



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO. 51A OF 2020

SAMUEL KIGATHI GACHARA.....PLAINTIFF/APPLICANT

VERSUS

RACHAEL NUNGARI KIGATHI.....1ST DEFENDANT/RESPONDENT

ROBINSON ERNEST KANGETHE NJOROGE...2ND DEFENDANT/RESPONDENT

EQUITY BANK KENYA LIMITED.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR KIAMBU DISTRICT.....4TH DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

There are two matters for determination. The 1st one is the Notice of Motion Application dated 21st July 2020 and the 2nd is the Notice of Preliminary Objection dated 9th September 2020 by the 1st Defendant/ Respondent.

In the Notice of Motion Application, the Plaintiff / Applicant sought for orders that;

- 1. A permanent injunction be issued restraining the 1st Defendant from the conduct of verbally abusing and threatening Physical abuse or Physically abusing against the plaintiff/ Applicant**
- 2. A temporary injunction be issued against the 1st, 2nd and 3rd Defendants, their agent or servants from interfering with the property known as L.R No. Nachu/Ndacha/1042 pending the hearing and determination of the suit herein.**

The Application is premised on the facts that the Plaintiff/ Applicant and the 1st Defendant/ Respondent are a married couple and have been living together for a period of over 50 years. That the Plaintiff/ Applicant has developed the whole of the suit property and at the time of acquiring the suit property, he was married to the 1st Defendant/ Respondent and agreed that the same be registered in the name of the 1st Defendant/ Respondent. That without the knowledge and or consent of the Plaintiff/ Applicant, the 1st Defendant/ Respondent sold the suit property to the 2nd Defendant/ Respondent through a fraudulent process and there is a **Charge** registered against it in favour of the 3rd Defendant/ Respondent and the same was used either as a security for loan borrowed by the 2nd Defendant/ Respondent.

That the Plaintiff/ Applicant had lodged a restriction against the suit property which was fraudulently removed by the 4th Defendant/ Respondent without his knowledge. Further that the Plaintiff/ Applicant who has an overriding interest over the suit property never gave his consent for the sale of the suit property. That the 1st Defendant's/ Respondents actions has created a rift in their marriage, whereby she has been disrespectful towards the Plaintiff/ Applicant and as he is of old age and undergoing cancer treatment, he is vulnerable to the actions of the 1st Defendant/Respondent. That the Plaintiff/ Applicant is apprehensive that the Defendants/ Respondents will continue to propagate the fraudulent dealings in view of the said property.

In his Supporting Affidavit **Samuel Kigathi Gachara** averred that he acquired the suit property from the then Kiambu County Council while he worked in the then **Nairobi City Council**. That the suit property was registered in the name of the 1st Defendant/ Respondent, to hold it **in trust** for him and their children. That he acquired the suit property together with adjacent properties. That he paid the requisite fees during the ballot process and registration fees as requested for by the 1st Defendant/Respondent and helped in obtaining all the

necessary documents.

That the suit property has an estimated market value of **Kshs.40,000,000/=** However, the same was fraudulently sold for **Kshs.13,000,000/=** by his wife . That the 3rd Defendant/ Respondent has threatened to forcefully evict him from the suit property claiming ownership of the suit property. That he relies on the suit property for his upkeep and livelihood and he has no place to take his livestock and crops are at risk of being destroyed .

The Application is opposed and the 1st Defendant / Respondent **Racheal Nungari Kigathi** filed a Replying Affidavit sworn on **9th September 2020**, and averred that she had been landless for a longtime and sometimes before the year **1990**, she began pursuing a process for the allocation of land from the then Kiambu County Council. That in the year **1990**, she was allocated the suit property vide an allocation letter dated **23rd May 1990**. That the process of pursuing the allocation of the suit property began prior to getting married to the Plaintiff/ Applicant, as they were only married in **August 1990** . Further that she was required to pay a sum of **Kshs.2,000/=** being survey fees which she single handedly paid and was issued with a receipt and subsequently she was issued with a **title deed** over the suit property in which she was the absolute proprietor .

That the Plaintiff/ Applicant has not proven that there was a restriction placed on the suit property and the details of the Plaintiff/Applicant's illness are only meant to whip emotions and not assist the Court determine the matter on its merit. That vide a valuation report dated **25th May 2018**, the value of the suit property was determined to be **Kshs.13, 800,000/=** and that the Plaintiff/ Applicant has not provided the Court with any valuation report . That the Court lacks **Pecuniary Jurisdiction** to deal with the matter. That having factored the value of the suit property , she freely sold the suit property to the 2nd Defendant/Respondent at **Kshs.13,000,000/=**.

