



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

MILIMANI LAW COURT AT NAIROBI

ELC NO. E209 OF 2021

JOHN KURIA MAHIA.....PLAINTIFF

-VERSUS-

PAUL ODHIAMBO OMOLLO.....DEFENDANT

RULING

INTRODUCTION

1. On the 8th of June 2021, the Plaintiff herein filed and/or lodged a Plaint before the Honorable Court, whereby the Plaintiff sought the following reliefs;

- i. An Order that the Defendant do remove or demolish or pull down the permanent stone perimeter wall that is trespassing or encroaching on the Plaintiff's parcel of land known as the plot No. NAIROBI/BLOCK 102/P67 within fourteen days of the making of the order herein and failure to do so the Plaintiff be at liberty to do same at the Defendant's costs.*
- ii. An order of permanent injunction to restrain the Defendant whether by himself, his agents, servants, employees or any person acting under the Defendant's mandate or authority or direction from trespassing or encroaching or entering or constructing or erecting or developing or in any way howsoever from interfering with the Plaintiff's ownership, use and possession of all that parcel of land known as Plot No. NAIROBI/BLOCK 102/P67.*
- iii. The OCS Kayole Police Station do ensure compliance with the orders of the court.*
- iv. Costs of this suit.*

2. Contemporaneous with the filing of the Plaint, the Plaintiff also took out a Notice of Motion Application where same sought for the following Reliefs;

- i.(Spent)*
- ii. Pending the hearing and determination of this Application, this Honorable Court be pleased to issue an Eviction against the Defendant/ Respondent, his agents, servants, workers and/or anybody claiming under them from all those parcels of land known as plot No. NAIROBI/BLOCK 102/P67, situate within Nairobi County in the Republic of Kenya.*
- iii. Pending the hearing and determination of this suit, this Honorable Court be pleased to issue an Eviction against the Defendant Respondent, his agents, servants, workers and/or anybody claiming under them from all those Parcels of land known as plot No. NAIROBI/BLOCK 102/P67, situate within Nairobi County in the Republic of Kenya.*
- iv. Pending the hearing and determination of this Application, an Order do issue that the Defendant do remove or demolish or pull down the permanent stone perimeter wall that is trespassing or encroaching on the Plaintiff's parcel of land known as the plot No. NAIROBI/BLOCK 102/P67 within fourteen days of the making of the order herein and failure to do so the Plaintiff be at liberty to do same at the Defendant's costs.*
- v. Pending the hearing and determination of this suit, an Order do issue that the Defendant do remove or demolish or pull down the permanent stone perimeter wall that is trespassing or encroaching on the Plaintiff's parcel of land known as the plot No. NAIROBI/BLOCK 102/P67 within fourteen days of the making of the order herein and failure to do so the Plaintiff be at liberty to*

do same at the Defendant's costs.

vi. An order of Permanent injunction to restrain the Defendant whether by himself, his agents, servants, employees or any person acting under the Defendant's mandate or authority or direction from trespassing or encroaching or entering or constructing or erecting or developing or in any way howsoever from interfering with the Plaintiff's ownership, use and possession of all that parcel land known as plot No. NAIROBI/BLOCK 102/P67.

vii. The OCS Kayole Police Station do ensure compliance with the orders of the Court.

viii. The Honorable Court do grant ay such further order as it deems fit.

ix. Cost of the Application be awarded to the Plaintiff Applicant.

3. The subject Application is premised on the various grounds enumerated at the foot thereof and same is further supported by the Affidavit of the Plaintiff Applicant sworn on an undisclosed date, in the year 2021 and to which the Plaintiff/ Applicant has attached various annextures.

4. The subject Application was placed before the Honorable Court on the 16th of June 2021, when directions were granted that the Application shall be heard on the 20th of July 2021 and the Plaintiff was ordered to serve the Defendant Respondent.

5. Though the subject matter was scheduled to come up on the 20th July 2021, the said date was declared as a public holiday and consequently no [proceedings were taken in respect of the subject matter. However, the subject matter came up on the following day, on which date the Honorable Court directed that the Application be heard on the **13th of October 2021.**

6. Following the directions of the Court, the Plaintiff proceeded to and indeed served the Defendant /Respondent with a Hearing notice, in respect of the scheduled hearing date. For clarity, the Affidavit of service pertaining to service on the Defendant/ Respondent was duly filed and same is on record.

7. Suffices it to say, that despite being served with the subject Application and the hearing date, the Defendant/ Respondent did not file any response to the subject Application. Consequently, the Application proceeded for hearing unopposed.

SUBMISSIONS

8. When the Application came up for hearing on the **13th of October 2021**, the Plaintiff Applicant was represented by Ms. Isolina Kinyua, Advocate, who relied on the supporting affidavit together with the annextures thereto and submitted that the subject Application was wholly uncontroverted.

9. On the other hand, Counsel further submitted that the Plaintiff/ Applicant is the lawful proprietor and/or owner of the suit property. In this regard, the Counsel thus implored the Court to proceed and grant the orders sought at the foot of the Application.

