



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 16 OF 2011

1. NANCY KAMENE MAINGI
2. ZILPAH MONYANGI ACHOKI.....PLAINTIFFS

VERSUS

1. TERESIAH K. MUTUKU
2. PAULINE M. PETER
3. ELIZABETH K. MUTHA..... DEFENDANTS

RULING

By a Motion on Notice dated and filed in this court on **26th January, 2011**, **Nancy Kamene Maingi** and **Zilpah Monyangi Achoki**, hereinafter “*the applicants*” sought that **Teresiah K. Mutuku, Pauline M. Peter** and **Elizabeth K. Mutha**, hereinafter “*the respondents*” be restrained by an order of temporary injunction from entering upon, wasting, alienating, using or in any other manner interfering with the applicants’ quiet use and occupation of land parcel **Mavoko Municipality Block 6/179** hereinafter “*the suit premises*” pending the hearing and determination of the suit. The applicants also prayed for costs.

The grounds in support of the application are that the applicants are the rightful owners of the suit premises, the respondents are bent on evicting them therefrom, had already demolished a structure therein and had threatened to demolish the rest of the building. The respondents’ acts were illegal, provocative and intended to force the applicants from their suit premises and if unchecked, it was likely to cause a breach of peace. Finally, the applicants claim that they are bound to suffer irreparable loss.

In support of the application, the 1st applicant swore an affidavit. Where pertinent, she deponed that they were the registered proprietors of the suit premises and exhibited a certificate of lease to that effect. However on or about **January, 2011**, the respondents in the company of their agents trespassed on the suit premises and attempted to forcefully and unlawfully evict them therefrom. In the process, they demolished a structure they had put upon the suit premises and had now threatened to demolish their building without any colour of right and or justification. They fear that unless the respondent are restrained by an order of interlocutory injunction, they will descend on the suit premises again and destroy the same which will subject them to irreparable loss, damages and untold suffering since they reside on the suit premises.

At the ex-parte stage, the application came before **Waweru,J** on 27th January, 2011 who granted interim injunction pending the hearing of the application interpartes. When the application was scheduled for interpartes hearing on 3rd February, 2011, the respondents sought and were granted leave to file their papers in opposition to the application. **Waweru,J** acceded to their request and granted them 14 days

within which to do so. However, it was not until 24th February, 2011 that those papers were filed. This was 6 days or so outside the stipulated period by **Waweru J's** order. The respondent never sought leave of court to extend time within which to file and serve their replying affidavit in terms of Order 50 rule 6 of the Civil Procedure rules. The applicants have therefore asked me to expunge the said replying affidavit from the record on the grounds that court orders are not made in vain.

The respondent in their written submissions acknowledge that indeed they filed their replying affidavit out of time and without leave of court. However they invite me to invoke "*the oxygen principle*" as encapsulated by section 1A & B of the Civil Procedure Act and refuse the invitation to throw out the replying affidavit.

The replying affidavit was clearly filed in a breach of a court order. Court orders are not made in vain. If for one reason or another, respondents were unable to file the replying affidavit within the time stipulated by the judge, nothing stopped them from approaching the court for extension of time. Nor have they given any explanation why they filed the same late. Some orders are made by court for orderly conduct of court business. If the same are not obeyed they breed contempt and confusion in the administration of justice. I do not think that flagrant disobedience of a court order as it happened here can be countenanced and or ameliorated by the invocation of "*the oxygen principle*". I therefore expunge from the record, the replying affidavit having been filed out of time and in a breach of a court order.

That leaves the depositions of the applicants unchallenged and uncontested. For now, the applicants are the registered proprietors of the suit premises. They are entitled to the protection given to them by sections 27 and 28 of the Registered Land Act. To that extent, the applicants have demonstrated a prima facie case with probability of success. They have demonstrated that they are the registered joint owners of the suit premises and having been living thereon since 1995 to date. They have also established that unless an order of injunction is granted, they will suffer irreparably such that they cannot be compensated by an award of damages. If their houses are demolished and they are evicted from, a place they have known as home since 1995, it will be such an inconvenience that cannot be compensated by an award of damages.

Finally, I think that the balance of convenience tilts in favour of the applicants who have been living on the suit premises for over 16 years. It is better that this *status quo* be maintained until the hearing and final determination of this suit. For the reasons stated, the application must succeed in terms of prayer 2 on its face. It is allowed as prayed. The applicants too shall have the costs of the application.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of NOVEMBER 2011.

ASIKE - MAKHANDIA
JUDGE