



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 71 OF 2020

(FORMERLY NAIROBI ELC NO 1571 OF 2016)

SAMUEL NJIRAINI NGABIA.....PLAINTIFF/ RESPONDENT

-VERSUS-

ANDREW KIGATHI WACHIURI.....1ST DEFENDANT/APPLICANT

DIRECTOR OF SURVEYS..... 2ND DEFENDANT/RESPONDENT

STANLEY PAUL MBUGUA GITHONGO.....INTERESTED PARTY

RULING

By a Notice of Motion Application dated 5th August 2020, brought under **Order 5 rule 17, order 40 Rule 1, 3,4, order 51 rule 1,3 and 4 of the Civil Procedure Rules, Sec,3A & 63 (c) and (e) of the Civil Procedure Act** the 1st Defendant/Applicant has sought for the following orders against the Plaintiff/Respondent: -

- 1. The Honorable Court be pleased to grant a temporary Injunction restraining the Plaintiff/Respondent whether by himself, his employee(s) Servant(s) and or agent(s) and or any person(s) purportedly acting on his behalf from harassing, threatening, selling, alienating, dealing, disposing, transferring, wasting and or interfering in any way howsoever and whatsoever with the 1st Defendant/ Applicant's occupation, possession and use of his portion (namely LR NO. 13537/233, measuring approximately 0.61 hectares) of the suit property herein namely LR NO 13537/99, situated South West of Thika Municipality, pending the hearing inter parties and final determination of this suit herein.***
- 2. The Honorable Court be pleased to direct the OCS to supervise the enforcement of the order(s) issued in connection herewith.***
- 3. The Honorable Court be also pleased to make and or grant such other order(s) as it may in the interests of justice deem expedient and or necessary.***
- 4. That the costs of this application be provided for.***

The Application is premised on the grounds that the Plaintiff/ Respondent has attempted to alienate, sell, dispose, waste , trespass and or interfere with the 1st Defendant's/ Applicant's occupation, possession and use of the suit property by unlawfully and illegally harassing , threatening and interfering with the 1st Defendant's/ Applicant's tenants residing thereon causing the 1st Defendant/ Applicant to suffer irreparable loss and damage.

In his Supporting Affidavit, **Andrew Kigathi Wachiuri averred that he is the owner of LR No. 13537/233**, measuring approximately **0.61 hectares**, being a portion of the suit property herein namely **LR NO 13537/99**, situated South West of Thika Municipality, having purchased the same from the Plaintiff/Respondent. That upon taking possession, he constructed several rooms and other structures. That he thereafter rented some of the rooms and received rental income from his tenants.

Further that the Plaintiff/ Respondent through his Advocates wrote a letter dated **10th July 2020**, addressed to his tenants demanding payment for rent arrears. That he has learnt that the Plaintiff/ Respondent is attempting to sell the suit property and has engaged brokers . It was his contention that the Plaintiff/ Respondent is attempting to illegally change the **status quo** existing between the parties. Further his Advocates had advised him, which advice he believes to be true that he has a prima facie case as against the Plaintiff/Respondent, with high chances of success since the Plaintiff/Respondent admission to having sold the property to him upon his payment of the full purchase price. That the balance of convenience favors the Honorable court to grant a temporary injunction against the Plaintiff/Respondent.

In support of the Application, the Interested Party **Stanley Paul Mbugua Githongo**, filed his Supporting Affidavit dated **22nd September 2020**, and averred that the Plaintiff/Respondent herein has trespassed on the 1st Defendant/Applicant portion of land known as **L.R. No. 13537/233**. That the Plaintiff/ Respondent sold **L.R 13537/232**, to him and **L.R 13537/233**, to the 1st Defendant/ Applicant which parcel are adjacent. That the Plaintiff/ Respondent has been interfering with the 1st Defendant/ Applicant's tenants and sending brokers to the suit property. That the Plaintiff/ Respondent is interfering with the suit property as he is afraid that their ownership to the land will be upheld.

