



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 110 OF 2021

DENIS WANJOHL.....APPLICANT

VERSUS

PETER MBURU NJIHIA.....RESPONDENT

RULING

1. The Plaintiff/Applicant filed the application dated 12/10/2021 seeking Orders THAT;

a. Spent.

b. This Honorable Court be pleased to issue interim orders preventing the Respondent, whether by himself, his representatives, employees, servants, agents, or any other person acting on his behalf or claiming through him from accessing, interfering with, threatening the Applicant's rights to use of the suit property pending hearing and determination of this Application.

c. This Honorable Court be pleased to issue interim orders preventing the Respondent, whether by himself, his representatives, employees, servants, agents, or any other person acting on his behalf or claiming through him from accessing, interfering with, threatening the Applicant's rights to use of the suit property pending hearing and determination of this suit.

d. The Commanding Officer, Murera Junction Police Post Ruiru to enforce any order issued herein.

e. Costs of this application be provided for.

2. The application is opposed. The Respondent, **Peter Mburu Njihia** swore a Replying Affidavit dated 27/10/2021. He deponed that being the spouse of the legal beneficial owner of the suit property, the application is misconceived against him. That his wife bought the suit land from Jufra Investments now T/A Jusma Ltd in the year 2014 and a certificate of ownership annexure "PMN-1" was issued to her. That due diligence was carried out in purchasing plot no. 25 situated in RUIRU/RUIRU EST BLOCK 2/1469 for Kshs. 500,000/=. That Kshs. 490,000/- was paid via bank and 10,000/- in cash and acknowledgement receipts annexed thereto. He maintained that he was a witness to the said transactions and the house construction on site begun in 2015 before it stopped. Thereafter the house was completed in October 2021 and they took possession in the same month.

3. The Respondent accused the Applicant for fraudulently acquiring title of the suit land in cohort with Justus Mue T/A Jusmah Limited. He urged the Court to dismiss the application.

4. Contemporaneously, to filing the Replying Affidavit, the Defendant/Respondent filed a Preliminary Objection of even date on grounds that;

a. The Applicant has sued the wrong party in this cause as the remedies he is seeking cannot lie against the Respondent.

b. The Applicant's claim against the Defendant is to that extent incompetent, bad in law, fatally defective and otherwise an abuse of the Court.

c. Granting the orders sought herein would totally prejudice the Respondent who has been irregularly brought to this Court on the basis of innuendos and rumors and cannot obey by the Court orders since he is not the owner of the suit property.

d. The Applicant's application should be dismissed forthwith and costs awarded to the Respondent in the instant suit.

e. This Court lacks jurisdiction to entertain this suit herein as it is vexatious and an abuse of the Court process.

5. On the 28/10/2021, directions were taken to canvass the application and Preliminary Objection concurrently by way of submissions. Only the Applicant filed his submissions dated 19/11/2021 through the firm of **Wafula Washika & Associates**.

6. He submitted that a Preliminary Objection must confine itself to pure points of law as opposed to contested facts. That save for ground 5 on Court's jurisdiction, the rest of the grounds revolve on facts and or misfacts. On suing him wrongly, the Applicant maintained that the Respondent was sued because he is in occupation of the suit property and his insistence that he was the bona fide purchaser of the property. That at no time did he indicate that his spouse is the registered owner and if that is the case, the Respondent is free to enjoin her. That Section 19 of Civil Procedure Act and Order 3 rule 1 Civil Procedure Rules moving a Court in a less desirable manner does not warrant dismissal of a suit. That the Court may direct the offending party to regularize its approach.

7. On the issue of jurisdiction, the Applicant was categorical that the Respondent has not demonstrated how this Court lacks jurisdiction.

8. Supporting his application dated 12/10/2021, the Applicant cited the case of **Giella v Cassman Brown Co. Ltd 1976 E.A 358** on the principles governing the grant of temporary injunction. That according to Section 26 of Land Registration Act the Applicant's title is prima facie evidence of absolute ownership of the suit land. That the continued use and wastage of the suit land by the Respondent would occasion the Applicant irreparable harm that may not be compensated by damages. On the issue of balance of convenience, the Applicant argued that he has title documents and indeed registered a restriction on the suit land. That the Respondent's conduct is contrasted in so far as he does not have any proof of ownership but illegally occupying the suit land.

9. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise crisp points of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

"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."

10. The instant Preliminary Objection impugns the Respondent's capacity to be sued and the Court's jurisdiction. I will start by addressing the issue of the Court's jurisdiction because without it, a Court must down its tools. A perusal of the Plaintiff dated 12/10/2021 seek inter alia the following orders; a declaration that the Plaintiff is the lawful owner of the suit land, permanent injunction against the Defendant from interfering with the suit land and an order against the Defendant for vacant possession of the suit land.

11. This Courts is established pursuant to Article 162(2)b of the Constitution of Kenya and detailed jurisdiction is contained in Section 13 of ELCA 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."

12. In light of the above provisions and prayers sought in this suit, it is my view that this Court is fully clothed with jurisdiction to entertain this suit. Accordingly ground 5 of the Preliminary Objection fails.

13. The other ground of the Preliminary Objection relate to the Defendant's capacity to be sued. The legal provisions on parties to a suit are found in Order 1 of the CPR;

"9. Misjoinder and non-joinder [Order 1, rule 9.]

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the

matter in controversy so far as regards the rights and interests of the parties actually before it.

10. Substitution and addition of parties [Order 1, rule 10.]

(1) Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks fit.

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a Plaintiff suing without a next friend or as the next friend of a Plaintiff under any disability without his consent in writing thereto.

(4) Where a Defendant is added or substituted, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new Defendant and, if the Court thinks fit, on the original Defendants.”

14. The Respondent argues that he is wrongly sued since he is not the registered owner of the suit property. That it is his wife who is legally registered thereof and any suit ought to lie against her. This allegation is refuted by the Applicant and for Court to determine the same, it will have to call for evidence. In my view, this is not a pure point of law to qualify as a Preliminary Objection. The question of parties to a suit is question of fact. As already highlighted above, a suit would not fail for mere reason of misjoinder.

15. For the foregoing reasons, the Preliminary Objection dated 10/5/2021 is unmerited and the same is dismissed with costs to the Plaintiff.

16. In respect to the application dated 12/10/2021, the main issue for determination is whether the Applicant has established a case for grant of a temporary injunction. Order 40 Rule 1 of Civil Procedure Rules provides;

“1. Cases in which temporary injunction may be granted [Order 40, rule 1.]

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.”

17. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience. See the celebrated cases of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** and **Nguruman Ltd v. Jan Bonde Nielsen & 2 Others [2014] eKLR**.

18. The starting point is to establish whether the Applicant has demonstrated a prima facie case to grant the orders sought. The Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123**, defined a prima facie case as:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is 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."

19. In **Nguruman case supra** the Court of Appeal went on to further state that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed.

20. In the instant case the Applicant has established that he is the registered owner of the suit land. He has given an account of how he purchased it from Jumah Ltd. The Applicant accuses the Respondent for unlawful occupation of the suit land hence the instant claim. The Respondent denies the allegations and maintains that his wife is the rightful owner of the same. Going by the definition in **Mrao case supra**, it is my view that the Applicant established a prima facie with a probability of success.

21. The second and third tests are that an injunction will not suffice where an award of damages would be sufficient; and if the Court is in doubt, it can decide the matter on a balance of convenience. The Applicant contends that the continued use and wastage of the suit land would not be adequately compensated by way of damages if this Court does not intervene. It is not disputed that the Respondent is already in occupation of the land and therefore would continue to deal with it as he pleases.

22. The Applicant submitted that the Respondent hurriedly moved in to the suit land in the month of October 2021 after filing of this suit. The Defendant confirmed taking occupation in the said month. Granting a temporary injunction when it is admitted that the Respondent is in occupation would not be serving the ends of justice.

23. In the interests of justice and to ensure the subject land is preserved, the commendable order would be an order of status quo in form of an inhibition to be lodged on the title inhibiting all dealings on the suit land pending the hearing and determination of the suit.

24. Costs shall be in the cause.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

MR. SIMIYU FOR PLAINTIFF/APPLICANT

MR. NGERESA FOR DEFENDANT/RESPONDENT

MS. PHYLLIS MWANGI – COURT ASSISTANT