



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. E061 OF 2022

ANTONY GAKURU MAINA.....PLAINTIFF/APPLICANT

-VERSUS-

MOURICE LORUKIA LOMILIO.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion dated the **16th February 2022**, the Plaintiff/Applicant herein has sought for the following Orders:

a.(Spent).

b. *This Honourable court do issue an order of Temporary injunction against the Defendant/Respondent by himself, agents, servants and/or workers from staying, entering, putting into use, interfering or in any manner whatsoever, with the residential house constructed on L.R No. 13862/1 (I.R No. 136365) pending the hearing and determination of this Application Inter-parties.*

c. *The Police Officer in Charge of Karen Police Station do assist in effecting this Order.*

d. *Costs of this Application be provided for.*

2. The subject Application is premised on the Grounds contained on the face thereof and same is further supported by the affidavit of the Plaintiff/Applicant sworn on the **16th February 2022**, in respect of which the Plaintiff/Applicant has exhibited a copy of title deed to and in respect of the suit property.

3. Upon being served with the subject Application, the Defendant/Respondent herein proceeded to and retained counsel, who merely filed a Memorandum of Appearance, but did not file any Response to the subject Application.

DEPOSITION BY THE PARTIES:

PLAINTIFF’S/APPLICANT’S CASE:

4. Vide Supporting Affidavit sworn on the **16th February 2022**, the Plaintiff/Applicant herein has averred as hereunder;

5. The suit Property, namely, **L.R No. 13862/1 (I.R No. 136365)**, belonged to and is registered in my name, namely, the name of the Plaintiff/ Applicant.

6. On the other hand, the Plaintiff/Applicant has further averred that the Defendant/Respondent has unlawfully and without any color of right entered upon and/or taken possession of the suit Property and same has therefore denied and/or deprived the Plaintiff/Applicant of his right to occupy, possess and otherwise utilize the suit Property.

7. Other than the foregoing, the Plaintiff/Applicant has averred that the Defendant/Respondent has also caused substantial damage to the suit property and that unless the orders sought herein are granted, there is a likelihood that the Plaintiff/Applicant shall be exposed to irreparable loss.

8. Further, the Plaintiff/Applicant has also averred that owing to the actions and/or activities by the Defendant/Respondent, there is need for same to be stopped by way of a Permanent Injunction from entering upon, staying in and/or otherwise interfering with the Plaintiff's/Applicant's lawful rights.

RESPONSE BY THE DEFENDANT/RESPONDENT:

9. The Defendant/Respondent herein instructed counsel who only entered Appearance, but did not file any Response to the subject matter herein.

SUBMISSIONS:

10. The subject Application came up for hearing on even date, namely the **8th March 2022**, when same was canvassed by way of Oral submissions made by and/or on behalf of the Parties.

11. It was the Plaintiff's/Applicant's submissions that same is the Proprietor and lawful owner of the suit property hereof and by virtue of being the registered owner of same, the same is entitled to absolute and exclusive occupation and possession of the suit property, to the exclusion of all and sundry, the Defendant/Respondent, no excepted.

12. Besides, the Plaintiff/Applicant has further submitted that the Defendant/Respondent has entered upon and taken possession of the suit property and that same is currently residing in the premises, *albeit* without the permission and/or consent of the Plaintiff/Applicant.

13. Owing to the actions and/or activities by the Defendant/Respondent, the Plaintiff/Applicant has therefore submitted that it is appropriate that the court be pleased to issue an order of temporary injunction to bar the Defendant/Respondent from entering upon and/or otherwise remaining in the suit property.

14. It was the Plaintiff's/Applicant's further submission that the Defendant/Respondent herein has denied and/or deprived the Plaintiff/Applicant of the right to occupy and use of the suit property. In this regard, the Plaintiff/Applicant submitted that same has therefore been rendered homeless.

15. On the other hand, the Plaintiff/Applicant has further submitted that based on the fact that same is the registered proprietor of the suit property, he has therefore established a prima facie case with overwhelming chances of success and in that regard, an order for temporary Injunction should issues.

16. Notwithstanding the foregoing, the Plaintiff/Applicant has also submitted that same is likely to suffer Irreparable loss, which shall not be compensable in monetary terms, unless the orders sought are granted.

17. Finally, the Plaintiff/Applicant has also submitted that by virtue of being the owner of the suit property, the balance of convenience tilts in favor of the Plaintiff/Applicant.

18. On his part, the Defendant/Respondent only raised one issue. For clarity, it was the Defendant's/Respondent's position that the subject application has been overtaken by events owing to the fact that the Defendant/Respondent was admittedly in occupation of the suit premises.

19. Based on the foregoing, the Defendant/Respondent submitted that the order of temporary Injunction which is being sought by the Plaintiff/Applicant shall be ineffective and in effectual.

20. In the premises, the Defendant/Respondent submitted that the court cannot therefore issue the orders sought and specifically, that the issuance of such orders would amount to acting in futility.

