



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 851 OF 2017**

**JOHN MWANGI KAMAU.....PLAINTIFF/APPLICANT/RESPONDENT**

**VERSUS**

**DAVID MWAURA NDURUHU.....DEFENDANT/APPLICANT/RESPONDENT**

**RULING**

There are **three Applications** for determination herein.

The **1<sup>st</sup> Notice of Motion Application** is dated **14<sup>th</sup> November 2018**, by the Defendant/Applicant seeking for orders that:-

***1. There be a stay of proceedings in this case pending the hearing and determination of Nairobi ELC No. 17 of 2014;- David Mwaura Nduruhi vs Jane Wambui Kabaru & 2 others.***

***2. That costs of the Application be in the cause.***

The Application is premised on the following grounds; that the subject matter in this suit, **LR No. 4953/34/IV**, is the same as the subject matter in **Nairobi ELC No. 17 of 2014; David Mwaura Nduruhi Vs Jane Wambui Kabaru & 2 Others**, which is partly heard before **Hon. Justice Okong'o**; that there will be no prejudice if this application is allowed as the same will indeed assist the court to arrive at a just and well informed decision.

The Application is further supported by the Affidavit of **David Mwaura Nduruhi**, who averred that he purchased a property known as **Plot No. 4953/34/IV**, within **Thika Municipality** in **February 2009** from **Peter Kabaru Muiruri** and **Jane Wambui Kabaru** on **20<sup>th</sup> February 2009**, and has had quiet possession since then.

That the Plaintiff/Respondent filed this suit with the full knowledge of the existence of **Thika CMCC No. 59 of 2017; David Mwaura Nduruhi Vs John Mwangi Kamau** where the Plaintiff herein had been restrained from distressing for rent, proclaiming, attaching, evicting or in any way interfering with the quiet possession of the Defendant's over the suit premises herein. Further that the Plaintiff/Respondent is also aware of a pending matter at Nairobi being **ELC No. 17 of 2014**, between the Defendant herein and **Jane Wangui Kabaru & Another**.

That in the said matter, the Defendant is seeking for **specific performance** over the subject matter being **Plot No. 4953/34/IV** and the matter is partly heard before **Justice Okong'o**. That the Applicant has been advised by his advocate that the matter in issue in **ELC No. 17/2014**, is directly in issue in this matter and it is prudent that this court stays proceedings herein pending the hearing and determination of Nairobi **ELC No. 17 of 2014**. Further that the Plaintiff/Respondent lodged a complaint with the Police and the Defendant/Applicant was charged in **Thika Criminal Case No. 1611 of 2017**, but the High Court in Nairobi stayed the said Criminal Case, pending the hearing and determination of **ELC No. 17 of 2014**. That it is only fair and in the interest of Justice that this matter be stayed pending the hearing and determination of Nairobi **ELC No.17 of 2014**, on the issue of ownership of the suit property. Further that the Plaintiff/Respondent will not suffer any prejudice, but the Court will arrive at a just determination after hearing both parties.

This Application is opposed and the Plaintiff/Respondent, **John Mwangi Kamau**, swore a Replying Affidavit on **10<sup>th</sup> December 2018**, and averred that though the Defendant/Applicant filed **Thika CMCC No. 59 of 2017**, and obtained restraining orders against him, he intends to file an Appeal against the said orders. Further that indeed there is an ongoing case being **ELC No. 17 of 2014**, before Nairobi ELC between the Defendant and the beneficiaries of the Estate of **John Muiruri Kabaru** (deceased). However, the Plaintiff/ Respondent is not a party to the said suit and therefore being a holder of a valid title in respect of the suit property, he will be greatly affected by the outcome of the said suit and that necessitated the filing of the instant suit. Further, that he has been advised by his advocate that the prayers sought in **ELC No. 17 of 2014**, are for specific performance of a contract and/or refund of the purchase price by the beneficiaries of the Estate of **John Muiruri Kabaru**. That the Plaintiff/Respondent is not a party to the said suit and therefore there is no duplication of prayers in the two suits.

Further that the Defendant/Applicant has not satisfactorily shown to this Court why the suit herein should be stayed. That if the suit is stayed, he will suffer irreparable loss and damage as he is unable to continue using his business premises and the said premises continues to wastes

away from the year 2016, since the Defendant/applicant only occupies 3 shops without paying rent. He urged the court to dismiss the instant application with costs.

