



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 240 OF 2018

(FORMERLY NAIROBI ELC 182 OF 2016)

DOROTHY WAMUYU MUCHIRI.....PLAINTIFF/ APPLICANT

VERSUS

MOSES MWANGI WAWERU.....DEFENDANT/RESPONDENT

RULING

On **19th September 2018**, the Court made a Ruling with regards to two Applications. This Court in its Ruling dated **14th June 2019**, reviewed the said Ruling and set it aside. It is the two Applications that are coming up for determination.

The 1st Application is the Plaintiff/ Applicant's Notice of Motion Application dated **29th February 2016**, seeking for orders;

1. That an order of injunction do issue restraining the Defendant herein either by himself, his employees, agents, servants relatives spouses or by anybody else whatsoever from charging, mortgaging, transferring, entering, trespassing thereon, erecting any structure or structures thereon, receiving any rent from any tenant therein or in any other way whatsoever dealing with parcels of land known as L.R 4953/43/II in Thika town, pending hearing and final determination of this suit.

2. That the Officer in charge Commanding Thika Police Station does ensure that order 2 hereof is strictly complied with.

3. That cost of and incidental to this Application be provided for.

The Application is premised on the grounds that the Plaintiff's late husband known as **Onesmus Muchiri Titi**, who was an elder brother to the Defendant had during his lifetime purchased some properties in common trust with the Defendant, most of which were registered in the Defendant's name although they had contributed the money in equal shares. That the Defendant has been benefitting from the proceeds of the suit property in term of **house rent** and **tea payments** and that the family of **Onesmus** has been pursuing the issue of subdivision of the said assets. That the family of the late **Onesmus Muchiri** has taken possession of the plot with rental houses and that instead of the Defendant/Respondent arranging to have the said plot transferred to the Plaintiff/ Applicant on behalf of the family members, he is in the process of taking a loan from **Equity Bank of Kenya Limited**. That unless restraining orders are issued, the Plaintiff/Applicant and her children will suffer irreparable loss,

In her Supporting Affidavit the Plaintiff/ Applicant **Dorothy Wamuyu**, averred that her husband and the Defendant/Respondent have always jointly owned the assets and they should have the assets in issue transferred to the Plaintiff and her children, and also have the issue of division of the said assets. That the suit property was purchased around **1969** or **1970** for **Kshs.55,000/=** from a close relative of **Ms. S.P Punka Advocate**, in whose office the Defendant/ Respondent was working. She contended that the property would have been sold for **Kshs. 80,000/=**, but the Defendant/Respondent negotiated the same and hence the plot was registered in the name of the Defendant. She further averred that the Defendant/Respondent and her husband contributed a sum of **Kshs.15,200/=** each and they obtained a loan in respect of the balance of the purchase price, and they deposited their title deed in respect of another parcel of land they had purchased, being **Ndarugu/Kamunyuka/177**, as security for the loan and the said loan was repaid by proceed from the **tea payments** made from the tea bushes,

That on **21st November 2015**, the issue of the parcel of land was deliberated upon by the elders and the area Chief and they held that the suit property should be owned by her family, and she immediately took possession. That she learnt that the Defendant was in the process of securing a loan with the title deed of the suit property as security and if he succeeds, the Applicant together with her children may suffer.

The Application was opposed and the Defendant/Respondent, Bartholomew **Joseph Waweru**, swore Replying Affidavit on **18th March 2016**, and denied purchasing the suit property together with the deceased **Onesmus Muchiri**. It was his contention that the only asset they purchased jointly was **Ndarugu/Kamunyuka/177**, which was registered in their joint names. He further averred that the invasion of his

property by the Plaintiff's son is a criminal act which had been reported to the authorities. That the only time his brother claimed the plot he bought in Thika was in the **Land Disputes Tribunal Case No. 20/1987**, wherein it was ruled that **L.R Ndarugu/ Kamunyaka/177**, was a property owned jointly by him and his brother and he was advised to make his claim in Court of competent jurisdiction.

Further that there were no assets to be divided between his family and that of the Plaintiff. He contended that he purchased the plot exclusively by obtaining a **Charge** on the property from **Grindlays National Bank**, and the loan repayments were made by deductions from his salary. Further that **L.R 177**, was charged with the **Standard Bank** in **1973**, as his brother wished to obtain funds to develop plot **No. 6 Kaibere**, which was his own plot. He contended that the loans to **National** and **Grindlays Banks** were repaid by deductions to his salary and since **1970**, when he purchased the suit property, he has exercised full proprietorship rights.

That on **21st November 2015**, the Plaintiff/Applicant with the area Assistant Chief, called some elders and proceeded to deliberate on his properties among them the suit property and he informed them of the illegal nature of their act. He contended that the Plaintiff/Applicant cannot suffer by him collecting rent from his property because she has no legal or equitable right. He further averred that being the registered owner, he is entitled to all the benefits from his property.

