



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC CIVIL SUIT NO.1371 OF 2013

SIMON THUKU KANUI and ANN FIDELIS NG'ENDO THUKU

(Suing in their Capacity as administrators of the

ESTATE of LILIAN W THUKU (
DECEASED.....PLAINTIFFS/APPLICANTS

-VERSUS-

LILIAN WATHITHI MUIGAI..... DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the Plaintiffs /Applicants amended Notice of Motion amended on **12th May 2014** . The application is against the Defendant/Respondent herein **Lilian Wathithi Muigai** and is brought under **Order 51 Rule 1 , Order 40 Rules 1 and 2 of the Civil Procedure Rules , Section 3A and Section 63 (e) of the Civil Procedure Act** and all other enabling provisions of the Law.

The applicants have sought for the following orders :-

- 1. That the Defendant /Respondent whether by herself or acting through her agents and or servants or any of them be restrained by an order of temporary injunction from trespassing and or interfering and/or further interfering with the Plaintiffs/Applicants rights of occupation ,ownership and use of all that land known as Plot Number 014 comprised in a certificate Number 014 issued by Kamae Resettlement Project Phase Two belonging to the Plaintiffs and situated in Githurai Division in the County of Nairobi (herein after “ the suit Premises”) pending hearing and determination of the suit herein.**
- 2. That the Honourable Court be pleased to Order the eviction and removal of the Defendant /Respondent , her agents and/or servants or any of them from the Suit premises and the demolition of all and any such structures that have been unlawfully erected on the Suit Premises by the Defendant/Respondent , her agents and/or servants or any of them.**
- 3. That the Honourable Court be pleased to Order the Inspector General of Police and the Officer Commanding Police Division , Kasarani Division to avail all necessary assistance and security to the Court Bailiffs of the High Court of Kenya in the execution of the eviction Order .**
- 4. That the Plaintiffs/Applicants be at liberty to apply for any further or other orders and/or directions as this Honourable Court may deem fit and just to grant in the circumstances.**

5. That the costs of the Application be borne by the Defendant/ Respondent in any event .

The application is premised on the grounds stated on the face of the application and also on the supporting affidavit of **Thuku Kanui**. These grounds are:-

i. That the Defendant/Respondent has trespassed onto and encroached on to the Suit Premises and is constructing un authorized structures on the suit premises and shall continue to do so unless restrained by an order of this Honourable Court.

ii. That the Suit Premises are owned by the late LILIAN WANJIKU THUKU (Deceased).The Plaitiffs/Applicants are the administators of her estate and are the legitimate owners of the Suit Premises.

iii. That the encroachment by the Defendant/Respondent and her use of the Suit Premises amount to trespass in law and are in infringement of the Plaintiff's/Applicants's proprietary rights in the Suit Premises.

iv. That the action of The defendant/Respondent amounts to unlwaful intermeddling with a Deceased person's estate . The Defendants actions are therefore illegal,unjustifiableand have no colour of right.

v. That in the circumstance , the Defendant / Respondent has acted capriciously ,fraudulently and recklessly and has treated the Plaintiffs /Applicants oppressively and maliciously out of bad faith.

vi. That it is in the interest of justice that the aforesaid orders be granted as prayed and the Plaintiffs do stand to suffer grave and irreparable damage if the orders sought are not granted.

In his supporting Affidavit, **Simon Thuku Kanui** averred that he is the widower of and the administrator of the estate of the late **Lilian Wanjiku Thuku (Deceased)** together with his daughter **.Ann Fidelis Ngendo Thuku** . It was his contention that on **3rd May 2002**, the late Lilian Wanjiku Thuku (Deceased) was allocated a parcel of land known as plot **No. 014** comprised in a certificate **No 014** issued by **Kamae Resettlement Project Phase II**, as evidenced by annexure **STK/B** . Further that since the allotment of the suit premises to the late **Lilian Wanjiku Thuku**, the deponent has been in occupation of the said suit premises jointly with the other members of his family. He also contended that sometimes in September 2013, the Defendant/Respondent trespassed unto to and excavated the suit premises and illegally commenced construction.He further contended that the Respondent is a trespasser into the said land though she is holding herself as the registered proprietor and he has issued her several **notices to vacate** ,the suit land but Defendant has threatened to inflict bodily harm on himself. Therefore ,that unless the Defendant is restrained by this Court, she will persist with her unlawful action to his detriment and he will suffer irreparable loss. The applicant urges the court to grant the orders sought for the interest of justice .

The application is opposed. The Respondent **Lilian Wathithi Muigai** swore her Replying Affidavit and denied the allegations made by the Plainiffs /Applicants . She averred that she is the rightful owner of the property known as **Plot No.014** , situated within Kamae Resettlement Phase II having purchased the same from one **Lilian Mwende Nzambu** vide a sale agreement dated **4th May 2013**, annexure **LWM 1**.

She further contended that prior to purchasing the subject property, she made inquiries from the Officials of **Kamae Resettlement Scheme Phase II**, and confirmed that the rightful owner of the subject plot as per their records was **Lilian Mwende Nzambu** . Further that she was issued with ownership certificate in respect of **plot No. 014**, annexure **LWM2** and such entry was made in the Registrar of Kamae Resettlement Project Phase II, as evidenced by annexure **LWM 3** .

It was her further contention that the officials of **Kamae Resettlement Scheme Phase II**, confirmed that she was the owner of plot **No 014** as she purchased it from **Lilian Mwende Nzambu**, as evidenced by

annexture **LWM4**. The Respondent contended that she has been in occupation of the suit premises until **November 2013** when the applicant started claiming ownership thereof. She maintains that she was the lawful proprietor of plot No.014 and that the application herein has no merit and should be dismissed.

The Court directed that the said application be canvassed by way of written submissions. The parties herein complied with the said directions and filed their respective written submissions. This Court has now carefully considered the pleadings herein, the instant Notice of Motion, the written submissions and the relevant laws and makes the following findings:-

There is no doubt that at the centre of the controversy herein is plot **No.014 Kamae Resettlement Scheme Phase II**. There is also no doubt that the applicants herein have in their possession ownership certificate **No 014**, for **Lilian Wanjiku Thuku** issued on **3rd May 2002**. There is also no doubt that the Respondent herein **Lilian Wathithi Muigai** is also in possession of ownership certificate **No.120** issued on **4th May 2013 for plot No014 – Kamae Resettlement Project Phase II**. The Respondent alleged that she purchased the suit plot from one **Lilian Mwendu Nzambu** vide sale agreement dated **4th May 2013 (LWM1)**.

It is also evident that the applicant herein is one of the administrators of the Estate of **Lilian Wanjiku Thuku (Deceased)** as per the certificate of confirmation of grant and **Plot No. 014 (Kamae Resettlement Project)** was one of the properties that was distributed to the beneficiaries of **Lilian Wanjiku Thuku**.

There is also no doubt that one **Francis Nganga**, allegedly the chairman of **Kamae Resettlement Schemes Phase II**, confirmed that the suit plot belongs to **Lilian Wathithi Muigai**, the Respondent, allegedly having purchased it from **Lilian Mwendu Nzambu**. Further the said **Francis Nganga**, alleged that he was a stranger to the certificate of ownership issued to **Lilian Wanjiku Thuku**. What is not in doubt is that both the Plaintiffs and the Defendant are claiming ownership of the suit plot.

The Plaintiffs /Applicants have alleged that they are in occupation of the suit plot and the Respondent has also alleged that she has been in occupation of the suit plot from the time of the purchase until when the applicants emerged and claimed ownership of the same.

It is now doubtful as to who between the two is in actual occupation of the suit property. That is an issue that would only be resolved by the court after calling of evidence and testing of the same through cross-examination. It cannot be resolved through affidavit evidence.

The Court has considered the prayers sought by the applicants and noted that the applicants have sought temporary injunctions against the Defendant and also an order of eviction and removal of the Defendant from the suit premises. The order of eviction or removal of the Defendant from the suit premises is a mandatory injunction or **final order** which is capable of disposing of the suit. The said Order is issued in very special circumstances. See the case of “**The Official Receiver and Provisional Liquidator, Kenya National Assurance Co.ltd Vs John Gitiche Mbao, Civil Appeal No. 236 of 1999**”.

Since the applicants sought for temporary injunction, they ought to have satisfied the principles for grant of such orders as was laid down in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358**. These conditions 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.**

Has the applicant satisfied the above stated principles?.