The 2<sup>nd</sup> Notice of Motion Application is dated 8<sup>th</sup> March 2019, brought by the Plaintiff/Application who sought for the following orders:-

- 1. That the court to call for and consolidate this matter with High Court Nairobi ELC No. 14 of 2014.*
- 2. That the Court be pleased to withdraw Thika CMCC No. 59 of 2017 and transfer it to this Court for trial and determination.*
- 3. That costs be provided for.*

The Application is premised on the grounds that the subject matter in the three suits is one and the same property known as LR No. 4953/34/IV, situate within Thika Township; That the Plaintiff and the Defendant in Thika CMCC No. 59 of 2017, reside and work for gain within Thika Township. The Defendant in Nairobi ELC No. 17 of 2014 also reside within Thika township and all the parties to the suits are within the jurisdiction of this Court; that no injustice, prejudice and or inconvenience of whatever nature shall be visited upon any party or parties in three (3) suits in any manner, but rather the Court will deal with the issue one-stop forum for a just and expedient determination.

The Application is further supported by the Affidavit of John Mwangi Kamau, who averred that the suit property herein LR No. 4953/34/IV (IR No. 7836), was duly transferred to him after a successful purchase from the previous owner on the 30<sup>th</sup> May 2016. Therefore, he became the legitimate owner and bonafide purchaser for value of the suit property. That he was to take immediate possession and deal with it as he deemed necessary for propose of development. But he has been frustrated, obstructed, prevented unjustifiably and unfairly put out of possession of the suit property by the machinations of the Defendant.

That unknown to him, the Defendant herein had filed ELC No. 17 of 2014, in Nairobi against the Administrators of the Estate of the original owner of the suit property John Muiruri Kabaru. That he is not a party in the said suit and the said ELC No. 17 of 2014 Nairobi is partly heard, but it touches on the same subject property in the instant suit. Further that there is no telling when the said matter though partly heard will be heard to its conclusion. Therefore, the Applicant will continue to be deprived of right of use, possession and desired development of the suit property. That he has been denied rental income for the last 3 years, not only from the Defendant herein, but also by the other tenants who should have occupied the said property. That the Defendant and the Applicant are entangled in various courts wherein the Defendant/Respondent has put up spirited effort to deny him right of enjoyment and use of the suit property.

That the various matters have not been concluded and he continues to suffer loss by way of costs and time. He therefore prays that Thika CMCC No. 59 of 2017, and Nairobi ELC No. 17 of 2014, be transferred to this Court and be consolidated so that they can be heard together. That his advocate has advised him that it is fair and just to have the two parallel cases heard simultaneously as they address the same subject matter. That the suit property is situated in Thika Township within the Geography jurisdiction of the this Court and thus ELC No. 17 of 2014, should be consolidated and heard together with the instant suit. Further that from the advice of his advocate, none of the parties herein will suffer any prejudice, loss and/or any inconvenience of any nature but rather will benefit if the two suits are consolidated and heard together.

The Application is opposed and David Mwaura Nduru, filed a Replying Affidavit sworn on 27<sup>th</sup> April 2019, and averred that the Plaintiff/Applicant filed his application dated 8<sup>th</sup> March 2019, to defeat the Defendant's application dated 14<sup>th</sup> November 2018. He opposed consolidation of this matter with ELC No. 17 of 2014, which has proceeded and is partly heard and the Defendant herein who is a Plaintiff in the said case has closed his case and the matter was scheduled for defence hearing on 19<sup>th</sup> June, 2019. Further that the Plaintiff herein has filed an application to be enjoined in the said suit as an interested party. Therefore, the Plaintiff herein is not truthful by alleging that he is not a party in the ELC No. 17 of 2014 and did not know the existence of the said suit. He averred that it is in the interest of justice that this suit be stayed pending the hearing and determination of Nairobi ELC No. 17 of 2014, which is partly heard. He urged the Court to dismiss the instant application and stay the instant suits earlier prayed.

The 3<sup>rd</sup> application is dated 5<sup>th</sup> October 2020 brought by the Defendant/applicant who has sought for the following orders:-

- 1. A mandatory injunction be issued directed at the Plaintiff and its agents, servants, - Chador Auctioneers to unconditionally re-instate, restore and to put back the Defendant/Applicant as well as the building premises, goods and chattels carted away into the premises situated on LR No. 4954/34/IV within Thika Town.*
- 2. A temporary injunction do issue restraining the Defendant, his servants and agents from further evicting, terminating, recovering, possession and/or in any other manner dealing and/or interfering with the Defendant's/Applicant's occupation and/or possession of the suit premises situated on LR No. 4954/34/IV within Thika Town pending hearing and determination of this suit.*
- 3. The Plaintiff/Respondent be condemned to pay costs of this application.*

The application is premised on the grounds that on 5<sup>th</sup> October 2020, at 5.00 p.m. the Plaintiff/Respondent caused his agents one Eliud C. Wambu T/A Chador Auctioneers, to illegally evict and take possession of the suit premises known as LR No.4954/34/IV, within Thika Town.