Despite being served with the Application, the Plaintiff/Respondent did not respond to the application.

Parties were directed to file written submissions and in compliance with the said directive, the Interested Party filed his submissions on **22nd February 2021**, through the Law Firm of **G.W Wainaina & Co. Advocates** while the 1st Defendant/Applicant filed his on **26th November 2020**, through the Law Firm of **Kibanya & Kamau Associates Advocates**.

The Court has carefully considered the instant Application and the annexures thereto. The Court has further considered the other pleadings and the written submissions as filed by the parties herein and finds that the issue for determination is **whether the 1st Defendant/ Applicant is entitled to the orders sought**.

The 1st Defendant/Applicant has brought this application under **Order 40 Rule 1** which provides that:-

“Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

As the application is anchored under the above **Order 40** of the **Civil Procedure Rules**, it is incumbent upon the Applicant to prove that his property is in danger of being **wasted, damaged, alienated** or wrongfully sold by the Plaintiff/ Respondent. See the case of **Noormohammed Jan Mohammed...Vs...Kassam Ali Virji (1953) 20 LRK 8**, where the Court held that:-

“To justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition.”

Further In determining whether or not to grant the temporary injunctive orders sought, the Court will be guided by the principles set out in the case of **Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358**, and also in the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“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.*”

Has the 1st Defendant/ Applicant herein established that he has a prima facie case? The Court in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, defined a prima facie case to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The 1st Defendant/ Applicant has contended that he bought the suit property from the Plaintiff/ Respondent. His contentions have been supported by the Supporting Affidavit of the Interested Party. Further in his Plaint **dated 14th December 2016**, the Plaintiff/ Respondent averred that he disposed off one and half acre to the 1st Defendant/ Applicant and the full purchase price was paid.

In the suit herein, the dispute seem to be whether or not the Plaintiff consented to the subdivision. As to whether or not the subdivision was legal, these are matters that can only be determined at the main trial. Therefore, the Court finds and holds that the 1st Defendant/ Applicant has established that he has an interest over the suit. The allegations by the 1st Defendant/ Applicant and the Interested Party that the Plaintiff/ Respondent is trying to sell off the suit property have not been controverted. Further the Court has seen the letter dated **10th July 2020**, from **S.N Ndegwa & Company Advocates**, in which the Plaintiff/ Respondent purports to collect rent from the Applicant's tenants. It is the Court's considered view that this is in breach of the Applicant's right to the quiet use and possession of his property. This Court therefore finds and holds that the 1st Defendant/ Applicant has established prima facie case with probability of success.

On whether the 1st Defendant/ Applicant will suffer irreparable harm, that cannot be compensated by way of damages, this Court will echo the findings in the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, wherein the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction. There must be evidence of immediate danger to property or sale or other disposition.”

Equally in this case, the Court finds that if the Applicant’s rights have been infringed, no amount of money can compensate such infringement. Therefore, the Court finds that the Applicant has established that he is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages, bearing in mind it is a parcel of land in issue and the 1st Defendant/ Applicant has developed the same.

On the third limb, the Court is not in doubt. However, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining *status quo* and the *status quo* herein is directing the Plaintiff/Respondent to desist from carrying out any dealings upon the suit properties until the suit is heard and determined. See the case of *Agnes Adhiambo Ojwang...Vs... Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000*, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence, the Court finds that the 1st Defendants/Applicant’s *Notice of Motion* Application dated 5th August 2020, is merited and the same is allowed entirely in terms of prayers **No. 3 and 5** of the said Application, with costs to the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 6TH DAY OF MAY 2021.

L. GACHERU

JUDGE

6/5/2021

Court Assistant – Phyllis

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 **15th 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

No appearance for the Plaintiff/Respondent

Mr. Kibanya for the 1st Defendant/Applicant

No appearance for the 2nd Defendant/Respondent

Mr. Wambu holding brief for Mr. Wainaina for the Interested Party

L. GACHERU

JUDGE

6/5/2021