Further that a search on the suit property sometimes in **2018** clearly indicated that there was no restriction placed thereon and there was no Applications pending . That the Plaintiff/ Applicant was aware of the sale as he signed a spousal consent Affidavit . That the Plaintiff/ Applicant sold two plots in March without involving her and in any event they reside in another parcel of land in **Kamangu Kinajangi Village**

Nachu Ward, and it is untrue that he relies on the suit property for his upkeep and livelihood. That she has single handedly developed the suit property with the assistance of their children and the Plaintiff/ Applicant's Application is an abuse of the Court process.

The Plaintiff/ Applicant filed a Supplementary Affidavit sworn by **Samuel Kigathi Gachara** on **28th May 2021**, and averred that the Court is vested with the requisite jurisdiction as the estimated value as per the report dated **28th September 2020** was **Kshs.17,800,000/=** and the same is evident that the 1st Defendant/ Respondent sold their property at an undervalued price . That the pecuniary Jurisdiction of the Kikuyu Law Courts is **Kshs. 15,000,000/=** and therefore the suit cannot be instituted there.

The Plaintiff/ Applicant filed a further Affidavit sworn on **9th December 2020**, and averred that they were married in **1972**, contrary to the 1st Defendant's/ Respondents allegations and they have **6** issues with the first born having born in the year **1973**. That he made financial contribution towards the construction of a five bedroom house in the year **1994** on the suit property, which was never occupied due to the 1st Defendant/ Applicant's reluctance to live within the area's. That he had placed a restriction on the suit property and the green card was tampered with and the original green card is in the CID's custody. That the Court is vested with the unlimited jurisdiction to hear and determine matters concerning land and therefore has proper jurisdiction to deal with the matter . That he was never made aware of the sale and he is aware that an unknown person of identification **No. 242891359** represented himself as the 1st Defendant's/ Respondent's husband and may have helped in perpetrating the fraud . That the 2nd Defendant/ Respondent was aware of the 1st Respondent's **marital status** and that he was using the suit property and he has retained possession to date. That the original **Green card** has been replaced with a new green card and the restriction entry he had placed is missing.

The Notice of Preliminary Objection dated **9th September 2020** on the grounds that ;

- 1. That the Plaintiffs Claim against the Defendants is bad in law, fatally defective and incurable by an amendment**
- 2. That the Honourable Court lacks the proper jurisdiction to hear and determine the matter.**

Both the Notice of Motion Application and the Preliminary Objection were canvassed together by way of Written Submissions which the Court has carefully read and considered, alongside the pleadings, the Affidavits and the annexures thereto and finds that the issues for determination are ;

- 1. Whether the Notice of Preliminary Objection dated 9th September 2020 is merited**
- 2. Whether the Notice of Motion Application dated 21st July 2020 is merited**

1. Whether the Notice of Preliminary Objection dated 9th September 2020 is merited

The 1st Defendant/ Objector filed a Preliminary Objection on the grounds that the suit is bad in law and defective and cannot be cured by an amendment as the Court lacks jurisdiction being that the suit property is valued at **Kshs.13,000,000/=**.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir *Charles Nebbold, JA* stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

The 1st Defendant/ Objector has called into question the jurisdiction of this Court to hear and determine the matter. It is trite that jurisdiction is everything and without it a Court has no option but to down its tools. An issue of jurisdiction goes to the root of the matter and if this Court is to find that it has no jurisdiction, it would automatically down its tools and thus the said issue is a Preliminary Objection properly raised.

On whether the same is merited, Under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011**, this Court has jurisdiction to determine all disputes relating to the environment and the use and occupation of, and title to land. **Section 13(1)** and **(2)** of the **Environment and Land Act** provides as follows:

“13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

There is no doubt from the foregoing that this Court has jurisdiction to determine the dispute before it which revolves around title to land. The **Constitution** and the **Land Act 2012** do not place any pecuniary jurisdiction to the **Environment & Land Court Act** to hear and determine matters involving land use and occupation. While the **Land Act** provides that Magistrates Court are empowered to only determine matters that are within their pecuniary jurisdiction, it is clear that the Environment & Land Court has original jurisdiction to deal with all disputes relating to land use and occupation and has no barrier to pecuniary jurisdiction, Therefore, it follows that this Court has the requisite jurisdiction to hear and determine.

However, on the issue as to whether this Court ought to exercise its original jurisdiction to hear and determine a matter that may be dealt with at the Magistrates Court, the same is another issue all together. It is quite clear that the parties dispute the value of the suit property and it is the Plaintiff's/Applicant's contention that the Court in Kikuyu does not have the requisite pecuniary jurisdiction as the suit property is valued at more than **Kshs. 15,000,000/=**. A preliminary Objection does not deal with issues of ascertainment of facts or affidavit evidence, until a proper valuation report had been presented before this

Court. This Court which can exercise the original jurisdiction ought to deal with the matter so that the Court does not transfer the matter to Kikuyu Law Court and run the risk of transferring a matter to a Court that lacks jurisdiction.