- (b) That the Plaintiff and Chador Auctioneers are in the process of evicting the Applicant camouflaged as levying of distress for the imaginary unpaid rent.*

*(c) That the Plaintiff/Respondent has caused the defendant goods to be illegally carted away by Chador Auctioneers and hundreds of hired goons with police protection supervised by OCPD Thika, without lawful Court Order.*

*(d) That the Plaintiff is in the process of evicting the Defendant/Applicant clandestinely as recovery of possession without any Court Order though the BPRT vide Cause No. 12 of 2017 had restrained the Plaintiff from interfering with the defendant quiet possession of the suit premises.*

*(e) That the conduct of the Plaintiff and its agent Chador Auctioneers ought to be fronted upon by the Court by way of issuing Mandatory Order of Injunction to restore the Defendant and his chattel goods in the premises.*

*(f) That the hardship that would be caused if the court does not protect the Defendant is unproportionate to the interest that the Respondent is illegally seeking to secure as the illegal eviction would bring the applicant business to a standstill.*

*(g) That unless the application is heard and granted, the applicant stands to suffer irreparable damages and loss as the Auctioneer is likely to cart and/or sell the Applicant's goods and the applicant has a good case with very overwhelming chances of success.*

The application is also supported by the affidavit of **David Mwaura Nduru**, who averred that he has been in uninterrupted possession of the suit premises **L.R. No. 4954/34/IV**, within Thika Town having purchased the same in the year **2009**. However on **5<sup>th</sup> October, 2020**, the Plaintiff caused an Auctioneer to illegally take possession by use of bull dozers to demolish the business premises and cart away his goods, in the process evicting him from the premises without any justification. He further averred that it is just and equitable that this honourable Court grants the Orders as prayed in the interest of Justice.

The application is opposed and **John Mwangi Kamau**, the Plaintiff herein filed a Replying Affidavit sworn on **26<sup>th</sup> October, 2020**, and averred that he is the registered owner of the suit property having purchased the same from the previous owners. That the Defendant/Applicant is not the owner of the suit property and has illegally been in occupation of the same and has refused to vacate the said premises and does not pay rent. That the Defendant/Applicant has not enjoyed uninterrupted possession of the suit premises as there are multiple suits over the said property.

That there is no Court Order stopping the Plaintiff from protecting his interest in the suit property. Further that there is no order from **Business Premises Rent Tribunal**, restraining him from demolishing the suit premises as **Business Premises Rent Tribunal** has no jurisdiction to deal with ownership of property. Further that the injunctive orders in place were discharged by this Court on Appeal and as a registered owner of the suit property, the law takes precedence in protecting such registered owner.

That there were no valid Court Orders against the Plaintiff/Respondent and therefore the applicant cannot be reinstated in an already demolished structure. Further that the applicant cannot be restored as there is no building to restore him to. That Defendant/Applicant has not demonstrated to this court that he has interest worth protecting. He urged the court to dismiss the instant application.

The three applications were canvassed by way of Written Submissions which this Court has carefully read and considered. The Court will determine the three Applications in their respective orders.

The first application is seeking to stay these proceedings or suit pending the hearing and determination of Nairobi **ELC No. 17 of 2014**.

From the proceedings herein, the Plaintiff herein **John Mwangi Kamau** alleges that he purchased the suit property **L.R. No. 4953/34/IV** from **Mary Njeri Kimiri, Francisca Nyambura Nganga, Annah Waithira Muiruri and Teresia Nyambura Kariuki**, being the beneficiaries of the Estate of the late **John Muiruri Kabaru**, and obtained a title deed to the said property on **4<sup>th</sup> July, 2016**. A sale agreement dated **7<sup>th</sup> June, 2013**, is also attached to the proceedings which shows that the Plaintiff bought the suit property for **Kshs. 55,000,000/=** from the beneficiaries of the Estate of **John Muiruri Kabaru**. There is also a confirmed grant in which the vendors herein are named as the beneficiaries of the suit property. The said confirmed grant was issued on **6<sup>th</sup> September, 2011**. In his suit, the Plaintiff has sought for permanent Injunction to restrain the Defendant herein from interfering or dealing in any manner with the suit property, **L.R. No. 4953/34/IV**, within Thika Town. He has also sought for vacant possession of the same and a declaration that he is the legal, rightful owner and bonafide purchaser of **L.R. No. 4953/34/IV** among other prayers.

