



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE NO. 339 OF 2014

THOMAS MWANGI KANYONGE.....PLAINTIFF

VERSUS

JONAH MAINA GAKIBO.....DEFENDANT

RULING

1. The Plaintiff filed the Notice of Motion dated 13th May 2021 under Order 40 rule 1, 2, 3 and 4, Order 50 rule 1 of the Civil Procedure Rules 2010, Article 159(2) (d) of the Constitution of Kenya 2010, section 1A, 1B and 3A of the Civil Procedure Act in which he seeks the following orders:

1) **Spent.**

2) **Spent.**

3) **Spent.**

4) **THAT the Honourable Court be pleased to issue a permanent order of injunction restraining the defendant by themselves, their servants, agents, assigns or any other person claiming title from developing, alienating, selling, transferring or disposed of or in any other manner whatsoever dealing with the entire land parcel known as NAKURU OLONGAI PHASE II/486 pending hearing and determination of the main suit.**

5) **THAT the O.C. S Menengai Police Station do enforce those orders and ensure peace and order prevails.**

6) **THAT costs of this application be provided for.**

2. The application is supported by the sworn affidavit of one Rosemary Wangari Mwangi, the applicant's biological daughter. The grounds for the application are as follows: that the respondent has instructed surveyors to subdivide the suit land with the intention of selling the same to third parties yet the instant suit is still pending; that the respondent may alienate the suit land and occasion the applicant irreparable loss and damage and that the proceedings herein would be rendered nugatory by the defendant's intended action if carried out to conclusion.

The response.

3. In his replying affidavit dated 14/6/2021 the respondent's reply to the instant application is that he has not instructed any surveyors as claimed; that the suit land was allocated to him by the District Settlement Office in 1979 and he paid for the same and took up possession and developed it; that he has been living on the suit land with his family ever since; that in 1987 he received a letter from the District Commissioner asking him to vacate parcel No 486 and take up possession of plot no 487; that one Francis M'elaku was trying to "grab" plot 486; that the defendant failed to secure a hearing before the Settlement Officer and the Area Settlement Controller as they wanted inducements which he failed to give; that the plaintiff invaded the suit land in 1990 claiming to have purchased it from Francis M'elaku; that in 2008 the plaintiff served him summons claiming that he had trespassed on plot no 468 which the plaintiff claimed to be his; that after due diligence he has discovered that plot no 487 does not exist; that he has been living on the suit land for 42 years now; that the plaintiff used goons to attack the defendant at night between 2004-2008; that in any event he has no intention of disposing of the suit land owing to its economic and sentimental value; that being the rightful allottee of the suit land the injunction sought cannot issue against him; that granting the prayers sought would amount to granting final orders at an interlocutory stage in these proceedings; that the applicant has not demonstrated a *prima facie* case and the balance of convenience in the instant application tilts in the defendant's favour.

Submissions.

4. I have perused the file record and found only the submissions of the respondent. It appears that the applicant never filed submissions as

ordered.

5. The respondent raised a formidable multi-pronged defence to the application. The application is opposed on the ground that first, it attempts to introduce a new cause of action that was not in the plaint; secondly, that an interlocutory application must have correlation to the main pleading; thirdly, it is urged that the prayer for a permanent injunction is final in nature and can not be issued at the interlocutory stage. The following cases are cited in support of those propositions: **Paul Mujera & 6 Others Vs African Israel Church Nineve & 3 Others 2011 eKLR**; **Witmore Investments Limited Vs County Government Of Kirinyaga & 3 Others 2016 eKLR**; **Sunrise Properties Ltd Vs Fifty Investments Ltd & Another 2007 eKLR**, **Pinnacle Projects Limited & 3 Others Vs Beatper Enterprises Ltd & 4 Others 2016 eKLR** and **Sammy Kemoo Alekai Vs Eliakim W. Olweny & Another 2021 eKLR**. It is also urged, citing the well-known **Giella vs Cassman Brown 1973 EA 358**, **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others 2003 eKLR** decisions as well as **Amir Suleiman Vs Amboseli Resort Ltd 2004 eKLR** and **Pius Kipchirchir Kogo vs Frank Kimeli Tenai 2018 eKLR** that the applicant is not in any event entitled to an injunction as against the defendants as it has not been established that the plaintiff has a *prima facie* case or that he would suffer irreparable harm. Lastly the defendant urged that the plaintiff is guilty of material non-disclosure and that he presented falsehoods to the court. However on the last issue this court finds that it would be best dealt with in a hearing of the main suit. The defendant also prayed for costs.

Determination.

6. The principal issue for determination is whether the order sought by the plaintiff in his application can issue. The application seeks an order of **permanent injunction**. I am not inclined to presume that this was a mistake on the part of the counsel drafting the application in this very contentious matter. In any event the respondent has on his part made the prayer for a permanent injunction a vital ground of his attack against the instant application. I agree with the holdings in the case law cited by the respondent. I find that the mere wording of **prayer no 4** of the instant application disentitles the applicant from the order sought. A *permanent injunction* can not issue at an interlocutory stage. A permanent injunction, as stated in the cited case law, can only issue at the conclusion of litigation.

7. Consequently, I hereby dismiss with costs the application dated **13/5/2021** on the grounds that it seeks a permanent injunction which order if granted may avail the applicant final orders at an interim stage and also that the applicant has not satisfied this court that he deserves an order of injunction.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF OCTOBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU