



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 35 OF 2019(OS)**

**JOSEPH NJUGUNA KABUGUA .....PLAINTIFF**

**VS**

**PETER NJUGUNA GIICO.....1<sup>ST</sup> DEFENDANT**

**JOHN THUO GIICO ..... 2<sup>ND</sup> DEFENDANT**

**RULING/DIRECTIONS**

1. The Plaintiff/Applicant lodged eviction proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant vide an originating summons dated 11<sup>th</sup> December 2013 and filed on even date seeking the following orders;

- a. A declaration that Peter Njuguna Gi'iko and John Thuo Gi'iko (the Defendant herein) are illegally occupying the land parcel L.R NO. loc.1/THUITA/1078, Thika.
- b. That the Defendants be evicted from the said parcel of land being L.R NO. LOC.1/THUITA/1078, THIKA.
- c. That the Defendants do pay Mesne profits equivalent to rent chargeable for continued occupation of the property from 2011 until the final determination of the summons.
- d. That the Defendants do bear the costs of this application.

2. To support the application, the Plaintiff swore a supporting affidavit in which he deposes that he is the registered and bonafide owner of the land parcel number LOC.1/THUITA/1078 measuring about 0.44 hectares and located within Thika and referred to as the suit land. That he purchased the suit land from one Pauline Wanjiru. That the Defendants are in occupation of the suit land and have failed to heed the eviction notices issued on them by the Plaintiff. That their continued occupation of the suit land is denying the Plaintiff his right of use of the suit land.

3. The Defendants in their replying affidavit dated 10/02/2014 aver that the application is misconceived and an abuse of Court process and the entire application is couched on falsehoods. That their stay on the suit land has been for a period in excess of twelve years with permission from one Agnes Njeri Kabatha. That the suit land is a subdivision of land parcel number LOC.1/THUITA/576 registered in the name of Pauline Wanjiru Ndichu the mother of Agnes Njeri Kabatha. That sometimes in the year 1992 when Agnes Njeri Kabatha learnt that her mother Pauline Wanjiru Ndichu was in the process of subdividing the original parcel of land, moved to Court vide Thika Civil case no. 1284 of 1995 and sought injunctive orders against the intended subdivision which orders were granted, but the mother defied the said Court order and went ahead to subdivide the land. That in the Thika case Pauline Wanjiru Ndichu was ordered to transfer the land to Agnes Njeri Kabatha which orders she unsuccessfully sought to quash vide judicial review application as Misc civil application no. 83 of 2010.

4. They contend that the title deed issued to the Applicant in the subsistence of Court orders barring the alienation of the original parcel of land was obtained fraudulently and is therefore void and cannot confer any proprietary rights to the Applicant. That the Applicant has never been in occupation of the suit land. In the premises the Defendants aver that the originating summons as filed is defective and ought to be dismissed with costs.

5. On the 29/1/2020 the parties through their learned counsels on record elected to canvass this matter by way of written submissions. On my perusal of the file it has become clear to me that this matter raises contentious and even complex issues that cannot be determined in a justiciable manner in form of affidavit evidence.

6. It is trite that a suit may be commenced by way of an Originating Summons to enable simple matters to be settled by the Court without the expense of bringing an action in the usual manner.

7. However, the scope of an inquiry which can be made on an Originating Summons and the ability to deal with a contested issue is very limited. When it becomes obvious that the issues raise complex and contentious questions of facts and law, a judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit. See the case of **Cyril J Haroo & another v Uchumi Services Limited & 3 others [2014] eKLR**

8. In my view the parties may find refuge can be sought in Order 37 rule 19 (1) of the Civil Procedure Rules which provides as:

“Where, on an Originating Summons under this order, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add, or to apply for particulars of those affidavits.

9. I am guided by the provisions of Art 159 (2) (d) of the Constitution which enjoin this Court to administer justice without undue regard to procedural technicalities. Equally section 1A and 1B empowers this Court to facilitate the just expeditious proportionate and affordable resolution of civil disputes. Without seeming to overwrite the right of the parties to plead their cases in the manner they so desire, I still find that giving the parties a chance to ventilate their case through a trial is where the justice of the case lies instead of dismissing the case without tending to its merits.

10. For the reasons given above, I hereby vacate the orders reserving the matter for judgment issued by this Court on the 29/1/2020.

11. I Order the parties to fix this matter for pretrial expeditiously and prepare the case for full trial at their earliest.

12. The costs shall be in the cause.

13. It is so ordered

**DELIVERED, DATED AND SIGNED VIA EMAIL THIS 7<sup>TH</sup> DAY OF MAY 2020.**

**J G KEMEI**

**JUDGE**

**ORDERS**

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this Ruling/Directions have been delivered to the parties by electronic mail/video conferencing. In this case the parties 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.

**J.G. KEMEI**

**JUDGE**