Consequently, the Court finds and holds that it is vested with the requisite jurisdiction to hear and determine the instant suit. Consequently the Notice of Preliminary Objection is not merited.

2. Whether the Notice of Motion Application dated 21st July 2020 is merited.

The Plaintiff/ Applicant is seeking injunctive orders in his Application. The Principles that guide the Court in deciding whether or not to grant injunctive orders are set out in the case of *Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358*. These are:-

a) The Applicant must establish that he has a prima facie case with probability of success.

b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c) When the Court is in doubt, to decide the case on a balance of convenience.

A prima-facie case was described in the Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125, to mean;-

“In civil cases, it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for a explanation or rebuttal from the latter”

The Plaintiff/ Applicant and the 1st Defendant/ Respondent are a married couple, while the 1st Defendant/ Respondent alleges that they got married in the year 1990, when she had already began the process of acquiring the suit property, the Plaintiff / Applicant has contended that they got married on the year 1972, and has further produced their children birth Certificate to support his contention. This in the Court's considered view is important as the sale of the suit property was done in the year 2019, which meant that the sale is subject to the Matrimonial Property Act, the **Land Registration Act Section 93(2) (3) and (4)**, which provides that the spouse of a registered owner has interest over property that is held by another spouse and under Section (4) it provides that if the spouse undertaking the disposition deliberately misleads the lender, the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.

At this stage the Court is not called upon to determine disputed facts, as this is only at the interim stage and evidences based on Affidavit cannot form the basis of the Court determining issues that are in dispute including on whether or not the Plaintiff/ Applicant signed the spousal consent as the same has been denied. 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”.

To determine whether a Prima facie case has been established, the Court is required to be satisfied that there exist a right that may have been infringed. In this instant case, the Plaintiff/ Applicant being the spouse of the 1st Defendant/ Respondent prima facie had a right over the suit property and also a right to consent to the sale of the said property. Without conclusively making a determination, the Court is satisfied that there exist a right that has apparently been infringed and the same requires an explanation. The Court finds and holds that the Plaintiff/ Applicant has established a prima facie case, with probability of success at the trial.

On whether the Plaintiff/ Applicant will suffer irreparable loss that cannot be compensated by way of damages, the Plaintiff's/ Applicant's contention is that he is in possession of the suit property has not been rebutted. The Plaintiff has further averred that he rears livestock and farms on the suit property. It is not in doubt that land is unique and no one parcel can be equated in value to another, and it would not be right to say that the Applicant can be compensated by way of damages. See the case of JM Gichanga versus Cooperative Bank of Kenya Limited (2005) eKLR, where the court held that:-

“A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it.

Further in the case of Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR, 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.”

It is this Courts finding that since the Plaintiff/Applicant is in possession of the suit property, if the Court would not grant the injunctive Orders sought and for any other purposes the land is sold and or disposed, the Plaintiff/ Applicant would suffer irreparable harm

The third principle is that if the Court is in doubt the Court should decide on a balance of convenience. The Court is not in doubt, however, the balance of convenience always tilts in favour of maintaining the status quo which is the act that existed before the alleged wrongful act. The Court finds that by granting the Interlocutory injunction restraining the Defendants/Respondents from interfering with the suit property, it would be maintaining the status quo as it is and since the 3rd Respondent is possession of the title documents while the Plaintiff/ Applicant is in possession of the suit property, then it should remain so. The Court therefore finds and holds that the same is merited.

The Plaintiff/ Applicant has also sought for a permanent injunction restraining the 1st Defendant from the conduct of verbally abusing and threatening Physical abuse or Physically abusing him. As noted above, this Court has jurisdiction to hear and determine disputes relating to land use and occupation and therefore granting the said orders though are permanent orders that may be granted are outside the scope of this Court's jurisdiction. The Court finds and holds that the Notice of Motion Application is merited only in terms of the interlocutory orders sought.

Further the Court notes that the Plaintiff/ Applicant did not seek for cost of the application. Parties are bound by their pleadings and in this instant the Plaintiff/ Applicants is not entitled to the costs of the Application.

The Upshot of the foregoing therefore is that the Court finds and holds that the **Notice of Preliminary Objection** dated 9th September 2020,

is not merited and the same is dismissed with entirely costs to the Plaintiff/ Applicant. However, Notice of Motion Application dated 21st July 2020, is found merited and the same is allowed in the following terms;

1. A temporary injunction be and is hereby issued against the 1st, 2nd and 3rd Defendants/Respondents, their agents or servants preventing them from interfering with the property known as L.R No. Nachu/Ndacha/1042 pending the hearing and determination of the suit herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy