



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.142 OF 2019

THIKA WORKERS HOUSING CO-OPERATIVE

SOCIETY LIMITED PLAINTIFF/APPLICANT

VERSUS

THIKA CHRISTIAN TEACHERS HOUSING

CO-OPERATIVE SOCIETY LIMITEDDEFENDANT/RESPONDENT

RULING

By a Notice of Motion Application dated **2nd September 2019**, the Plaintiff/Applicant has sought for the following orders against the Defendant/Respondent: -

- 3. That pending the hearing and determination of this suit, a temporary injunction be issued by this Honourable Court restraining the defendant, its agents and/or servants from trespassing, encroaching and/or interfering with the Plaintiff's Plots Nos. 26819, 26820 and 26821 and digging trenches and committing other acts of waste.**
- 4. That the OCS Makongeni Police Station Thika do supervise compliance of this Court Order.**
- 5. That costs of this application be provided for.**

The application is premised upon the following grounds:-

- 1. That the Plaintiff is the owner of Plots Nos. 26819, 26820, 26821.**
- 2. That the Defendant and its agents have trespassed on the Plaintiff's parcels of land and are digging trenches and want to construct permanent house.**
- 3. That it is only fair, just and in the interest of justice for the Honourable Court to grant the orders herein above sought.**

Further it is supported by the Supporting Affidavit of **John Kagira Nage, William Mutinda Wambua** and **Florence Waithera**, who are officials of the Plaintiff. They averred that the Plaintiff owns plots **Nos. 26819, 26820 and 26821**, which borders the Defendant/Respondent **Plot No.23962**. Further that on **26th August 2019**, they visited the said plots and found that the Defendant/Respondent, its agents and/or servants had trespassed and/or encroached on the said plots **No. 26819, 26820 and 26821**, by digging trenches in readiness for construction of permanent houses. They annexed **JKN 2** to confirm the said digging of trenches. That though they had stopped the Defendant and or its servants or agents from trespassing, entering and/or interfering with the said plots, it has been to no avail. Further that the Defendant/Respondent does not have any proprietary right over the said plots and that the said act or trespass and interfering with the applicant's parcels of land is illegal and unlawful. They urged the court to restrain the Defendant/Respondent and its agents and/or servants from continuing with its acts of trespass and stop the said construction on their plots.

The application is opposed and the Defendant/Respondent filed grounds of opposition and a Replying Affidavit sworn by **Samuel Munene Thuo**.

In the grounds of opposition, the Respondent averred that:-

- 1. That the Plaintiff/Applicant has not proved any valid legal/beneficial title to the suit property Plots No. 26819, 26829 and 26821 and as such lacks the requisite locus standi to bring this Application.**

2. That the Plaintiff/Applicant's application is therefore bad in law, an abuse of the Court Process and ought to be dismissed with costs to the Defendant /Respondent.

In his Replying Affidavit, **Samuel Munene Thuo**, the Chairman of the Defendant/Respondent averred that the Plaintiff/Applicant has not proven to be either the legal nor the beneficial owner of **LR. No. 26819, 26820 and 26821**, as no documents have been attached evidencing credible title over the properties. Further that the Plaintiff/Applicant is neither an allottee of the land Parcels No. **26819, 26820 and 26820**, nor does it have a valid agreement or transfer with the said allottees to transfer valid title to it. Therefore, the Plaintiff/Applicant lacks the necessary *locus standi* to institute this application.

Further that the Defendant/Respondent is not in occupation of, nor in trespass, encroachment and/or interfering with the stated suit properties. However, the said suit properties had encroached on the Defendant/Respondent's property being **LR. No. 23962**, which the Defendant/Respondent has owned and occupied since **1998**. The Defendant/Respondent attached its title deed as annexure **SMT 1**.

Further that the Plaintiff's/Applicant's suit properties have encroached on the Defendant's property **LR. No. 23962** and several communications have been exchanged between **Thika District Surveyor** and the **Deputy County Commissioner**, to find a solution to the said overlap.

It was further alleged that the Plaintiff/Applicant's application is a blatant attempt to mislead the court and is an abuse of the Court process and waste of the Court's time and should be dismissed with costs.

