



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 99 OF 2011

EUNICE WAMBUI KIBUNJA.....PLAINTIFF

VERSUS

PAUL GATHERI KIBUNJA.....DEFENDANT

RULING

The Notice of Motion dated 5/5/2011 was filed by the firm of Hari Gakinya on behalf of the plaintiff/applicant, Eunice Wambui Kibunja. The applicant's prayer is that pending the hearing and determination of this suit, this court be pleased to restrain the defendant, by himself, his agents or servants from in any way interfering with the plaintiff's enjoyment, occupation and from trespassing on the applicant's property known as MAU NAROK/SIEPEI BLOCK 3/30. The applicant claims to be the registered proprietor of the said land and exhibited the title in her name. It is dated 5/1/1996. She deponed that single handedly she brought up her children who include the respondent, and bought land in Mau Narok, and carried out small businesses. She has also bought her children land and built semi permanent houses for them. She built rental houses on her property next to Nakuru-Mau Narok Road where she resides with tenants and gets rents for her upkeep. Early this year the respondent who is one of her sons brought his young wife to her plot, his married daughter, then his older wife and they started collecting her rents by force. That the defendant tried to obtain money from her account by lying to the Bank Manager that she was dead and presented a false death certificate; that he has started buying building materials and depositing it on her property without her permission and has been using the area chief to harass her. She denies that the respondent has ever provided for her but instead it is her who provides for him. She has stopped providing for him since he started the harassment and she wants the court to restrain the respondent from interfering with her property.

In his replying affidavit, the respondent deponed that the application is brought in bad faith because in the year 1992, the applicant gave him a portion of the suit land and helped him construct a semi permanent house where he lives with his family. He exhibited photographs of his house "PGK1", that he has since made several developments on the plot worth over Kshs.3 million i.e. shops, rental houses, a bar, lodgings and even a petrol station with the consent of the applicant. He denied having chased his brother, Joseph Kangethe from the plot and contends that the rents he has been collecting are from his properties. He exhibited receipts to that effect (PGK3). The respondent claimed to have been co-existing with the applicant very well till his brother started taking advantage of her old age and manipulating her; that each of her children were given part of the suit land by the applicant. It is the respondent's contention that these problems have been brought about by his brother, Kangethe who had even forged a power of attorney as having been given by the plaintiff which has been the subject of police investigation – a copy was exhibited and correspondence in respect thereof.

When Mr. Gakinya brought this application under certificate of urgency on 6/5/2011, the court granted interim orders of injunction in terms of prayer (b), whose effect is that the respondent be restrained from

interfering with the plaintiff's enjoyment and quiet possession of the land and trespassing onto the land. By an application dated 11/5/2011, the respondent through the firm of Murindi Advocate sought to have the court discharge, vary or set aside its orders made on 6/5/2011 and instead order that status quo be maintained pending the hearing of this application. The reasons for the application are that the order of 6/5/2011 was barring the respondent from accessing the only house that he has had for the last 21 years and that his businesses have been paralyzed and as a result the respondent is incurring irreparable loss. He reiterated the grounds for opposing the application filed by the applicant. The applicant opposed this application by her replying affidavit dated 16/5/2011.

I have considered both applications and there is no doubt that the suit land is registered in the names of the plaintiff/applicant.

I have seen the photographs exhibited by the respondent to his affidavit respecting the developments he claims to have made on the property. These developments must have taken time to put up and if they were put up without the applicant's consent, this court does not understand why the applicant took so long to move the court. The respondent also exhibited receipts in which rents are allegedly paid to him. They are many receipts and are for the years 2009 to date. If there are houses for rental, they must have been put up since 2009. The question that begs is why the applicant did not seek to restrain the respondent from those acts of trespass when they were being put up. What has transpired? In the supporting affidavit of the applicant (para.6) she deponed that the respondent had just started interfering with her possession early this year. This is contrary to what the applicant later states that the respondent actually started interfering in 2009 and wanted to take over her property this year.

In my view, all the facts respecting this dispute are not before the court and the court would need to hear both sides before restraining the acts of either of them. For these reasons, it is my view that the orders restraining the respondent from entering or trespassing into the said piece of land are discharged. It seems the respondent has been on the land for sometime and it will be unfair to lock him out abruptly without hearing the dispute. If the respondent has been on the said plot, even if it is registered in the names of the applicant, he must have entered the plot with her consent and it must be established why the applicant wants him restrained or out of the plot now. Does the respondent want to disinherit the mother before her death or is it the respondent's brother seeking to alienate the respondent from the mother in order to have the whole cake? For the above reasons, I decline to grant prayer (c) of the Notice of Motion dated 5/5/2011 seeking to confirm the order of injunction that was given ex-parte and that order issued on 6/5/2011 stands discharged. Instead I will order that the respondent do continue living and using his property built on the suit plot and carrying on his businesses on the plot but should not in any way interfere with the applicant's possession and quiet enjoyment of her part of the plot till this matter is heard. Costs to abide the hearing of the suit.

DATED and DELIVERED this 16th day of December, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Wanjiru holding brief for Mr. Gakinya for the plaintiff/applicant.

Mr. Bosire holding brief for Mr. Mulindi for the defendant/respondent.

Kennedy – Court Clerk.