



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA**

**ELC NO 208 OF 2019**

**CHRISTINE MWENDE.....PLAINTIFF**

**VERSUS**

**DANIEL MBOGHO KALUME.....DEFENDANT**

**THE COUNTY GOVERNMENT OF KILIFI.....DEFENDANT**

**RULING**

1. The application before me for determination is the Notice of Motion dated 20<sup>th</sup> November, 2019 by the plaintiff seeking an order of temporary injunction restraining the defendants from intimidation, harassment, eviction and demolishing the boundary wall belonging to the plaintiff's premises on a portion of Plot No. MN/III/9476 pending the hearing and determination of this application and the suit. The application is supported by the affidavit of Christine Mwende, the plaintiff sworn on 20<sup>th</sup> November, 2020, and further affidavit sworn on 26<sup>th</sup> October, 2020. It is the plaintiff's case that on 22<sup>nd</sup> September, 2014, she purchased 1/8<sup>th</sup> of an acre on PLOT NO.MN/II/4427 (ORIGINAL NO.3847/7 MAINLAND NORTH) from one Jones Muchiti Chitahi for the amount of Kshs.1,500,000/=. That the sale agreement refers to the beneficial owner as Jones Muchiti Chitahi who had purchased the property from Daniel Mbogoh Kitsaumbi, the 1<sup>st</sup> defendant. That the 1<sup>st</sup> defendant was aware since he had apportioned Musa Idd Kanzori (deceased) the husband of Jones Muchiti Chitahi a parcel of land that houses a church called Miracle Revival Fellowship Pentecostal Church which land the plaintiff bought an eight (1/8<sup>th</sup>) of an acre. The plaintiff avers that she constructed a day school known as Jambo Jipia School on the said plot L which caters for Nursery, Primary and Secondary Schools that has approximately 200 students which the plaintiff has been managing since she acquired the property. The plaintiff has a copy of the sale agreement.

2. The plaintiff avers that on 18<sup>th</sup> December, 2013, they filed a representative suit wherein Daniel Mbogho Kalume is the 9<sup>th</sup> Defendant. Copies of amended plaint in ELC NO. 299 of 2013 and Order have been annexed. That the suit has an order restraining the 1<sup>st</sup> respondent from interfering with the plaintiff's property and was scheduled for inter-partes hearing on 3<sup>rd</sup> December, 2019. That on 31<sup>st</sup> October, 2019, the defendant herein demanded for rental arrears of Kshs.700,000/= and threatened to terminate the plaintiff's tenancy. The plaintiff maintains that she is not a tenant but has proprietary interest in the suit property. The plaintiff seeks to restrain the defendants from enforcing the notice.

3. In opposing the plaintiff's application, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 23<sup>rd</sup> February, 2020. It is the 1<sup>st</sup> defendant's contention that he is the registered proprietor of all that parcel of land known as PLOT NUMBER 9476/III/MN (ORIGINAL NO.3847/5) which shares a common boundary with PLOT NUMBER 9479/III/MN which he is also a beneficial owner. He has annexed copies

of the certificate of title and deed plan. That the two parcels were subdivisions carved out of the original PLOT NUMBER 3847 SECTION III MAINLAND NORTH which was family land owned by the 1<sup>st</sup> defendant's late father Kalume Kitsaumbi and that the family allocated the 1<sup>st</sup> defendant the said portions of land as part of his shares of the estate of his deceased father. The 1<sup>st</sup> defendant avers that his mother, Mwaka Kalume Kitsaumbi had, with his permission and consent leased subdivision NUMBER 9479/III/MN to one Bishop Musa Iddi Kanzovu (now deceased) as a ground tenant with permission to construct thereon temporary residential houses for lease to third parties and used to pay ground rent. That the plaintiff rented the temporary residential structures from the late Musa Iddi Kanzovu where she established a children's home and nursery school known as Jambo Jipya Primary School and presumably paying ground rent to the family of the late Musa Iddi Kanzovu. That sometime around early 2014 or thereabouts the plaintiff, then a member of Miracle Revival Fellowship Pentecostal Church approached the 1<sup>st</sup> defendant and requested him to lease out to her some structures which he had built on a portion of PLOT NO.9476/III/MN where she needed to expand her school to include a secondary school and the 1<sup>st</sup> defendant agreed. That the structures were leased out to the plaintiff at a monthly rent of Kshs.25,000/=. That the plaintiff was also allowed to put up a perimeter wall to shield the learners from passersby. That the plaintiff after about two years defaulted in payment of rent and fell into arrears, and started extending the height of the boundary wall, prompting the 1<sup>st</sup> defendant to seek the intervention of the 2<sup>nd</sup> defendant who issued an enforcement notice requiring the plaintiff to *inter alia*, stop the construction of the wall and to submit approved architectural drawings for approval. Thereafter, the plaintiff rushed to court and filed this suit. The 1<sup>st</sup> defendant contends that the application and the supporting affidavit are full of falsehoods only aimed at hoodwinking this court to grant the orders sought, and urged the court to dismiss the application.

4. The application was canvassed by way of written submissions which were duly filed by both the plaintiff and the 1<sup>st</sup> defendant. I have considered the application and the submissions filed. The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicant is deserving of injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute are resolved. A party also seeks injunctive orders when he feels that his right has been infringed.

5. The principles upon which an interlocutory injunction may be granted are well settled. One has to establish a *prima facie* case with a probability of success, and an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the court will decide the matter on a balance of convenience.

6. In this case, the plaintiff is seeking injunctive orders over a portion of PLOT NO. MN/III/9476. It is not in dispute that the registered owner of PLOT NUMBER 9476/III/MN is the 1<sup>st</sup> defendant who has exhibited a copy of the title. The plaintiff is laying her claim on an agreement for sale in respect of 1/8<sup>th</sup> of an acre of plot divided from PLOT NO.MN/II/4427 (Original 3847/7/MN). The plaintiff has completely failed to explain the connection between the plot she alleges she purchased and the suit premises herein, PLOT NUMBER MN/III/9476. The plaintiff does not deny the 1<sup>st</sup> defendant's title. The plaintiff has also indicated that there are previous proceedings, to wit ELC NO.299 of 2013 in which there is an order issued in her favour. It is not clear why the plaintiff has opted to file another case to seek injunctive orders if there are already existing orders in her favour. Given the above position, and in particular the fact that the 1<sup>st</sup> defendant is holding title in respect of the suit property which has not been challenged, and to which no connection has been given between it and the plot that the plaintiff allegedly purchased, and considering the existence of a previous suit, I find that the plaintiff has not established a *prima facie* case with a probability of success. Further, the plaintiff would not suffer irreparable loss if the demolition of the wall is undertaken because the value of constructing the same can be ascertained. I take the view that any damage suffered by the plaintiff, if any, can be quantified in damages.

7. Arising from the above reasons, I find that the notice of motion dated 20<sup>th</sup> November, 2019 lacks merit and the same is dismissed with costs to the 1<sup>st</sup> defendant.

8. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 18<sup>th</sup> day of March, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**