



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC 374 OF 2013**

**SAMMY KEMOO AREKAI.....PLAINTIFF**

**VERSUS**

**ELIAKIM W OLWENY.....1<sup>ST</sup> DEFENDANT**

**NORAH ATIENO OLWENY....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> Defendant vide the Notice of Motion dated 29<sup>th</sup> July 2020, which is the subject of this ruling, seeks the following substantive orders:-

3. That upon hearing and eventual determination of this application this Honourable Court be pleased to issue a perpetual order of injunction restraining the plaintiff, his agents, servants, employees or others whosoever from trespassing, tilling, cultivating, developing permanently/temporarily or using the applicant's parcel of land known as **Elburgon/Turi Block 2/625 (Ndenderu)**.

4. That this Honourable Court be pleased to issue an order of eviction against the plaintiff to vacate the Applicant's parcel of land known as **Elburgon/Turi block 2/625 (Ndenderu)**.

5. That the officer Commanding Station- Elburgon police station be directed to enforce the orders of eviction upon issuance by this Honourable court.

2. The application is brought under the provisions of Order 40 Rule 2(a), Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is grounded on the grounds set out on the body of the application and on the supporting affidavit sworn by the 2<sup>nd</sup> defendant/applicant. The applicant avers that the plaintiff's cause of action was intrinsically tied to the 1<sup>st</sup> defendant from who he claims to have purchased the suit property pursuant to a sale agreement entered into in February 2002. The suit property was transferred and registered in the 2<sup>nd</sup> defendant's name together with her minor son, John Kelvin Odhiambo Olweny on 12<sup>th</sup> March 2013 and a title issued in their joint names. The 2<sup>nd</sup> Defendant averred that the 1<sup>st</sup> Defendant passed away in 2016 and was not substituted within the requisite period of one year from the date of death and therefore the suit against him abated on expiry of 12 months from the date he died. The 2<sup>nd</sup> defendant contended that as the plaintiff's claim could only crystallize if the 1<sup>st</sup> defendant was held to be culpable, the suit against the 1<sup>st</sup> defendant having abated for want of substitution, the plaintiff's suit against the 2<sup>nd</sup> defendant was rendered unsustainable. The 2<sup>nd</sup> defendant further averred that as the plaintiff had no privity of contract with the 2<sup>nd</sup> defendant in his dealings the plaintiff could not properly make any claim against the 2<sup>nd</sup> defendant. On that account the 2<sup>nd</sup> defendant /applicant sought the orders prayed for in the application.

3. The plaintiff in response to the 2<sup>nd</sup> defendant's application averred that the application was misconceived and an abuse of the Court process and was devoid of any merit and therefore underserving of the Court's discretion to grant the orders sought. The plaintiff in the replying affidavit sworn in opposition to the 2<sup>nd</sup> defendant's application denies that the suit against the 1<sup>st</sup> defendant has abated indicating that two applications seeking substitution of the 1<sup>st</sup> defendant have been filed which have not been disposed of. The plaintiff states that the applications were pending the resolution of a succession cause that had been filed by the widows of the 1<sup>st</sup> defendant.

4. The plaintiff further averred that the 2<sup>nd</sup> Defendant vide the application sought what constitutes final orders which cannot be granted in an interlocutory application such as the one the 2<sup>nd</sup> defendant has brought but upon final hearing of the matter on merits. The plaintiff has further asserted that he has been in occupation and has been utilizing the land over a long period of time predating when the suit was filed by the plaintiff.

5. The application was canvassed by the parties by way of written submissions. The applicant's submissions were filed on 2<sup>nd</sup> November 2020 and those of the Respondent were filed on 17<sup>th</sup> November 2020. I have reviewed the submissions by the parties and have considered the authorities referred to by the parties.

6. The 2<sup>nd</sup> defendant/ applicant has submitted that the plaintiff's case against the 1<sup>st</sup> defendant has abated. The plaintiff has countered that assertion by submitting that he has filed two applications seeking the substitution of the 1<sup>st</sup> defendant and these applications have not been disposed of by the Court. The first application dated 19<sup>th</sup> January 2018 was not determined as the Court was informed a succession cause to the estate of the 1<sup>st</sup> defendant (deceased) had been filed and that the three widows of the 1<sup>st</sup> defendant were contesting as to who should be appointed as the administrator. The Court on 22<sup>nd</sup> January 2018 directed that the 3 widows be enjoined to the application for substitution and the plaintiff appropriately joined the widows to the application dated 5<sup>th</sup> February 2018. As per the record of the Court these applications for substitution have not been determined one way or the other as apparently the succession matter remained unresolved. The Court on 18<sup>th</sup> June 2019 made an order that **"it was best to await the outcome of the succession cause"**. The outcome of the succession cause has not been communicated to the Court and in those circumstances, it is not entirely correct to say that the plaintiff's case against the 1<sup>st</sup> defendant has abated. The Court record shows there is a pending application for substitution of the 1<sup>st</sup> defendant before the Court.

7. Although on the basis that there is no evidence that the suit against the 1<sup>st</sup> defendant has indeed abated should suffice to dispose of the 2<sup>nd</sup> defendant's application, I will nonetheless consider the other issue raised whether or not a permanent or perpetual injunction can properly be granted vide an interlocutory application as in the instant case. The 2<sup>nd</sup> defendant's present application is anchored under Order 40 Rule 1 and 2 of the Civil Procedure Rules. Under Rule 1 it is clear the order of injunction contemplated is a temporary injunction pending the disposal of the suit and/or further orders of the Court. Equally under Rule 2 the injunction that can be granted is temporary on such terms as the Court may deem fit. An application under Order 40 Rules 1 and 2 cannot be synonymous for instance to an application for summary judgment under Order 36 Rule 1 where in an appropriate case a Court can give summary judgment which would constitute final orders such as those the Court can give after a full trial following which a decree in the suit can issue.

8. The order the 2<sup>nd</sup> defendant prays for, notably prayers 3 and 4 where the 2<sup>nd</sup> defendant prays for a perpetual order of injunction and an order of eviction respectively are in their nature final orders that can only be issued at the conclusion of the case after hearing the parties on the merits of the case. The 2<sup>nd</sup> defendant has pleaded a counterclaim where she essentially avers the plaintiff is a trespasser in the suit land and prays for an order for his eviction. The 2<sup>nd</sup> defendant would be expected to prove the counterclaim for her to get an order for the eviction of the plaintiff that she prays for.

9. Ideally interim injunction reliefs by way of temporary injunctions are sought during the pendency of a suit as a means of preserving the subject matter of the suit pending the hearing and determination of the suit. An injunction may be sought to prevent wastage, degradation and/or change of the character and/or status of the subject matter so that the subject matter remains intact up to the time the suit is determined. A permanent injunction would issue only after the rights of the contesting parties have been adjudicated and the Court has reached a final decision.

10. Korir, J aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of *Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib (2018) eKLR* when he stated thus:-

“ A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

11. In the matter before me I find no basis upon which I can grant the 2<sup>nd</sup> defendant the orders she seeks. I find no merit in the application dated 29<sup>th</sup> July 2020. The same is ordered dismissed with costs to the plaintiff.

12. Orders accordingly.

**Ruling dated signed and delivered virtually this 21<sup>st</sup> day of January 2021.**

**J M MUTUNGI**

**JUDGE**