



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

MILIMANI LAW COURTS

ELC CASE NO. 745 OF 2016

DANIEL MACHARIA.....PLAINTIFF

=VERSUS=

KIMANI KAMAU & 3 OTHERS.....DEFENDANTS

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 20th February 2019 in which he seeks the following orders:-

1. Spent

2. Spent

3. That the Court be pleased to grant a temporary injunction restraining one Lucy Wangari the intended Defendant/ Respondent whether by herself, her agents and/or servants from trespassing, constructing or otherwise interfering/ meddling with the Plaintiff's property known as Plot No.88 Shauri Moyo Estate particularly house number 3 pending the hearing and determination of this suit.

4. Spent

5. That the Court be pleased to grant a temporary injunction restraining the 4th Defendant/Respondent and all other tenants on Plot No.88 Shauri Moyo Estate whether by themselves, their agents and/or servants from constructing or otherwise making alteration on the suit property pending the hearing and determination of this suit.

6. That the Officer Commanding Shauri Moyo Police Station do enforce compliance of the orders above.

7. That One Lucy Wangari be enjoined as a defendant in the matter.

2. The Applicant claims to be the head tenant of plot No.88 Shauri Moyo Estate. The Applicant contends that the 4th Defendant and the intended Defendant Lucy Wangari are building illegal structures outside plot No. 88 and that the said Lucy Wangari who occupies house No.3 has refused to vacate the house. The Applicant therefore contends that the continued occupancy of house No.3 and the construction of the illegal structures by the said Lucy Wangari and the 4th Defendant/Respondent are causing him damage and prejudice. The Applicant therefore prays for injunction against Lucy Wangari and the 4th Defendant.

3. The Applicant's application is opposed through an affidavit sworn on 17th September 2019 by one Lucy Wagaiteri Mwangi who claims to be occupying house No.3 on account of her being the daughter of the late Mwangi Muthaka who was a tenant of house 3. She contends that she has lived in the house for the last 29 years without paying rent to an individual and that they had been paying rent to Nairobi City Council until the houses were condemned by the county Government of Nairobi. The deponent of this affidavit states that the issues being raised by the Applicant are *res-judicata*. The deponent denies any construction of illegal structures.

4. I have considered the Applicant's application as well as the opposition thereto by Lucy Wagaiteri Mwangi. Though I do not know whether Lucy Wagaiteri Mwangi is the same person as Lucy Wangari, there is no doubt that the deponent of the affidavit in opposition is an occupant of house No.3. The deponent is daughter to Mwangi Muthaka who is the 3rd Defendant herein. The 4th Defendant died in January 2017.

5. There are two issues which stand out for determination. The first is whether Lucy Wangari should be enjoined as a Defendant in this suit

and secondly, whether an injunction can issue against Lucy Wangari and the 4th Defendant. The said Lucy Wangari who is intended to be enjoined as a defendant was never served with this application. She is said to be occupying house No.3. House No.3 was being occupied by Mwangi Muthaka who has since died. Mwangi Muthaka is the 3rd Defendant in this case. The said Mwangi Muthaka has not been substituted. There is therefore no basis upon which the said Lucy Wangari can be enjoined in this suit as a defendant because she is not a legal representative of the deceased. The intended joinder of Lucy Wangari is intended to circumvent the process of substitution. I therefore find that Lucy Wangari cannot be enjoined in these proceedings as a Defendant.

6. On whether injunction can be granted, I have already said herein above that the defendant is deceased. There has been no substitution and the suit against him has already abated. There is no injunction which can be granted against a deceased person against whom a suit has abated. Equally no injunction can issue against a person who is not party to a suit and especially where the injunction sought is meant to evict that person without affording her an opportunity to defend herself. I therefore find that the applicant's application lacks merit. It is dismissed with no order as to costs.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **11th** day of **November 2019**.

E.O.OBAGA

JUDGE

In the presence of:-

M/s Njeri for Defendant

Mr Serunjogi for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE