



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
ENVIRONMENTAL AND LAND CASE NO.396 OF 2011  
**EDWARD (K) KIGONDU.....PLAINTIFF**  
**VERSUS**  
**GODFREY NG'ANG'A THANJI.....DEFENDANT**  
**RULING**

The Plaintiff is the registered proprietor of the property known as **Dagoretti/Waithaka/202** from 1971. The Defendant sued the Plaintiff in **HCCC No: 78 of 1999**, seeking for orders *inter alia*, an injunction to restrain the Plaintiff and also for declaratory orders that the Defendant is the owner of the suit premises.

That suit was dismissed on 9<sup>th</sup> November, 2010, by a Judgment of **Aganyanya, JA** (as the suit must have been finalized when he was a Judge of the High Court). The Defendant filed an application for stay of execution of that judgment, which was also dismissed by **Mwera, J**, on 2<sup>nd</sup> March, 2011.

The Plaintiff served a notice upon the Defendant on 9<sup>th</sup> May, 2011, giving him six months within which to vacate from the suit premises. The Defendant failed to heed the notice thus, the Plaintiff filed this suit in which he is seeking for the following orders:

- a. *A mandatory injunction directing and compelling the Defendant to give possession of all that parcel of land known as Title Number DAGORETTI/WAITHAKA/202 to the Plaintiff;*
- b. *A mandatory injunction directing and compelling the Defendant to vacate all that parcel of land known as Title Number DAGORETTI/WAITHAKA/202;*
- c. *General damages against the Defendant;*
- d. *Costs of this suit; and*
- e. *Any other remedy that this Honourable Court may deem fit to grant.*

The Plaintiff also filed a notice of motion which is brought under the provisions of **Order 40 of the Civil Procedure Rules**, in which he is seeking for a mandatory order of injunction compelling the Defendant to deliver possession of all that parcel of land forming part of Title No: Dagoretti/Waithaka/202 to the Plaintiff.

This application is supported by the grounds that the Plaintiff is the registered owner of the suit land. The Defendant had sued the Plaintiff in HCCC No: 78 of 1999, seeking to be declared the owner of the land but the suit was dismissed for lacking in merit. The Defendant filed an application for stay of execution pending appeal which was dismissed by Mwera, J on 2<sup>nd</sup> March, 2011. The Defendant was also given six (6) months to vacate the suit premises, but nine (9) months down the line, he had not vacated the Plaintiff's property. The Plaintiff is apprehensive that the Defendant is likely to commit acts which may prejudice his interests over the suit premises, thus he seeks for an order of eviction of the Defendant from the suit premises.

When the Defendant was served with the notice of motion, he filed a replying affidavit sworn on 19<sup>th</sup> November, 2011. He also filed a defence that denies liability and alludes to a notice of appeal that he has filed against the judgment of *Aganyanya, JA*. The appeal itself has not been filed. Further the Defendant denies that he is occupying the Plaintiff's land illegally. He claims that he bought part of the land in 1990 and built up his own home. He has been in possession since then. Since HCCC No: 78 of 1999 was dismissed, he has filed a Notice appeal to the Court of Appeal.

In further arguments, the Defendant who is representing himself argued that he was not a trespasser on the Plaintiff's land as he moved and occupied the Plaintiff's land with his express permission. The Defendant moved in the suit land with his children when they were very young, they consider it their only home and if he is to move from the suit land, he should be offered fair compensation.

The above is the summary of the salient matters raised for and against the notice of motion that is under consideration.

The Plaintiff seeks for a mandatory order of injunction, that is, the Plaintiff be compelled to deliver possession of the suit property.

It is trite law that a mandatory order, being final in nature can only be granted in very clear cases. There is no dispute that the Plaintiff is the registered proprietor of the suit premises. The Defendant had sued the Plaintiff in HCCC No: 78 of 1999. By a judgment of *Aganyanya, JA* made on 9<sup>th</sup> November, 2010, the court in a portion of that judgment held that:

*“There was no privity of contract between the Plaintiff and the 2<sup>nd</sup> Defendant in respect to this transaction. Since the Plaintiff sought refund of the advance payment of KShs.120,000/- in prayer 7 of the plaint, the 1<sup>st</sup> Defendant (that is, James Edward Kagondu) should refund him the money as promised for by Section 7 of the Land Control Act, together with interest at court rates from the date of filing suit till payment in full. Otherwise this suit has no merit and it is dismissed with costs by the Plaintiff to the 2<sup>nd</sup> Defendant.”*

After the suit was dismissed the Defendant, applied for an order of stay of execution which was also declined. As the matters stand, the Plaintiff's case is clear; there is no plausible reason why this court should not grant the orders sought. The plaintiff's application meets the threshold of granting mandatory order according to the principles set out in the case of; ***KENYA BREWERIES LIMITED VS OKEYO EALR {2002} 1EA Page 110***. In that case the Court of Appeal held as follows:

**“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction.”**

Accordingly, this case perfectly fits in that bill as the matter was tried and concluded. I allow the application in terms of Prayer Number 5; the Plaintiff shall have the costs of this application.

**Ruling read and signed this 17<sup>th</sup> day of February, 2012.**

**MARTHA KOOME**

**JUDGE OF APPEAL**

**Note:**

*This application was heard and concluded on 24<sup>th</sup> November, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceed to write and append my signature thereto in my new capacity.*