21. Consequently, the Defendant/Respondent implored the court to proceed and dismiss the Application.

ISSUES FOR DETERMINATION:

22. Having reviewed the Notice of Motion Application dated the **16th February 2022**, the Supporting Affidavit thereto and having taken into considerations the Oral submissions made by and/or on behalf of the Parties, the following issues Do arise and are germane for Determination.

a. Whether an Order of Temporary Injunction can issue and/or be issued when the act complained of has already occurred and/or accrued.

b. Whether a court can grant an order for Mandatory injunction when same has not been pleaded or prayed for in the Pleadings.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether an order of Temporary Injunction can issue and/or be issued when the act Complained of has already occurred and/or accrued.

23. The Plaintiff/Applicant herein has expressly and explicitly stated that the Defendant/Respondent entered upon and took possession of the suit property. For clarity, it is confirmed both in ground three (3) of the certificate of urgency, as well as the supporting affidavit that it is indeed the Defendant/Respondent who is in occupation of the suit premises.

24. On the other hand, the Plaintiff/Applicant has also sought for an order of Eviction, whose purport and tenor, is that upon the hearing and determination of the suit, the court should find it fit to issue an order of eviction.

25. Similarly, in the cause of the submission by the counsel for the Plaintiff/Applicant, same confirmed and/or acknowledged that it is the Defendant/Respondent who is in occupation of the suit premises and not otherwise.

26. Based on the foregoing, the question that then arises is whether an order of Temporary Injunction can be issued to address and/or take care of a situation where the act and/or activity complained of has already occurred.

27. Perhaps, before answering the question, it is important to take note of the legal import and consequence of an order of Temporary Injunction. In this regard, it is worthy to state that an order of Temporary Injunction is futuristic in nature and same looks ahead to avert, abate and or restrain an act and/or activity that is threatened, yet to occur and or which is in the process of occurring.

28. Contrarily, an order of temporary injunction cannot arise where the act and/or activity complained of has already taken place and/or otherwise happened.

29. In respect of the subject matter, it is clearly admitted that the Defendant/Respondent is the one in occupation of the suit property and hence an order of temporary injunction, will neither effectual nor effective.

30. On the other hand, it must also be recalled that an order of Temporary Injunction cannot result into Eviction and/or removal of the act that has already accrued and/or occurred. Consequently, an order for Temporary Injunction cannot remove the Defendant/Respondent from the suit property.

31. In the premises, whereas the Plaintiff/Applicant herein is seeking for an order for temporary injunction, yet same is confirming that the Defendant/Respondent is already in occupation of the suit premises, then the orders sought are being sought in vain and cannot address the intentment of the Plaintiff/Applicant.

32. In my humble view, the orders sought at the foot of the Application are not available to and in favor of the Plaintiff and to grant same, shall amount to acting in futility.

33. In support of the foregoing observation, I adopt and reiterate the decision in the case of **HEADMASTER KIEMBENI BAPTIST PRIMARY SCHOOL & another v PASTOR OF KIEMBENI BAPTIST CHURCH [2005] eKLR** where the court of observed as hereunder;

'I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders.

Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also Shah _v – Shah (1981) KLR 374.'

34. In respect of the subject matter, the grant of the orders sought would be tantamount to granting an order for mandatory injunction and/or better still an eviction, *albeit* at an interlocutory stage. Clearly, such a course of action is inimical to the rule of law.

ISSUE NUMBER 2:

Whether a Court can grant an order for Mandatory Injunction when same has not been Plead or prayed for in the Pleadings.

35. In the course of submissions by counsel for the Plaintiff/Applicant, same implored the court to remove the Defendant/Respondent from the suit premises and or essentially to grant orders of a like nature.

36. I must point out, that though the submissions were made to this effect, counsel for the Plaintiff/Applicant did not apply to amend the Application, so as to embody any prayer for a Mandatory injunction.

37. To the extent that the Plaintiff/Applicant has not pleaded a prayer and/or relief for Mandatory injunction, it is not open and/or available for the Plaintiff/Applicant to seek for same by way of submissions.

38. Suffice it to point out, that Parties are bound by their pleadings and in this case, the Plaintiff/Applicant is bound by the contents of the Application, which essentially seeks for Temporary Injunction.

39. Barring an amendment, which has not been sought for by the Plaintiff/Applicant, same cannot now be heard to implore the court to grant a relief that has not been pleaded. In this regard, the Doctrine of departure forbids the court from venturing outside the four (4) corners of the

Pleadings.

40. Be that as it may, it is appropriate to take cognizance of the decision in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, where the court observed as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves.

It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.

To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

41. Given that Parties are bound by their Pleadings and coupled with the fact that the Plaintiff/Applicant neither pleaded nor sought for orders of Mandatory Injunction, same cannot therefore be granted to and in favor of the Plaintiff/Applicant.

FINAL DISPOSITION:

42. Parties are obliged to plead their cases with necessary specificity and to appropriately chose the reliefs being sought from the court.

43. For coherence, it must also be noted that Parties are bound by their Pleadings and therefore a Party cannot expect to earn and/or accrue a Relief that has neither been pleaded nor prayed for in the Pleadings and/or operative Documents.

44. Consequently and in the premises, I find and hold that the Plaintiff’s/Applicant’s Application dated the 16th February 2022, is Devoid of Merits. Same be and is hereby Dismissed.

45. Costs of the Application shall abide the outcome of the suit.

46. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Miss Hannah Ndungu for the Plaintiff/Applicant

Mr. Onyango for the Defendant/Respondent