The Court directed the parties to canvass the application by way of written submissions. The Plaintiff/Applicant filed its submissions on **10th February 2020**, through the Law Firm of **Ndung'u Mwaura & Company Advocates**.

The Defendant/Respondent failed to file its written submissions as directed by the Court.

The Court has now considered the instant application and the annexures thereto. The Court has also considered the other pleadings and the written submissions as filed by the Applicant herein.

The Applicant has alleged that it is the owner of **Plots No. 26819, 26820 and 26821**, in Thika Municipality and that the Defendant/Respondent has encroached on the said properties by digging trenches thereof in preparation for construction of permanent houses. The Respondent has filed Grounds of Opposition and averred that the applicant lacks requisite *locus standi* to bring this application as it has no valid legal or beneficial title to the suit property.

However, in its annexures, the Plaintiff/Applicant annexed letters of allotment that were issued to **M. M. Enterprises** dated **26th February 1999** for **plot No. 26819**, and **Francis Ngugi** and **James Thiongo** for **plot LR. No. 26820**. There is also a sale agreement dated **20th November 2003**, wherein the Plaintiff/Applicant allegedly purchased **plots No. 26819, 26820 and 26821** from **M. M. Enterprises, Francis Ngugi** and **Charles Njuguna**. Therefore, from the above documents, unless contrary evidence is produced, the court finds and holds that the Plaintiff/Applicant has beneficial interest over the three suit properties.

The Plaintiff has alleged that the Defendant/Respondent has trespassed and encroached on the three mentioned plots and has dug trenches in readiness for construction of permanent houses. The Defendant/Respondent has not denied the fact that it has dug the said trenches as is evident from the photographs attached.

However, the Defendant/Respondent has alleged that there is an overlap of the three properties with the Defendant's property being **LR. No.23962**. The Defendant attached a copy of the title deed to prove the said ownership.

On whether there is overlap or not of the **four plots**, that is a matter of evidence. The Court cannot find and hold at this stage of the proceedings whether there is an overlap or not. The said determination will have to await the calling of evidence, testing of the same in cross examination and evaluation of the tendered evidence. At this stage, the court is only mandated to arrive at a finding of whether the applicant has met the threshold for grant of injunctive orders. The threshold was set out in the case of **Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358**, where the court held:-

"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420."

Further in the case of **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, the court held that:-

"In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria"

Has the applicant satisfied the above criteria?

The Plaintiff/Applicant purchased the three suit properties in 2003. Though no title deeds were produced, at least a sale agreement confirming such purchase is attached to the application. The applicant has alleged that the Defendant/Respondent has dug trenches on its parcels of land in readiness for construction of permanent structures. The Defendant has not denied such digging of the trenches. Though the Court would require evidence to confirm whether the said trenches are on the Plaintiff's parcels of land or the Defendant's, the court finds that the evidence of digging of trenches is prima facie proof that the substratum of the suit properties would be interfered with. Thus this Court finds and holds that the Plaintiff has established that it has a prima facie case with probability of success at the trial.

If the Defendant/Respondent is allowed to proceed and construct the permanent houses, that would change the topography of the area and in the event the Plaintiff/Applicant is a successful litigant at the end of the main trial, then it would have suffered an irreparable loss or damages which might not sufficiently be compensated by an award of damages. See the case of *Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR*, where the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.

On the balance of convenience, the court finds that it tilts in favour of maintaining the **status quo** and the **status quo** herein is not to allow any construction until the suit is heard and determined. See the case of *Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR*, where the Court of Appeal held that:-

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

Having carefully considered the instant Notice of Motion Application dated 2nd September 2019, the Court finds it **merited** and the same is allowed entirely in terms of prayers **No. 3** and **4** with costs to the Plaintiff/Applicant.

It is so ordered.

Dated, signed and Delivered at Thika this 24th day of September, 2020

L. GACHERU

JUDGE

24/9/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference

Mr. Mwangi holding brief for Ndungu Mwaura for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

L. GACHERU

JUDGE

24/9/2020