



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT DIVISION

ELC. NO. 855 OF 2012

FAST TRACK

NIXON MWAI KIMITI.....PLAINTIFF

VERSUS

LYDIA WAITHERA MUCHIRI.....1ST DEFENDANT

JUSTUS KAHUKI MUCHIRI.....2ND DEFENDANT

RULING

The application for consideration is t Notice of Motion dated 20th November, 2012 brought under *Order 40 Rule 1(a) and 2(i) and 4 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and 3, 13, 18 and 19 of ELC Act No. 19 of 2011 and any other enabling provisions of Law.*

The Applicant sought for these orders; -

1. Spent.
2. Spent.
3. An injunction restraining the Defendants, their agents, and/or servants from trespassing on the suit premises by carrying on any developments therein, entering the same, placing any construction materials therein, disposing off, alienating or in any other manner dealing with the suit premises or interfering with the Plaintiff's peaceful possession thereof until the hearing and determination of this suit.
4. That there be a mandatory injunction directing the Defendant to remove any implements, tools and/or materials from the suit property and in default the Plaintiff be at liberty to remove the same at the Defendant's cost.
5. Cost of this application be borne by the Defendant.
6. Any other relief that the court may deem just and appropriate.

The application was premised on the following grounds; -

- i. That plaintiff is the registered/lawful owner of the suit premises.
- ii. That the Respondents have been engaging the Plaintiff in endless vexatious disputes.
- iii. That the Plaintiff had commenced construction on the suit premises from the 25th October, 2012 which was maliciously demolished by the Respondents and or their agents.
- iv. That the Plaintiff cannot continue with construction of his own property because he is afraid of a

repeat performance by the Respondent or their gang of thugs.

The application was also supported by the annexed affidavit of Nixon Mwai Kamiti.

Initially the Applicant had brought This Notice of Motion against two Defendants i.e. Lydia Waithera M as 1st Defendant and Kariuki Waithera Aka Karis, as 2nd Defendant.

However, 18/4/2013 Mr. Ngala Advocate for the Applicant withdrew suit against 1st Defendant, Lydia Waithera Muchiri who allegedly died on 8/2/2013 as per the Death Certificate JKM1. The parties also had intended to canvass this application and another application involving both parties in ELC No. 844 of 2012 together. However, on 20/5/2013, the court directed that both files be dealt with separately since the plaintiff in ELC. 844 Of 2013 Lydia Waithera Muchiri is allegedly dead and no substitution has been done yet.

The application herein proceeded against the 2nd Defendant, Kariuki Waithera aka Karis. The said 2nd Defendant did not file any grounds of opposition or file Replying Affidavit. The instant application is therefore unopposed. Even if the application is unopposed, is the same merited?

Applicant has sought for injunctive relief. In the case of Kibutiri vs Kenya Shell, Nairobi High Court Civil Case No. 3398 of 1980 (1981) KLR 390, it was held that: - "The conditions for granting a temporary injunction in East Africa are well known and these are; first, an applicant must show a *prima-facie* case with a probability of success.

Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by or award of damages. Thirdly, if the court is in doubt to it will decide on application on the balance of convenience. See also EA Industries vs. Trufoods (1972) EA 420

The Applicant herein needed to prove that he has a *prima-facie* case with probability of success. From the documents attached to the supporting affidavit, there is evidence that one Nixon Mwai Kamiti is the allottee of plots No. 218 and 219 in Mutarakwa Jua – Kali – Kariobangi South Plots.

The two plots were initially in the names of Charles Kibathi (218) and Mary Wanjiru (219) who later transferred them to Nixon Mwai Kamiti. From annexure N2f, a letter from the Town Clerk, City Council of Nairobi, there is that confirmation that the plots in question are now allotted to Nixon Mwai Kamiti.

There is also a letter from the Area Chief N2 dated 6/6/2012 which also confirms that the two plots belong to Nixon Mwai, the Applicant herein. Annexure N3 a letter from City Planning Department of the City Council of Nairobi approving Nixon Mwai building plans also buttress the fact that indeed applicant is the owner of those two plots. The applicant has therefore established that he has a *prima-facie* case with high probability of success.

The Applicant alleged that he has started construction on the two parcels of land but Defendant has been invading the said plots and has prevented meaningful development. Indeed, applicant's building plans have been approved by the City Council of Nairobi.

N4 is a letter from the Provincial Commissioner Nariobi Area confirming that Applicant had reported a case of criminal gangs interfering with his plots no. 218 and 219. There is also a letter N5 from the Chairman of Kariobangi South Council of Elders which showed that Applicant had complained of unlawful eviction by one Kariuki alis Karis, the Defendant herein.

There is sufficient evidence to prove that if the Court does not intervene, the applicant will suffer irreparable loss which cannot be compensated by damages.

The Respondent has not opposed the application. The Applicant has demonstrated that he is the allottee of those two plots. He has also commenced construction but the Defendant has interfered with the said

construction. The balance of convenience tilts in favour of the applicant herein.

The applicant has also sought for mandatory injunction in prayer No. 4. As was held in the case of Agnes Adhiambo Ojwang vs Wycliffe Odhiambo Ojijo, Kisumu High Court, and Case No. 205 of 2000 (2000) LLR 8443, “The purpose of mandatory injunction is to preserve the status quo and status quo to be preserved is the one that existed before the wrongful act”.

The status quo herein is that the Applicant is the allottee of the two parcels of land and was in possession of the same. Also in the case of Kenya Breweries Ltd & another vs Washington O. Okeyo Civil Appeal No. 332 of 2000 (2000) LLR 4984 I.E.A., the court held that : -

“A mandatory injunction can be granted on an interlocutory application as well as at 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 simple and summary one which can easily be done or if the Defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted.”

In the instant case, it is very clear that the applicant is the allottee of the suit land and has been prevented from constructing on the same due to the action of the Defendant herein. The court will therefore not hesitate to grant the mandatory injunction as prayed in prayer No. 4 of the instant Notice of Motion.

Having now carefully considered the pleadings herein and the annexures thereto, the court finds that the applicant’s Notice of Motion dated 20th November, 2012 is merited. The same is allowed entirely in terms of prayers No. 3,4 and 5.

The applicant to set down the main suit for hearing within the next 12 months for the issues herein to be resolved.

It is so ordered.

Dated this 30th day of **August**, 2013.

L.N. GACHERU

JUDGE