



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 576 OF 2009

CATHERINE NJERI MACHARIA.....PLAINTIFF

=VERSUS=

MACHARIA KAGIO.....1ST DEFENDANT

HABIBA AHMED MOHAMED.....2ND DEFENDANT

RULING

Background

1. The plaintiff in this suit, Catherine Njeri Macharia, is daughter to the 1st defendant, Macharia Kagio. On 13/11/2009, the plaintiff brought this suit against her father together with the 2nd defendant, Habiba Ahmed Mohamed. Her case was that her father (**1st defendant**), as proprietor of **Land Reference Number 36/1/871 (the suit property)**, gifted her the said land together with the developments thereon in August 2005. Further to that, the 1st defendant gave her a power of attorney relating to the suit property. Subsequent to that, she got to learn, while in a family meeting, that the 1st defendant had sold the suit property to the 2nd defendant.

2. Aggrieved, she brought this suit seeking the following orders against the defendants:

a) An order that the 1st and 2nd defendants by themselves, their agents, servants or employees or anybody claiming under them be restrained by an order of permanent injunction from interfering with the plaintiff's peaceful possession and management of the suit property, that is, all that parcel of land forming part of Eastleigh Estate now known as Eastleigh in the City of Nairobi in the Nairobi Area of the Republic of Kenya containing by measurement Nought Decimal One One Three (0.113) of an acre or thereabouts that is to say L R No 36/1/871 and generally known as Plot Number 871 of Section One which piece of land is particularly delineated and described on a General Plan of the said Estate as plan No 871 of Section 1 registered at the Registry of Documents Department at Nairobi as Number 367/AXI/1913;

b) An order that the sale agreement and all the transfer documents executed in favour of the 2nd defendant by the 1st defendant be rescinded and/or revoked;

c) An order that the power of attorney given to the plaintiff by the 1st defendant be upheld and all the affairs and management of the suit property be accorded to the plaintiff;

d) General damages;

e) Costs of this suit;

f) Any such other or further relief as this honourable court may deem fit and just to grant in favour of the plaintiff.

3. Upon service of court papers on the two defendants, the 2nd defendant brought a notice of preliminary objection, challenging the suit on the ground that the power of attorney which the plaintiff was relying on did not comply with the mandatory requirements of the Government Lands Act. **Muchelule J** heard the preliminary objection and, in a ruling dated 1/10/2010, upheld the preliminary objection and struck out the plaintiff's suit against the 2nd defendant.

4. Subsequent to that, the 2nd defendant brought an application dated 5/5/2011 seeking, among other prayers, the following orders:

1. That pursuant to the ruling and order of this honourable court of 1st October 2010 striking out this suit, an order of eviction does issue forthwith against the plaintiff herein, Catherine Njeri Macharia, from the applicant's parcel of land, together with all developments thereon; particularly known as Land Reference Number 36/1/871 situated in Eastleigh

2. That the Officer in Charge (OCS), Pangani Police Station, Nairobi, does supervise and execute the eviction of Catherine Njeri Macharia, the plaintiff herein, from the 2nd defendant's parcel of land together with all the developments therein, being particularly known as LR No 36/1/871 situated in Eastleigh Estate within Nairobi.

3. That the order (2) and (3) above does (sic) apply to all the plaintiff's tenants if at all, residing within the said premises on parcel of land known as LR No 36/1/871 situated in Eastleigh Estate within Nairobi.

5. The plaintiff did not oppose the above application by the 2nd defendant. Consequently, on 2/11/2011, **Koome J** (as she then was) granted the application in the following verbatim words:

"The Notice of Motion dated 5th May 2011 is not opposed. It is hereby allowed as prayed"

6. Subsequent to that, the plaintiff brought a notice of motion dated 30/4/2012 seeking the following orders:

"2. That there be stay of execution of the decree in this case

pending hearing and determination of this application.

3. That orders issued on 2nd November 2011 and the eviction order given on 29th February 2012 be vacated and/or set aside pending the hearing and determination of this application."

4. That the plaintiff/applicant be allowed to prepare and file the intended appeal against the ruling delivered herein by the Honourable Justice Muchelule on 1st October 2010".

7. Mutungi J heard the said application dated 30/4/2012 and dismissed it for lack of merit through a ruling rendered on 18/4/2013.

The Two Applications

8. It is against the above background that six years later, the 1st defendant and the plaintiff brought the two separate applications which are the subject of this ruling. The first to be filed was the 1st defendant's notice of motion dated 6/11/2019 which seeks the following orders:

1) Spent

2) That pending the hearing and determination of this application interpartes, and or till further orders of this court, the ongoing eviction upon the suit property, LR No 36/1/871 Eastleigh Nairobi, commenced by the 2nd defendant, her agents and assigns before, on or about the 5th November 2019, be and is hereby stopped and the status quo existing before that eviction be and is hereby maintained.

3) That further, pending the hearing and determination of this application or till further orders of this court, no party in this suit shall dispose off, alienate or charge the property and title to the suit property, LR No 36/1/871, Eastleigh Nairobi.

4) That the status quo ante that existed before the eviction by the 2nd defendant, her agents and assigns respecting the suit property, LR No 36/1/871 Eastleigh Nairobi, be hereby maintained pending trial, hearing and determination of the suit.

5) That the Officer Commanding Pangani Police Station, Officer Commanding Nairobi Division and or their designates, and or any other law enforcement office to maintain the peace regarding the suit property, LR No 36/1/871 Eastleigh Nairobi, upon notice of this order.

6) That cost of this application be to the applicant.

9. The second application subject of this ruling is the plaintiff's notice of motion dated 19/11/2019 in which the plaintiff seeks the following orders:

1) Spent

2) An order restraining the 1st and 2nd defendants herein, their employees, servants, agents or any person claiming through them from making any developments in the property known as plot No 36/1/871 situated at Eastleigh within Nairobi County, or from otherwise alienating transferring, disposing and or dealing with the property in any manner adverse to the proprietary interest of the plaintiff/applicant pending the hearing and determination of this application interpartes.

3) An order restoring the plaintiff herein into the property known as plot No 36/1/871 situated at Eastleigh within Nairobi County pending the hearing and determination of this application interpartes.

4) An order restraining the 1st and 2nd defendants herein, their employees, servants, agents or any person claiming through them from making any developments in the property known as Plot No 36/1/871 situated at Eastleigh within Nairobi County, or from otherwise alienating transferring, disposing and or dealing with the property in any manner adverse to the proprietary

interest of the plaintiff/applicant pending the hearing and determination of Nairobi Court of Appeal Civil Appeal (Application) No 338 of 2013.

5) An order restoring the plaintiff herein into the property known as Plot No 36/1/871 situated at Eastleigh within Nairobi County pending the hearing and determination of Nairobi Court of Appeal Civil Appeal (Application) No 338 of 2012.

6) An order be issued directing the Officer Commanding Pangani Police Station to maintain peace and to ensure strict compliance with this order.

7) The costs of this application be provided for

8) Any other or further relief and/or remedy this honourable court may deem just and expedient to grant

10. I will analyze and make determinations on the two applications sequentially in the order in which they were filed.

Notice of Motion dated 6/11/2019

11. The Notice of Motion dated 6/11/2019 was brought by the 1st defendant. It seeks an order of *status quo ante* that existed before the eviction carried out by the 2nd defendant, pending hearing and determination of this suit. The application was premised on the grounds set out in the application. It was supported by the 1st defendant's affidavit sworn on 6/11/2019. The case of the 1st defendant/applicant was that the 2nd defendant was struck out of this suit on 1/10/2010 upon her application but proceeded to obtain illegal eviction orders in *vacuo*. The 1st defendant termed the eviction orders as illegal and mere nullities meant to undermine these proceedings.

12. The application was canvassed through written submissions by M/s Andrew Ombwayo & Company Advocates dated 14/1/2020. Urging the court to grant the prayers sought in the application, Mr Ombwayo argued that the 2nd defendant's act of gaining possession of the suit property with the aid of the court through these proceedings was the height of impunity, illegal, and nullities from the outset. Counsel further argued that there was no order in the ruling of 2/11/2011 granting the 2nd defendant ownership or possession of the suit property. Lastly, counsel argued that this court had inherent powers under Section 34 of the Civil Procedure Act to grant the prayers sought.

