup>th</sup> March 2013 as alleged by the Plaintiff and she disputed the process server's affidavit of service. She denied ever threatening the Plaintiff's tenants in the suit premises.

The Respondent caretaker Geoffrey Akoth also swore an affidavit and denied that he was ever served with the court order and also denied threatening the plaintiff's tenants. He denied that any tenant has moved out of the suit premises. The applicant herein had to prove that there was personal service on the Defendant.

I have seen the affidavit of service of *Peter Muchira Kaburu* who averred that he served the Defendant at the office of **USAID** Kenya with the Court documents including the Penal Notice. Nicholas Kisilu also deposed that he served the Court documents by fixing the copy of Order Court on the door of the caretaker.

Indeed, on 6th March 2012, Zablon Mokuia & Co. Advocates filed a Notice of Appointment of Advocates in court. He had been instructed by the Defendant. That was indication that Defendant was personally served and I have no reason to doubt the process servers.

However, the applicant alleged that the Defendant continued to have the structures on the suit premises and her agent threatened the Plaintiff's tenants. None of the said tenants swore any affidavit to that effect. The Applicant had deposed in his application of 28/2/2013 that Defendant had erected structures on the suit land. The Order issued by the Court was restraining the Defendant from trespass but not to demolish the already erected structures.

Having considered the oral submissions the Court finds that on the second application for contempt where the burden of proof is much higher than on a balance of probabilities as was held in the case of **Mutitika Vs Baharini Farm Ltd Civil Appeal No. 24 of 1985** where it was held that:-

*“The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities. The guilt of a contemnor or has to be proved with such strictness of proof as is consistent with the gravity of the Charge”*

The Court finds that the applicant has not demonstrated that Defendant is in contempt of Court Order issued on 28/2/2013 . The court disallows the said application dated 19/3/2013.Costs in the Cause. In the first application, dated 27/2/2013, the applicant is seeking for injunctive orders. He therefore had the burden of establishing principles for grant of injunction as laid down in the case of **Giella Vs Cassman Brown & Co. Ltd ( 1973) EA 358;** that is, he has a *prima facie* case with probabilities of success, he will suffer irreparable loss which cannot be compensated by way of damages and if the court is in doubt to determine the application on a balance of convenience.

I have considered the Notice of Motion dated 27/2/2013 and the annexures therein. I have also considered the written submissions. The applicant had attached a sale agreement EWK2 to show that he bought plot No. 303 from Stanley Konana Massengke. He also attached a letter of allotment from Olkejuado County Council dated 18<sup>th</sup> January, 2000 to Stanley Konana Massenke. The suit property is

the subject of this matter. I have also noted that the applicant is in possession of the suit land and has erected 12 stores which he has rented out as evidenced by the photographs **EWK 3**. Though the applicant alleged that the plot in question is owned by her and it is **Plot No. 730 Residential Ongata Rongai** , and applicant acquired that plot through fraud, I find that can only be established after calling evidence.

Having considered the circumstances of the case, I find that the applicant is in possession of the land and has put up 12 stores which he has rented out. The Defendant had encroached on it. The Defendant action was without any Court Order. Her action can cause a breach of peace. The ownership of the suit land can be established by calling evidence. However, for now, applicant has a sale agreement and it is evident he bought it from one Stanley Konana. Applicant has established that he has a prima facie case with high probability of success. Since he is in occupation, the balance of convenience tilt in his favour. I do therefore find that the applicant's application dated 27/2/2013 is meritorious and I do grant it in terms of prayer No. (c) and (d) .

Costs be in the cause.

Dated, Signed and delivered this 12<sup>TH</sup> day of July, 2013.

**L. N .GACHERU**

**JUDGE**

12/7/2013

Coram

Before Gacheru Judge

Court Clerk Anne

Kanara for the Plaintiff/Applicant

**L .N .GACHERU**

**JUDGE**

**COURT.**

Ruling Read in open Court in the presence of Mr.Kairaria for the Plaintiff/Applicant and Mr.Manyara for the Defendant.

**L N GACHERU**

**JUDGE**

**Manyara :** I apply for certified copy of the Ruling.

**COURT:**

To be supplied upon payment of the requisite fees.

**L .N. GACHERU**

**JUDGE**

**12/7/2013**