There is no doubt that the Defendant herein had sued **Jane Wambui Kabaru**, the administrator of the estate of **Peter Kabaru Muiruri, Teresia Nyambura Kariuki and Philomena Njoki Muiruri**, the administrators of the estate of **John Muiruri Kabaru** in **ELC No. 17 of 2014**. In the said **ELC No. 17 of 2014**, the Defendant herein **David Mwaura Nduru** had sought for various Orders against the Defendants thereon, among them an Order of specific performance directed to the 1<sup>st</sup> Defendant to execute and regulate transfer form in his favour over **Plot No. 4953/34/IV**, an Order of Permanent Injunction and alternatively a refund of the purchase price.

The Plaintiff in **ELC No. 17 of 2014**, had alleged that he had bought the suit property on **20<sup>th</sup> February, 2009**, from **Peter Kabaru Muiruri** who is now deceased. However, the Defendants have failed to transfer the said property to him though he took immediate possession upon execution of the sale agreement. The said allegations are denied by the defendants.

It is also not in doubt that **ELC No. 17 of 2014**, is partly heard before Milimani ELC. The Defendant/Applicant herein has alleged that as a Plaintiff in **ELC 17 of 2014**, he has already closed his case. The Defence hearing was slotted for **19<sup>th</sup> June, 2019**. He now wants the Court to Stay this suit, pending the hearing and determination of **ELC No. 17 of 2014**.

The Plaintiff /Respondent is opposed to the stay of these proceedings.

He alleges that he legally bought the suit property and he has a title to the said property. That he was not aware of the **ELC No. 17 of 2014**, by the time of instituting this suit. He avers that he brought this suit to protect his interest as a registered owner. Further that staying this suit will stifle his right of ownership.

This application is predicated under **Section 6** of the **Civil Procedure Act** which provides that:-

*“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly or substantially in issue in a previously instituted suit on proceedings between the same parties or between parties whom they or any of them claim litigating under the same title, where such suit or proceedings in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

The test herein is **matter in issue**. In the instant case, the **matter in issue** is **LR No. 4953/34/IV**, Thika Township. It is not in doubt that in **ELC No. 17 of 2014**, the Plaintiff thereon who is the Defendant herein is seeking an order of specific performance for the reasons that he purchased the suit property **LR No. 4953/34/IV** in the year **2004**. There is also no doubt that in the instant suit, the Plaintiff herein is seeking an order against the Defendant who is the Plaintiff in **ELC No. 17 of 2014**, that the Plaintiff be declared the legal and rightful owner of the suit property **LR No. 4953/34/IV**, having purchased the same in the year **2013**, from the beneficiaries of the Estate of **John Muiruri Kabaru**. He acquired title to the said property in the year **2016**. He alleged that by the time of filing this suit, he did not know of the existence of **ELC No. 17 of 2014**.

It is further evident that the subject matter in the two matters which is the suit property is the same. It is evident that the determination of **ELC No. 17 of 2014**, will have a bearing on the ownership of the suit property. Though the Plaintiff herein has a title deed to the suit property, the Court cannot shut its eyes to the fact that there is in existence **ELC No. 17 of 2014**, wherein the Plaintiff therein is seeking for an order of specific performance.

However, it is evident that the said suit Nairobi **ELC No. 17 of 2014** was partly heard as at **14<sup>th</sup> November 2018**, when the instant application was filed. The Defendant/Applicant who is the Plaintiff in **ELC No. 17 of 2014**, had alleged that he had closed his case and the matter was awaiting Defence hearing on **19<sup>th</sup> June 2019**. We are now in the year **2021**, and this Court is not aware how far the said **ELC No. 17 of 2014**, has reached and/or whether the same has been determined or not.

The Plaintiff herein is seeking for a declaration and protection of his right to own the said property. Given that this Court is not aware whether **ELC No. 17 of 2014** has been determined or not, it would not be prudent to stay the suit herein as provided by **Section 6** of the **Civil Procedure Act**. The court will allow the matter to remain active and in the course of the hearing of this matter, the parties can always avail the determination or the outcome of **ELC No. 17 of 2014**. Once the determination of **ELC No. 17 of 2014** is availed, the Court dealing with **ELC No. 851 of 2017** will be guided accordingly and therefore no party shall feel that it has been prevented by the Court from advancing its claim. For the above reasons, the Court **disallows** the **Notice of Motion Application** dated **14<sup>th</sup> November 2018**, with costs being in the cause.

