



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
E AND L CASE NO. 2 OF 2013

HARIET NKUENE KIRIMANIA & 9 OTHERS.....Plaintiffs

VERSUS

CONSTATINE MARTIN KITHINJI GITOBU.....1ST Defendant

M'KIRIMANIA M'IKIUGU.....2ND Defendant

R U L I N G

There are 2 Applications herein. The 1st one dated 3rd January, 2013 and filed by the Plaintiffs seeks orders:

1. **THAT the application be certified extremely urgent and it be heard ex- parte in the first instance, during this Christmas vacation for the High Court of Kenya.**
2. **THAT pending inter-partes hearing of the application, a temporary injunction be issued restraining the defendant/respondent, his family members, representatives, assigns, employees, servants, agents and/or anybody else claiming or acting for, through or on his behalf, from entering into, trespassing onto, utilizing and/or whatsoever interfering with the plaintiffs'/applicants' peaceful, quiet, uninterrupted and undisturbed actual possession, occupation, user and enjoyment of Plot No.11A together with the permanent commercial premises, situate in Kithurine market.**
3. **THAT the order issued as above be served upon the O.C.S., Nkubu police station & the chief of Chure location to ensure compliance & maintenance of peace and order.**
4. **THAT pending hearing and determination of the suit or until further orders of the court, a temporary injunction be issued restraining the defendant/respondent, his family members, representatives, assigns, employees, servants, agents and/or anybody else claiming or acting for, through or on his behalf, from entering into, trespassing onto, utilizing and/or whatsoever interfering with the plaintiffs'/applicants' peaceful, quiet, uninterrupted and undisturbed actual possession, occupation, user and enjoyment of Plot No.11A together with the permanent commercial premises, situate in Kithurine market.**
5. **THAT costs of the application be provided.**

The 2nd one dated 9.1.2013 and filed by the Defendant seeks Orders:

(A) **THAT this Application be certified as urgent and be heard exparte in the first instance during the Christmas vacation**

(B) THAT the Hon. Court be pleased to restrain the Defendants and their agents from interfering with the peaceful occupation of plot No.11A KITHIRUNI Market by the Plaintiff in the Counter claim until this Application is heard interpartes.

(C) THAT prayer B to be confirmed until this suit is heard and determined.

(D) THAT the costs be provided for.

The 1st Application was brought under a Certificate of Urgency by the Plaintiff and was heard ex-parte on 4th January, 2013. Interim Orders were granted in terms of prayers 2 and 3 pending Inter Partes hearing of the Application.

The 2nd Application also came to Court by way of a Certificate of Urgency and was heard ex-parte on 14.11.2013. No Interim orders were granted. In this Application Constatine Martin Kithinji Gatobu is cited as the Plaintiff/Applicant whereas in the Application dated 3rd January, 2013 he is cited as the Defendant/Respondent. Be it as it may, this situation may spawn unwarranted confusion. I will, therefore, for purposes of this ruling refer to him as the Defendant. I will also refer to the originators of the suit, Harriet Nkuene and the nine others as the Plaintiffs.

The Plaintiffs have submitted that the 1st Plaintiff is the wife of the 1st Defendant and the 2nd to 10th Plaintiffs are the offsprings of the union between the Plaintiff and the 2nd Defendant. They argue that the suit property is family property bought with the concerted efforts of the Plaintiffs and the 2nd Defendant from the proceedings, inter alia, of their farm and that they had all contributed towards its development. Although the suit plot is registered in the name of the 2nd Defendant, it was so registered in his name as a trustee for himself and all the Plaintiffs. It was also submitted that the suit property was exclusively occupied by the 2nd Plaintiff and had never been transferred to the 1st Defendant, the alleged purchaser.

It was submitted, being a family property, the Plaintiffs attached profound sentimental value to it which could not be compensated in monetary value terms should the suit property not be preserved pending the hearing of the suit herein. As they were in possession of the suit property, it was submitted that the balance of convenience tilted in their favour. They also submitted that their averments showed that their suit had an overwhelming chance of success. They prayed that their Application dated 3.2.2013 be allowed and the Defendant's Application dated 9.1.2013 be dismissed.

The Defendant has submitted that he is an innocent purchaser for value and that this is a plot and not a parcel of land. He argues that the Plaintiffs are in occupation of 15 acres of land which is family land and therefore the sale of the suit plot would not make the Plaintiffs destitute.

It was submitted that the existence of an agreement for sale was proof that the 1st Defendant had a *prima facie* case. It was denied that a relationship of husband and wife existed between the 1st Plaintiff and the Defendant. By extension, the Defendants were denying that the 2nd to 10th Plaintiffs were the children of the 2nd Defendant.

It was also submitted that the suit plot had already been transferred to the 1st Defendant after payment of the apposite consideration.

The Defendant prayed that his Application dated 9.1.2013 be allowed and the Plaintiff's Application dated 3.1.2013 be dismissed.

I have examined the pleadings, averments, submissions and the authorities proffered by the parties. As enunciated in the case of **Mbuthia Vs Jimba Credit Finance Corporation [1988] KLR**, decisions in Interlocutory Applications should look at the relative weight of the evidence proffered by the parties. Courts should not rule on issues which need to be canvassed during the hearing of the main suit. The court of Appeal said:

“The correct approach in dealing with an Application for an interlocutory injunction is not to

decide the issues of facts but rather to weigh up the relevant strength of each side's propositions. The lower Court Judge in this case had gone beyond his proper duties and made final findings.”

Issues such as whether the 2nd Defendant held the suit property as a trustee and whether the 1st Plaintiff was the wife of the 2nd Defendant can only be fully canvassed during the hearing of the main suit. And so is the question regarding whether the 2nd to 10th Plaintiffs are the children of the 1st Plaintiff and the 2nd Defendant.

I am satisfied that the Plaintiffs have demonstrated the existence of the ingredients required before a Court can grant an injunction as enunciated in the case of **Giella Vs Cassman Brown [1973] E. A.** I find that the Defendant has not satisfied the ingredients including irreparable loss and balance of convenience.

In the circumstances, I allow the Plaintiffs Application dated 3.1.2013 and dismiss the Defendant's Application dated 9.1.2013.

Costs shall be in the cause.

Delivered and dated in Open Court this 4th day of October, 2013 in the presence of:

Cc. Mwonjaru/Daniel

Miss Kiome h/b CarlPeters Mbaabu for Plaintiff/Applicant

Ogoti present for Defendant/Respondent

P. M. NJOROGE

JUDGE