REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC. CIVIL APPLICATION NO. 25 OF 2018

MARY WANJIRU…….…….APPLICANT

VERSUS

LUCY NJERI MUNYUA…….....……..…..1ST RESPONDENT

THE DISTRICT LAND REGISTRAR THIKA…….....……2ND RESPONDENT

JUDGMENT

The matter for determination is the **Notice of Motion** Application dated **3rd May 2018,** seeking for orders that;

> ***1. THAT the Honourable Court be pleased to order that the inhibitions registered over all the property described as Ruiru East Block 1/5578, 5579, 5580, 5581, 5582, 5583, 5584, 5585, 5586 and 5587 all measuring approximately 0.042 hectares situated at Ruiru within Kiambu County be removed.***
>
> ***2. THAT the Honourable Court be pleased to issue an injunction against the 1st Respondent whether by herself through her servants, agents employees, representatives or anyone claiming title or deriving authority under her restraining her from lodging any form of encumbrance or interfering in any manner whatsoever with all the property describe as Ruiru East Block 1/5578, 5579, 5580, 5581, 5582, 5583, 5584, 5585, 5586 and 5587 all measuring approximately 0.042 hectares situated at Ruiru within Kiambu County.***
>
> ***3. THAT this Court be pleased to order the District Land Registrar, Thika Land Registry not to register any form of encumbrance against the property described as Ruiru East Block 1/5578, 5579, 5580, 5581, 5582, 5583, 5584, 5585, 5586 and 5587 all measuring approximately 0.042 hectares situated at Ruiru within Kiambu County.***
>
> ***4. THAT the costs of this Application be borne by the 1st Respondent in any event.***

The Application is premised on the grounds that the Applicant is the registered proprietor of the suit parcels of land having acquired the same in **Succession Cause No.2388 of 2002,** in the matter of **Lanet Wanjahi Karanja (Deceased).** That the Applicant conducted an official search through her Advocates which searches indicated that an injunction had been issued in **Milimani Civil Case No.183 of 2007,** which searches indicated that there should be no dealings in the suit properties until investigations by the **DCIO** were concluded. That the said suit had been instituted by **Andrew Munyua Karanja**, the 1st Respondent's late husband. However the Applicant has never been a party to the suit and has never been summoned by the criminal investigators.

Further that the Plaintiff in the said suit passed away in **April 2009,** and no application for substitution was ever made and on the **14th March 2018,** it was ruled that the suit had abated. She contended that the 1st Respondent's husband consented in **High Court Succession Cause No. 2388 of 2002,** for the suit property to be given to the Applicant whereas the 1st Respondent was given her land. That the Applicant is desirous of utilizing the property but cannot do so due to the existence of the encumbrance and inhibitions therein.

In her **Supporting Affidavit**, the Applicant averred that she acquired the suit properties through a Confirmation of Grant in the matter of the **Estate of Lanet Wanjahi Karanja,** upon following due process. It was her

contention that on diverse dates in the month of **November** and **December 2015,** through her Advocates, she conducted an official search on the suit properties and learnt that there were inhibitions over the suit properties obtained in **ELC 183 of 2007, Nairobi**. That she then filed an Application to be enjoined in the suit as an interested party and on **29th November 2017,** the Court directed that the Plaintiff set the matter down for hearing within 60 days. She averred that the Plaintiff failed to do so and on **14th March 2018,** when the, matter was set for

directions, it was discovered that the Plaintiff had passed on in **April 2019,** and no application for substitution had been made. The court then ruled that the matter had abated.

She averred that the inhibitions had been registered in bad faith and it is therefore **fair** and **just** and in the **interest of justice** that the orders sought in the Application be granted to avert miscarriage of justice.

Despite being served with the suit papers, the Respondents did not enter appearance nor participate in the proceedings.

The Application was canvassed by way of written submissions and the Applicant through the **Law Firm of Norman Otieno & Company Advocates,** filed her written submissions on the **8th of November 2019,** and submitted that the suit properties are registered in the Applicant's name and that nothing has been produced to show that the properties were acquired through **fraud** or **misrepresentation**. The Applicant relied on various provisions of law and urged the Court to allow the prayers as sought.