On the **2<sup>nd</sup> Notice of Motion** dated **8<sup>th</sup> March 2019** wherein the Plaintiff/applicant has sought for consolidation of this suit with **ELC No. 17 of 2017**, and transfer of **Thika CMCC No. 59 of 2017** to this Court, the Court makes the following observations. In **ELC Appeal No. 59 of 2019** the Court found that the lower court had no pecuniary jurisdiction to deal with the matter. Since the matter was filed in a Court without jurisdiction, it cannot be transferred to this Court.

On the issue of consolidation, as the Court has pointed out, **ELC No. 17 of 2014** was partly heard by **8<sup>th</sup> March 2019**, when the instant application was filed. The Plaintiff in the said **ELC No. 17 of 2014**, had even closed his case. The said matter was slotted for further hearing on **19<sup>th</sup> June 2019**. Consolidating this instant matter with an already partly heard matter means delay in the determination of the said **ELC No. 17 of 2014**. The said consolidation would go against the spirit of the overriding objective of sections **1A** and **1B** of **Civil Procedure Act** which call for expeditious disposal of matters before court.

This Court is not aware whether the said **ELC No.17 of 2014**, has been concluded by now or not. It would not be prudent to call for a partly heard matter that was filed in **2014**, for consolidation with a matter filed in **2017** which has not yet started. In the case of **Global Tours & Travel Ltd (Nairobi) HC Winding Up Cause No. 43 of 2000** quoted with approval in the **Kenya Wildlife Service vs Mutembei (2019)**, the Court while quoting the Supreme Court in **Law Society of Kenya Vs the Centre for Human Rights and Democracy** stated

*“The essence of Consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of Justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantages towards the party that oppose it”*

If the matter herein is consolidated, it will cause undue disadvantage to the Plaintiff in **ELC 17 of 2014**, who filed his case more than **6 years** ago and might be called to start the said matter afresh. For the above reasons, the Court finds that there is no sufficient reasons, advanced herein to have this suit Consolidated with **ELC No. 17 of 2014** Nairobi. Therefore, the prayers in Notice of Motion dated **8<sup>th</sup> March, 2019**, are disallowed entirely with costs being in the cause.

On the **3<sup>rd</sup> Notice of Motion** dated **8<sup>th</sup> October, 2020**, the Defendant/Applicant has sought for **Mandatory Injunction** wherein the Plaintiff/Respondent should be directed to unconditionally reinstated and restore the Defendant/Applicant back to the suit property **L.R. No. 4953/34/IV** and a **temporary Injunction** to restrain the Plaintiff/Respondent from interfering with the Defendant’s occupation of the suit property.

The Principles to be considered in determining whether to grant the two prayers sought were set out in the following cases; **Kenya Breweries**

Ltd & Ano....Vs....Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109, where 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 a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948.*

And in the case of Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358, where the court held:-

*“The conditions for granting a temporary injunction in East Africa are well known and these are: **First**, the 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 might not adequately be compensated by an award of damages. **Thirdly**, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”*

From the pleadings availed in Court, the Plaintiff/Respondent herein is the registered owner of the suit property. He has in his possession a title deed in his favour which was issued in the year **2016**. However, the Defendant/Applicant has alleged that he has been in occupation since **2009** and there is a Court Order restraining the Plaintiff from interfering with his occupation. The Plaintiff has denied existence of any such Court Order.

For this court to determine whether there was a valid Court Order or not, evidence has to be availed through production of exhibits. The Defendant/Applicant has alleged that the Plaintiff/Respondent evicted him from the suit property by carting away his goods and demolishing the building. The Plaintiff has acknowledged that the said building was demolished. If that is the case, then there is no building or premises where the Defendant/Applicant can be reinstated and or restored back to. The application is therefore overtaken by events and this Court cannot issue orders in vain.

If in the event that the Defendant/Applicant would turn out to be the successful litigant, and since the loss and damages allegedly suffered by him can be ascertained and can be quantified then he would definitely be adequately compensated by an award of damages.

The court finds that the Defendant's/Applicant's Application dated **5<sup>th</sup> October, 2020** is **not merited** and the same is dismissed entirely with costs being in the cause.

Let the parties herein prepare this suit for hearing so that the same can be determined at once and on merit.

It is so ordered

Dated, signed and Delivered at Thika this **14<sup>th</sup>** day of January, 2021

**L. GACHERU**

**JUDGE**

**14/1/2021**

**Court Assistant - Lucy**

### **ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

### **With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

In the presence of M/s Waigwa for the Plaintiff/Respondent/Applicant.

Mr. Njagi for the Defendant/Applicant/Respondent

**L. GACHERU**

**JUDGE**