The applicants needed to establish that they have a prima facie case with probability of success. For that, they alleged that the late **Lilian Wanjiku Thuku** was issued with **plot No. 014 by Kamae Resettlement Scheme Phase II**, as per the certificate of ownership dated **3rd May, 2002**. However, the Defendant has her certificate of ownership by the same Kamae Resettlement Scheme Phase II and one **Francis Nganga**, has confirmed that the suit plot is for the Defendant. There is conflict as to who is the rightful owner and that conflict cannot be resolved by affidavit evidence but by calling evidence in the main trial of the case. The Court at this juncture cannot therefore find and hold that the applicants have established a prima facie with probability of success.

On the issue of irreparable loss, both the Plaintiffs and the Defendant are claiming to be in occupation of the suit property. Plaintiffs did not attach photographs of any residential premises on the suit premises. This issue can certainly be resolved by calling of evidence and ascertain who is in actual occupation. The Court cannot resolve it through affidavit evidence.

The Court finds that it cannot hold with certainty that failure to grant the orders sought, the applicants will suffer irreparable loss which cannot be compensated by an award of damages.

On the balance of convenience, the court finds that this suit was filed in court in the year 2013. The matter has been pending in Court with an order of **Status Quo**. The balance of convenience tilts in favour of maintaining the status quo that has been subsisting. I refer to the case of **Ougo v Otieno & another Civil Appeal No. 3 of 1987 (1987) eKLR** held that,

“the general principle is that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute has been decided on trial.

On the 2nd prayer of eviction and removal of the Defendant from the suit premises, the said Order is a final Order which is capable of disposing of the matter. The said order can only be granted in very special circumstances. The principles for grant of mandatory orders were well settled in the case of **Kenya Breweries Ltd and Another vs. Washington O. Okeyo Civil Appeal No. 332 of 2000 IEA 109**, the court held that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one in which the court thinks it ought to be decided at once or if the act done is simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the Plaintiff a mandatory injunction will be granted on an interlocutory application”..... See volume 24 Halsbury Laws of England 4th Edition paragraph 945.

The Plaintiffs/applicants therefore needed to establish that there are special circumstances herein that would warrant the court issue mandatory injunction.

The applicant submitted that the Defendant /Respondent is in breach of Court Order and is erecting structures on the suit property thus in contempt of court order issued on **26th February 2014**. However, there was no evidence of such construction of structures going on. Applicant had alleged that he has been in occupation of the suit property since the year 2003. The Respondent bought the plot in the year 2013. If that is the case, the structures on the ground would be the Plaintiffs/applicants and not the Defendant/Respondent.

Having considered the pleadings herein and the written submissions and the fact that the applicant is seeking for final orders the court finds that no **special circumstances** has been demonstrated and this case is not a clear one and the act allegedly done by the defendant is not a **simple** and **summary** one which can be **easily remedied**. No evidence that the defendant is attempting to **steal a march** on the plaintiffs as envisaged in the **Locabail International Finance Ltd case**.

For the above reasons, the court finds that the Plaintiffs/ applicants are not deserving of prayer No.5 of the amended Notice of Motion. Given that no mandatory injunction was issued herein, the court finds no

reason to grant prayers No.6 and 7.

Having now carefully considered the instant amended Notice of Motion and the Reply thereto and the written submissions, the court finds that the Plaintiffs/applicants have failed to satisfy the conditions for grant of temporary and mandatory injunctions and the Court therefore declines to grant the orders sought in the said application. However, the court finds that the **Status Quo** persisting should be maintained until the dispute herein has been decided after calling of the evidence in a full trial.

Consequently, the Court directs that **Status Quo** subsisting to be maintained and costs shall be in the cause.

It is so ordered.

Dated , Signed and Delivered at Nairobi this **5th** day of **February, 2016**

L. GACHERU

JUDGE

In the presence of :-

L .Gacheru : Judge

Hilda : Court Clerk

Mr Nderitu for the Plaintiff/Applicant

M/s Munyaka holding brief for Mr Kabue for Defendant/Respondent

Court:

Ruling Read in open Court in the presence of the above advocates.

L.GACHERU

JUDGE

5/2/2016