



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 55 OF 2020

KENNETH MBAABU MUCHIRI.....PLAINTIFF/APPLICANT

-VERSUS-

KENNEDY WACHIRA.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **30th July 2020**, brought by the Plaintiff/Applicant seeking for orders that;

1. This Honorable Court be pleased to issue a temporary injunction restraining the Defendant/Respondent by himself, servants, legal representatives' agents or whosoever from entering into, pulling down barbed wire fence, chasing away workers, blocking, or any other manner interfering with or wasting the Plaintiff's property being L.R Nos.5973/76 and 5973/77 situate at Runda Kiambu County pending hearing and determination of this suit.

2. The officer in charge of Thindigua Police Post, do ensure compliance with the orders above.

3. Costs be in the cause.

The Application is supported by the grounds on the face of the Application and the Supporting Affidavit of **Kenneth Mbaabu Muchiri**. He averred that he is the registered proprietor of **L.R Nos.5973/76 and 5973/77**, situate at **Runda, Kiambu County** and on **11th May 2020**, he entered into a contract with four men to construct a fence around his property.

He further averred that the Defendant/Respondent by himself and his agents illegally entered into his property and stopped his workers and threatened to pull down the perimeter fence round his properties. That he reported the matter to **Thindigua Police Post**, about the harassment vide **OB No.11/15/06/20**, and the officers from **Thindigua Police Post** visited the site and recorded statements from the workers.

The Application is opposed and the Defendant/Respondent filed Grounds of Opposition dated **28th September 2020**, on the primary ground that the Application is incompetent, misconceived and devoid of any merit in view of its contents together with the Supporting Affidavit. He also filed a Replying Affidavit dated **12th October 2020**, and averred that he is the current chairperson of **Muhasibu Runda Welfare Association(MRWA)**. It was his further averment that by virtue of the Plaintiff being a plot owner, he was aware that service charge is payable monthly and a notice was served upon him and as per the minutes of the AGM, members agreed on specific consequences' for defaulters including;

I. Denying defaulters access to common community estate services such as water connection, gate opening services etc.

II. Naming and shaming on the notice board.

III. Members taking matters into their hands and reversing the unlawful activity e.g. breaking built walls at the owner's costs.

It was his contention that the minutes and resolutions thereto were forwarded to the Plaintiff/Applicant and thus he was aware of the same. That since 2017, the Plaintiff/Applicant has defaulted on the by-laws of the estate and on **6th June 2020**, the treasurer of the Association did sent to the Plaintiff/Applicant his outstanding balances. It was his further contention that one **Bernard Ngiri**, the caretaker with instructions from the committee instructed Plaintiff/Applicant's workers to cease activities pending payment of outstanding amounts. He therefore urged this Court not to grant the orders prayed for.

Parties were directed to file written submissions. The Plaintiff/Applicant filed his submissions dated 22nd February 2021, through the **Law Firm of Ondabu & Co. Advocates**. While the Defendant/Respondent filed his submissions dated 5th July 2021, through the **Law Firm of Simba & Simba Advocates**.

This Court has now carefully considered the instant Notice of Motion, the annexures, thereto and the pleadings in general. The Court has further considered the Written Submissions and the relevant provisions of Law and the main issue for determination is **whether the Plaintiff/Applicant's Application is merited**.

The Applicant having sought for Injunctive Orders is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

In determining whether to grant or not to grant the 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**, which principles have later been upheld in other cases. See 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.”

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success. A *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, 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”.

It is the duty of the Applicant herein to establish that he has a *prima-facie* case. From the facts of this case, it is not in doubt that the Plaintiff/Applicant is the owner of **L.R Nos.5973/76 and 5973/77**, situate at **Runda- Kiambu**. It is also not in doubt that the Defendant/Respondent is a member and the current chairperson of **Muhasibu Runda Welfare Association(MRWA)**. The Defendant/Respondent maintains that the Applicant had not paid maintenance fee and continues to enjoy free services.

However, the Defendant/Respondent having attached Muhasibu Runda Welfare Association(MRWA) By-Laws, Minutes and resolutions, he has not attached a list of members to conclude that the Plaintiff /Applicant is a Member of the Association. Further, the Association by-laws have not explained if any individual holds a parcel of land within the precincts of MRWA, he/she automatically becomes a member of the said Association.

The Plaintiff/Applicant being the registered owner of **L.R Nos.5973/76 and 5973/77**, then by dint of section 26(1) of the **Land Registration Act**, is deemed to be the **absolute and indefeasible** owner, subject to the **encumbrances, easements, restrictions and conditions** contained or endorsed in the certificate thus he has a prima facie case with a probability of success.

Further as an absolute and **indefeasible** owner of the suit property Sections 24 and 25 of the **Land Registration Act confers** rights to such an owner, which rights can only be defeated through operation of the Law. Section 24(a) of the Land Registration Act provides that

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all right and privileges belonging or appurtenant thereto”

Touching on the second issue of irreparable damages, the Plaintiff/Applicant as a bonafide owner of **L.R Nos.5973/76 and 5973/77**, in case of any demolition or any illegal activity or abuse of the rights of his workers, it is the Court's considered view that the Plaintiff/Applicant may suffer irreparable damages which might not be awarded by way of compensation.

On the third limb, the balance of convenience also tilts in favor of allowing the Notice of Motion in the manner in which the said prayers have been presented.

The Court cannot hold at this stage that indeed the Defendant/Respondent has authority to sue on behalf of the Association or whether the Plaintiff/Applicant has breached the special conditions provided in the By-Laws without hearing witnesses and bringing forth evidence.

Be that as it may, the Court finds that the Plaintiff/Applicant has established the threshold for grant of injunctive orders as sought by himself.

Having now considered the instant **Notice of Motion Application** dated 30th July 2020, and the annexures thereto, the ground of opposition and the written submissions, the Court finds the said application is merited and the same is allowed entirely in terms of **prayers No. 3, 4 and 5**.

It is so ordered.

Dated, signed and Delivered at Thika this 24th day of September, 2021.

L. GACHERU

JUDGE

Court Assistant –

ORDER