13. The 2nd defendant opposed the said application through her affidavit sworn on 2/12/2019. The affidavit was a combined response to the two applications under consideration. She similarly filed written submissions dated 27/1/2020 relating to the two applications. Her case was that since the suit against her was struck out by Muchelule J on 1/10/2010, the two applications could not be maintained against her. She added that the two applicants had always pretended to be protagonists in several suits relating to the suit property but in actual fact they were conspirators working in cahoots.

14. The 2nd defendant deposed that the plea for a conservatory order was incapable of being granted because, firstly, the suit against her was struck out; and secondly, the plea was *res judicata*.

15. The 2nd defendant argued in written submissions filed through the firm of Gatundu & Co Advocates that the two applications had no legal basis because the suit against the 2nd defendant had been struck out. Counsel added that the two applications were *res judicata* because Mutungi J had considered and determined a similar application. Counsel further submitted that the eviction carried out was grounded on the orders issued by the court on 2/11/2011 by **Koome J** (as she then was). It was further argued that the application constituted a recant of an undertaking which the plaintiff had given to the court on 17/9/2013 and affirmed before Nyamweya J on 5/11/2013. Counsel for the 2nd defendant added that the **Court of Appeal** had in **Nairobi Civil Appeal Number 308 of 2013** declined to grant the 1st defendant a similar plea noting that the 2nd defendant was the registered proprietor of the suit property. It was further argued that eviction was carried out severally because wherever they were evicted, the applicants would hire goons to force their way back into the suit premises. Lastly, counsel for the 2nd defendant faulted the applicant for deliberately withholding material facts from the court, contending that the applicants had failed to disclose to the court that there were related suits in the High Court and in the Court of Appeal in which they had unsuccessfully sought similar orders.

16. I have considered the said application dated 6/11/2019. Prayers 1, 2 and 3 of the application are now spent because they were interim orders sought pending the hearing and determination of the application. They are spent because the application is now under determination today. The import of prayers 4 and 5 is that, the two prayers are a plea for a mandatory injunction evicting the 2nd defendant from the suit property. The key question to be determined in the said application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant mandatory injunctive orders. That criteria was spelt out in the English case of **Locabi International Finance Limited v Agro-Export and Another (1986) All ER 901** in the following terms:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had already been granted, that being a different and higher standard than was required for a prohibitory injunction.”

17. Our courts have applied the above principle in a line of decisions, among them: **Kamau Mucuha v the Ripples Limited (Civil Application Number Nai 186 of 1992)**; **Jaj Super Power Cash and Carry Limited v Nairobi City Council and two others**; and **Shariff Abdi Hassan v Nadhif Jama Adan (2006) eKLR**.

18. In the present suit, the 2nd defendant is the registered proprietor of the suit property. Secondly, Muchelule J rendered a ruling in which he struck out the suit against the 2nd defendant. The said order has not been set aside. In my view, until that order is set aside, an order in

the nature of a mandatory injunction directed against the 2nd defendant cannot be issued against the 2nd defendant in this suit.

19. Secondly, the plea for a mandatory injunctive order is sought by the 1st defendant. I have looked at the pleadings on record and I have not seen any counter-claim filed by the 1st defendant to form the basis upon which to issue the mandatory injunctive order which he seeks against the second 2nd defendant.

20. Thirdly, I have noted from the ruling in Court of Appeal **Civil Application Number Nai 308 of 2013** that the 1st defendant made a similar application for an injunctive order against the 2nd defendant herein and the same was considered and found unmerited by the Court of Appeal. It is therefore apparent that the 1st defendant is trying his luck in this court after his bid in the Court of Appeal failed. Regrettably, what the 1st defendant is engaging in is a blatant abuse of the court process.

21. In light of the above reasons, it is my finding on the single issue in this application that the applicant in the notice of motion dated 6/11/2019 (1st defendant) has failed to satisfy the criteria upon which an order in the nature of a mandatory injunction is issued. Consequently, the 1st defendant's notice of motion dated 6/11/2019 is dismissed for lack of merit. The 1st defendant shall bear costs of the application.

Notice of Motion dated 19/11/2019

22. Prayers 1 to 3 in the notice of motion dated 19/11/2019 are spent because they were sought pending the hearing and determination of the application. The tenor and import of prayers 4 to 7 in the notice of motion dated 19/11/2019 is that the plaintiff seeks a mandatory injunctive order restoring her into the suit property pending the hearing and determination of **Court of Appeal Civil Appeal No Nai 338 of 2013**. Secondly, the plaintiff seeks an injunction restraining the 1st and 2nd defendants against dealing with the suit property pending the hearing and determination of Court of Appeal Civil Appeal No Nai 338 of 2013. Thirdly, she wants the Officer Commanding Pangani Police Station to enforce the injunctive orders.

