



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 3 OF 2020

SAMUEL NG'ANG'A KIAMBUTHI.....PLAINTIFF/APPLICANT

VERSUS

ERIC MUNENE GITONGA.....ST DEFENDANT/RESPONDENT

CLEMENT GICHOHI KUNGU.....ND DEFENDANT/RESPONDENT

CHRISTOPHER WARUINGI.....RD DEFENDANT/RESPONDENT

WILSON MBUKI.....TH DEFENDANT/RESPONDENT

SAMUEL MACHARIA.....^{5TH} DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **15th January 2020**, by the Plaintiff/ Applicant seeking for orders that;

1. THAT the orders of the Honourable Court be enforced by the O.C.S Ruiru Police Station.

2. THAT pending the hearing and determination of this suit, the Defendants/ Respondents, their agents, servants, employees and/or nominees or whosoever be restrained by an order of injunction from trespassing, harassing, wasting, depositing any materials, construction or in any other way from interfering with the Plaintiff's/Applicant's property known as Ruiru/ Ruiru East Block 2/2049 situated in Ha Tom area, Murera, in Kiambu County.

3. THAT costs of this Application be borne by the Defendants/ Respondents.

The Application is premised on the grounds that the Plaintiff/ Applicant is the absolute registered owner of the suit property in view of the title deed issued on **6th February 2019**, and that the same is acknowledged by the Defendants/ Respondents. Further that sometimes in **2018**, the Defendants/ Respondents invaded, encroached and/or trespassed into the suit property and started subdividing it and constructing temporary and also semi-permanent structures thereon. That the Plaintiff/Applicant reported the invasion to the Police and was issued with **OB No. OB/22/06/03/2018**. Further that the Defendants/ Respondents have stated that they will not stop the invasion and though the Plaintiff/ Applicant has written to the Defendants/ Respondents, they have turned violent and threatened to continue with the illegal constructions. That the Plaintiff/ Applicant stands to suffer repairable damages if the illegal and unlawful actions are allowed to continue.

In his supporting Affidavit sworn on **15th January 2020**, **Samuel Ng'ang'a Kiambuthi**, reiterated the contents of the grounds in support of the Application and averred that he purchased the suit property from **Nyakinyua Investment Company**, in the year **1974**, through purchase of shares in the said company. He averred that in the same year, he was cohabiting with one **Njoki Kiambuthi**, as his wife and since the said **Nyakinyua Land Company Limited**, was at the time allocating their land to women only, he nominated the said **Njoki Kiambuthi**, to be allocated the land pending the issuance of the title deed. It was his contention that in **1972**, the said **Njoki Kiambuthi** left him and that he had not seen her since then. Further that he would occasionally visit the suit property to confirm that no one was trespassing on the same. That in **2018**, when he visited the suit property, he found that the Defendants/ Respondents had invaded the suit property without his consent, uprooted the warning poster and constructed temporary and semi-permanent structures. That he reported the matter to the Police and then visited **Nyakinyua Investment Company** to confirm the status of the suit property and he found that the suit property was still registered in the name of his nominee **Njoki Kiambuthi**. He further averred that he attended at least two Nyakinyua Board meetings and presented his case, upon which he surrendered his share certificate and the ballot to the Company and on **5th April 2018**, he was issued

with a clearance letter from the Company. He further averred that he presented the clearance letter at Thika Lands Registry and supported it by an Affidavit stating the reasons as to why the letter showed that the land belonged to **Njoki Kiambuthi**. It was his contention that the ownership of the suit property is undisputed.

That when the Defendants/Respondents continued with the trespass, he lodged a claim at the **Ruiru Senior Principal Magistrates Court**, unaware that the Court lacked jurisdiction due to the monetary value. That the Court allowed him to lodge his claim before this Court. It was his contention that the Defendants/ Respondents will suffer no harm or prejudice if the Application is granted as they should not be allowed to benefit from their illegality. Further that he stands to suffer loss and damage, as a result of, malicious damage to his property if the injunction is not granted. That it is in the interest of **justice** and **equity** that the Application is granted.

The Application is opposed and **Eric Munene**, the 1st Defendant/ Respondent herein swore a Replying Affidavit on **6th February 2020**, on behalf of his **Co Defendants** and averred that at the time they purchased portions of the suit property, it had no title and that the allottee was **Njoki Kiambuthi** who had instructed that the land be sold to them. That upon purchase of their portions of the subdivided land from **Gate Visual agents**, they were either issued with a share certificate or a sale agreement or both. It was his contention that at the time they bought the suit property, the Plaintiff/ applicant was not registered as the owner and that the suit property was vacant.

He contended that they all moved in and constructed residential houses and that they have lived on the suit property since then. It was his further contention that the Plaintiff/ Applicant acquired the title over the suit property through dubious means after the Respondent had developed the suit property. That this Application is improper as the Defendant are already residing on the suit property.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. It is the Court's considered view that the issue for determination is **whether the Plaintiff/ Applicant has met the threshold for grant of temporary injunctive orders**.

The Plaintiff/ Applicant has sought for temporary injunctive orders, which are equitable orders granted at the discretion of the Court. In determining whether or not to grant the orders sought, the Court is guided by the principles set out in the case of **Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358**: These principles have been expounded severally by courts in various other decisions:-

“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.”

Therefore, the Applicant had a duty to establish that he has a *prima-facie* case with probability of success. A *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

Has the Plaintiff/ Applicant herein established a prima facie case? It is not in doubt that the Plaintiff/ Applicant is the registered owner of the suit property. He has contended that he bought the suit property from Nyakinyua Investment Company Limited, through his then wife one Njoki Kiambuthi, when he bought shares from the said company. However, the Defendants/ Respondents have averred that the title to the suit property was fraudulently acquired by the Plaintiff/ Applicant. It was the Defendant's contention that they bought subdivisions of the suit property when the same was sold out to them upon instructions from the said Njoki Kiambuthi.

As a registered owner, the Applicant is deemed to be an absolute and indefeasible proprietor whose proprietorship can only be challenged as provided by the law. See **Section 26(1) (a)&(b)** of the **Land Registration Act**. The Defendants/ Respondents have averred that they bought the suit property from Gate Visual Agents. However, the Court having perused the documents produced by the Defendants/ Respondents, the Court notes that the sale agreements indicates one **Zacharia Gichiri Kariuki** as the vendor of an alleged **plot No.15** on the suit property, Further the receipts of payment were issued by a **Geomark Investments**, other Sale Agreements indicates a **Gate Visual Investment** as the vendor. Though the said Vendors have been indicated as the Vendors in the said sale agreements, there is no evidence of their ownership of the suit property or even any interest they might have over the suit property. Though the Court takes cognizance of the fact that where there are contentious issues the Court ought not to determine the same at the interlocutory stage, it is however the Court's considered view that a party who seeks to have its interests protected must show what interest it has over the said suit property. The Defendants/ Respondents herein have not shown any interest they have at this particular stage.

The Plaintiff/ Applicant has therefore established he has an interest over the suit property by his production of title of ownership. The Plaintiff being the prima facie owner of the suit property and given that he has alleged that the Defendants/ Respondents are interfering with his use and enjoyment over the suit property, it is not in doubt that his rights over the suit property have been infringed upon by the Defendants/ Respondents. Therefore, the Court finds and holds that the Plaintiff/ Applicant has established a prima facie case with probability of success as his rights can only be curtailed in accordance with the law.

On whether the Plaintiff/ Applicant will suffer irreparable harm. ‘Irreparable loss’ was described in the case of Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015, as *simply injury or harm that cannot be compensated by damages and would be continuous.*

The Defendants/ Respondents have acknowledged that they are in possession of the suit property and therefore it is not in doubt that having taken possession of the suit property, the Plaintiff/ Applicant is being deprived of his rights over the suit property. In the Case of Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.

Equally in this case the Court finds that if the Applicant’s rights are infringed, no amount of money can compensate such infringement. Consequently, the Court finds that the Applicant has established that it is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the third limb of *if the Court is in doubt then it ought to determine the matter on the balance of convenience*, the Court is not in doubt at all.

Having now carefully considered the **Notice of Motion Application** dated **15th January 2020**, brought by the Plaintiff/Applicant herein, the Court finds it merited and the same is allowed entirely in terms of **prayers no. 3, 4 and 5**.

It is so ordered.

Dated, signed and Delivered at Thika this 1st day of October 2020

L. GACHERU

JUDGE

1/10/2020

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 – Microsoft Teams Platform

No appearance for the Plaintiff/Applicant

Mr. Njuguna Kiarie for the 1st, 2nd, 3rd, 4th and

5th Defendants/Respondents

L. GACHERU

JUDGE

1/10/2020