ISSUES FOR DETERMINATION

10. Having reviewed the Application, the supporting affidavit as well as the oral submissions by Counsel for the Plaintiff / Applicant and having also considered the relevant and applicable law, essentially the provisions of **Order 40 of the Civil Procedure Rules**, the following issues stand out for determination;

i. What is the import and tenor of the orders sought in the Notice of Motion Application

ii. Whether the Honorable Court has jurisdiction to grant the orders sought

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

What is the import and tenor of the orders sought in the Notice of Motion Application

11. From a cursory glance, the prayers and/or reliefs being sought by the Plaintiff/ Applicant are a replica of the reliefs sought in the main suit. For clarity, the reliefs sought by the Application includes orders of Eviction, Demolition of structures and Permanent injunction, which have all been sought on the basis of the interlocutory Application herein.

12. There is no gainsaying that the orders which are sought by the subject Application are orders which are substantive and in any event final in nature. In this regard, I am afraid that the grant and/or issuance of the said orders, shall no doubt conclude and/or terminate the suit, albeit before the plenary hearing.

13. In my humble view, the reliefs being sought by the Plaintiff/ Applicant cannot issue, either in the manner sought or at all.

ISSUE NUMBER 2

Whether the Honorable Court has jurisdiction to grant the orders sought

14. In determining whether or not the Court is possessed of the requisite jurisdiction, it is first and foremost important to appreciate the source of a Court's jurisdiction. In this regard, I can do no better than to rehash the holding of the Honorable Court of Appeal in the decision in the case of **Esther Gachambi Mwangi vs Samuel Mwangi Ngiri [2013] eKLR** where the Court held as follows;

*“As was stated in the **Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd 1989 KLR 1**, jurisdiction is everything. Without it, a court has no power to take one more step. In the **Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011**; the Supreme Court noted that **The Lillian ‘S’ case [1989] KLR 1**] establishes that “**jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity...**”*

15. In respect of the instant matter, I must first point out that this Honorable Court is seized of jurisdiction to entertain and adjudicate upon the subject suit as filed vide the Plaint, wherein the Plaintiff/Applicant seeks substantive orders and/or reliefs. For the avoidance of doubt, the jurisdiction in this regard is underscored by **Section 13 of the Environment and Land Court Act** as read together with **Article 162(2)(b) of the Constitution 2010**.

16. Nevertheless, the aspect of jurisdiction as pertains to the subject matter, namely the Application, relates to whether such orders can be issued by the court at this juncture or better still, whether the Honorable Court has the jurisdiction to do so.

17. In my humble view, the Honorable Court has jurisdiction to grant either temporary orders of injunction pursuant to **Order 40 of the Civil Procedure Rules** or Mandatory injunction pursuant to the provisions of **Section 3A of the Civil Procedure Act** vide an interlocutory Application,(subject to satisfaction of the prerequisite conditions.), which are well known and in the case of Temporary Injunction, same are espoused vide the Decision in the case of **Giella versus Cassman Brown Limited [1973] EA**. However, the Honorable Court is not vested with jurisdiction to grant either an Eviction order, Demolition order or Permanent injunction, at an Interlocutory stage.

18. For the avoidance of doubt, it bears repeating that the reliefs of the nature sought by the Plaintiff/Applicant herein are so substantive in nature that same can only issue upon a plenary hearing and at the conclusion of a particular case. Such orders can only ensue pursuant to and/or at the foot of a judgment and/or decree of the Court or better still where the Honorable Court proceeds to grant summary judgment, like in a case where the Court invokes the provisions of **Order 36 of the Civil Procedure Rules**.

19. Short of that, the grant of the reliefs sought by the Plaintiff/Applicant, shall amount to terminating and/or concluding the entire suit at an interlocutory stage. In this regard, the Court shall have occasioned a travesty of justice.

20. What am saying is that the request for Orders like the ones before hand, must be eschewed and/or avoided at all costs. In any event, a similar scenario was canvassed and addressed by the Honorable Court in the case of **The Headmaster Kiembeni Primary School vs Baptist Church [2005] eKLR** where it stated as hereunder;

*“In my view these are issues that can only be resolved after a full hearing of the case. The Respondents application sought a permanent injunction and that is what the learned Senior Resident Magistrate granted. That in effect conclusively decided the suit. That is wrong. When dealing with applications for injunction courts should not decide issues of fact – **Mbuthia – Vs – Jimba Credit Finance Corporation & Another (1988) KLR 1**. Issues of fact should be decided after hearing evidence.”*

21. Before I depart from the issue of granting final orders, like the ones sought before the Court herein, I must also add that on my own, I had occasioned to deal with a similar situation in the case of **Andrew Karanja Ndaba & Another vs Pasadena Systems Limited [Unreported]** and I wish to uphold and reiterate the same position herein.

22. In a nutshell, I am afraid the orders being sought herein cannot issue and to do so would occasion a grave injustice and a serious breach of the Rule of Law.

FINAL DISPOSITION

23. I have said enough to show that in my humble view, the Notice of Motion Application, is not meritorious and in any event, same is fraught with underlying attempts to Defraud the Cause of Justice.

24. Consequently, and in view of the foregoing, the said Application dated 8th of June 2021 be and is hereby Dismissed, albeit with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the presence of;

June Nafula Court Assistant.

Ms Isolina Kinyua Counsel for Plaintiff/ Applicant.