23. The court is cognizant of the fact that what is before the Court of Appeal is an interlocutory appeal. This court is still seized of the main suit. The court has already noted from the materials placed before it that the 1st defendant made a similar plea to the Court of Appeal in an appeal against the orders made in this matter by Nyamweya J. The Court of Appeal rendered itself on the application. The key question in this application is whether the applicant has satisfied the **criteria** upon which this court exercises jurisdiction to grant mandatory and ordinary injunctive orders.

24. The criteria upon which a trial court exercises jurisdiction to grant a mandatory injunction has been outlined in the preceding paragraphs. The criteria upon which our courts exercise jurisdiction to issue an ordinary injunction was articulated in **Giella v Cassman Brown (1973) EA 358**. In the present application, the plaintiff seeks the two injunctive orders pending the hearing and determination of an appeal in the Court of Appeal. It is within this context that the court is to consider the two limbs of the notice of motion dated 19/11/2019.

25. Firstly, the injunctive orders sought by the plaintiff are essentially directed against the 2nd defendant who is the registered proprietor of the suit property and who has possession of the suit property. Muchelule J struck out the suit against the 2nd defendant on 1/10/2010. The order striking out the suit against the 2nd defendant has neither been set aside nor stayed. In my view, without saying much, no injunctive order of any kind can be issued in this suit against the 2nd defendant in his absence as a party to the suit.

26. Secondly, the Court of Appeal rendered itself on a similar application by the 1st defendant in Civil Application No Nai 308 of 2013 in the following words:

“17. The application shows that the property that is the subject of the litigation is known as LR No 36/1/871. It is registered in the name of the 1st respondent as the proprietor or the legal owner. The transfer of the property to the 1st respondent was pursuant to a sale following monetary consideration. The applicant subsequently tried without success to rescind the sale. The injunction orders now sought are designed to stop or prevent acts that have already occurred. The title to the property is in the name of the 1st respondent and it is not now possible in the circumstances of this case to restrain the 1st respondent from dealing with the suit premises nor is it possible to describe the applicant as having legal rights to the property in the absence of proof of his registration as the legal owner or an order of the court to that effect. In effect, the applicant seems to be seeking to close the stable door after the horse has already bolted. The applicant has not established justiciability of his claim, much less the agruability of the appeal.”

27. Circumstances relating to proprietorship and possession of the suit property have not changed. What the plaintiff and the 1st defendant, who are daughter and father, are doing is to invite this court to overturn the above decision by the Court of Appeal. I decline to do that because I do not have that jurisdiction.

28. In urging the Court to grant the mandatory injunctive orders, counsel for the plaintiff termed the eviction orders granted by Koome J (as she then was) and Nyamweya J, as illegal and mere nullities. Counsel contended that because the suit against the 2nd defendant had been struck out, the court should not have subsequently granted the 2nd defendant eviction orders in the same suit. I have reflected on that argument.

29. The orders which counsel described as illegal and mere nullities have not been vacated in the manner provided by the law. If the plaintiff was aggrieved by the said orders, she had the liberty to seek redress in the manner stipulated by the law. The present notice of motion dated 19/11/2019 is not the platform envisaged by the law for the purpose of challenging the said orders. I will not say more.

30. Suffice to say that, based on the evidential materials placed before this court, the plaintiff has failed to satisfy the criteria upon which this court exercises jurisdiction to grant mandatory and ordinary injunctive orders, respectively.

Disposal Orders

31. In light of the above findings, the two applications under consideration in this ruling are disposed as follows:

- a) The 1st defendant's notice of motion dated 6/11/2019 is dismissed for lack of merit.*
- b) The plaintiff's notice of motion dated 19/11/2019 is similarly dismissed for lack of merit.*
- c) The respective applicants in the two applications shall bear costs of their respective applications.*

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE 2020.

B M EBOSO

JUDGE

In the presence of: -

Mr Ombwayo for the 1st defendant

Mr Githinji for the plaintiff

Mr Gatundu for the 2nd defendant

Court Clerk - June Nafula