The fact that suit has not been contested means that the Applicant's evidence remains uncontroverted and unchallenged. However the Plaintiff is still required to prove her case on the required standard of balance of probabilities. See the case of **Shaneebal Limited…Vs…County Government of Machakos (2018)eKLR,** where the Court cited the case of **Karuru Munyororo…..Vs….Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988,** where it was held that:-

> ***"The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant's and or their Counsel to cross examine her on her evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon''***

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion, as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited…Vs…Nathan Karanja Gachoka & Another [2016] eKLR, where the Court** stated:-

> ***"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court***
>
> ***should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.''***

Further the case of **Gichinga Kibutha…Vs…Caroline Nduku (2018) eKLR,** the Court held that:-

> ***"It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.''***

Having considered the available evidence, the issue for determination is ***Whether the Applicant is entitled to the orders sought.***

It is not in doubt that the Applicant is the registered owner of some of the suit properties as evidenced by the official searches that have been produced before this Court. The registration of a person as the proprietor of the suit property gives that person all the rights and privileges over the suit property as provided by **Section 26** of the **Land Registration Act**, which provides that such a registered person is the absolute proprietor of the said suit property until and unless the same is impeached in accordance with the said provisions of law**.**

It is also not in doubt that any Court with competent jurisdiction has powers to grant temporary injunctive orders for purpose of preservation of the suit property as per the provisions of **Order 40** of the **Civil Procedure Rules**. This Court has already stated above that the Applicant's Application

remains uncontroverted and therefore her sequence of events remain the unchallenged. However these allegations must also be proved as they are not automatic. From the searches produced before this Court, the Court notes that the Certificate of official search for the suit property **Ruiru East Block 1/5578,** bears the name of one **Daniel Gitau Kuria** and **Alice Wambui Gitau,** who are not the Applicant herein. Further this Court notes that the searches have orders that have stated that the injunction will remain in place until **Civil Case No.183 of 2007,** has been finalized. It would therefore mean that the said injunction were issued pursuant to Court orders made in that suit which fact have not been disputed by the Applicant.

The Applicant has claimed that the late **Andrew Munyua** was the Plaintiff in that suit. However what the Applicant provided before this Court is only a funeral program for the alleged Plaintiff and an allegation that the suit had been terminated for having abated. This Court has not been provided with any proceedings or documentation from the said suit being **Civil Case No.183 of 2007,** evidencing that the suit had been terminated and that the said deceased was the Plaintiff in the said suit. This Court is therefore not satisfied with the documentations that have been provided before it for the reasons that the Court is not in a position to authoritatively establish that the said late **Andrew Munyua** who is allegedly the husband to the 1st Respondent was the Plaintiff in the said suit.

Further no decree or order has been produced before this Court to prove that indeed **Civil Case No.183 of 2007,** had been finalized to enable this Court come to a conclusion that it is in a position to lift the injunction. It is not enough for the Applicant to simply say that she attended Court and a finding has been made. The Applicant ought to have provided before this Court documentary evidence to enable it make a proper finding. This Court is guarding against a scenario where it would be making orders that are in contravention of the orders that would have been made in the **Civil Case No.183 of 2007,** by a Court with equal and equivalent status. Further, the Applicant has failed to file the suit

against the **DCIO** to enable the **DCIO** shade light on why it put out the injunction as against the suit properties. It is the Court's considered finding that the burden rests solely on the shoulders of the Applicant to provide sufficient evidence before this Court for a proper determination. The Court therefore finds and holds that the Applicant has not proved her case on the required standard of balance of probabilities and therefore the Notice of Motion Application dated **3rd May 2018,** is not merited and the same is dismissed with no orders as to costs.

Having now carefully read and considered the pleadings by the Applicant, the evidence adduced and the written submissions, the Court finds that the Applicant has failed to prove her case on the required standard of balance of probabilities and Consequently her claim is not

merited and the same is dismissed entirely with no orders to cost.

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this ***27th day*** of ***February 2020***.

L. GACHERU

JUDGE

27/2/2020

In the presence of

Mr. Kamunye holding brief for Mr. Otieno for Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

27/2/2020