The 2nd Application for determination is the **Notice of Motion Application** dated **3rd July 2017** by the Defendant seeking for orders that;

1. That the Plaintiff/ Respondent be restrained by an order of this Court from interfering in any way with the Defendant's/ Applicant's management of land L.R 4953/43/ 11 , until the hearing and determination of this suit.

2. That the Respondents does pay the costs of this Application.

The Application is premised on the grounds that the Defendant/ Applicant is the owner of the suit property. That the Defendant / Applicant has had occupation, care and control of the suit property since **1974** until **December 2015**, when the Plaintiff's/ Respondent's son forcefully gained entry into the premises and made it impossible for the Defendant/ Applicant to access the premises. Further, the Plaintiff's/ Respondent's son has since been collecting rent and the Applicant is apprehensive that the Respondent may be unable to refund the amounts collected. That until their interest in any way is established by the Court, the Plaintiff/ Respondent is a trespasser,

In his supporting Affidavit, **Bartholomew J. Waweru** averred that he is the sole owner of the suit property which comprises rental units as well as a section that he had occupied. That in **December 2015**, the Plaintiff's/ Respondent's son invaded the suit property and made it

impossible for him to collect rents and access the property. That he reported the matter to Thika Police Station, but they were reluctant to

help him and the Plaintiff/ Respondent filed the instant suit and an Application but it is almost two years since the Application was filed but there is no determination.

He contended that he was apprehensive that the Plaintiff/ Respondent may be unable to pay him the sums they have already taken, and since he is unable to access the property, he is apprehensive that the same may suffer waste. Further as, the owner of the suit property, he needed the Court's protection to manage it and he urged the court to bar the Plaintiff/ Respondent from collecting the rent.

The Application is opposed and the Plaintiff/ Respondent **Dorothy Wamuyu Muchiri**, swore a Replying Affidavit on **7th August 2018**, and averred that her husband who was the Defendant's brother and the Defendant/ Applicant purchased assets together and the same were registered in the name of the Defendant/Applicant, who used to pursue the said transactions in her husband's absence as he was well versed with the issue by virtue of being an Advocate's clerk.

She denied that the Defendant/ Applicant was the sole owner of the suit property as the suit property had been purchased by both brothers through **bank loans** obtained while giving the title documents as security. She contended that when her husband sought to have joint ownership reflected on the ownership documents, the Defendant/ Applicant disowned her husband's entitlement with the said ownership and a dispute arose which dispute was reported to the elders and the Chief and their verdicts were in favour of her husband. However, the elders did not have the powers to cancel the title. That most of the assets are around their rural home and have been purchased from people of the said area and as such the joint ownership is well known. She averred that there are similar cases involving other assets and the Courts have had the view that the main suits do proceed for hearing to finalisation instead of granting temporary orders. She further averred that the Defendant's/ Applicant's wife has assaulted her son, when he went to one of the parcels of land and the police have always referred them to the Courts when they complained.

She urged the Court to find that the asset in issue was purchased by both the Applicant and his brother, both of whom used to benefit from the said assets together.

The Applications were canvassed by way of written submissions which the Court has carefully read and considered. It is therefore the Court's considered view that the issues for determination are;

1. Whether the Plaintiff/ Applicant is entitled to the orders sought

2. Whether the Defendant's/ Respondents Application dated 3RD July 2017 is merited.

1. Whether the Plaintiff/ Applicant is entitled to the orders sought

The Plaintiff/Applicant has sought for orders restraining the Defendant/ Respondent from dealing with the suit property until the hearing and

determination of the suit.

In deciding whether or not grant injunctive orders sought the Court is guided by 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.”

Has the Plaintiff/Applicant herein established a prima facie case? 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.”

Is there a right that apparently has been infringed? It is the Plaintiff's/ Applicant's contention that the Defendant/Respondent together with her late husband bought the suit property jointly and therefore her family and herself are entitled to the suit property. However, the Plaintiff/ Applicant has not provided any documentation before this Court to show that she has a right over the suit property. It is not in doubt that the Defendant/ Respondent is the registered owner of the suit property and without any evidence by the Plaintiff/ Applicant to show that she has any rights over the suit property which rights are likely or may have been infringed, it is the Court's considered view that the Plaintiff/ Applicant has not established a prima facie case.

The Court notes that the Plaintiff/Applicant seeks to rely on alleged meeting held by the Assistant Chief when the said Assistant Chief and the elders made a determination that she and her family were entitled to the suit property. However, it is not in doubt that the said meeting had absolutely no jurisdiction or even powers to make a determination over the ownership of the suit property or even any property and therefore their determination or otherwise in the Court's considered view was **null** and **void** and could not in any way confer any rights upon the Plaintiff/ Applicant over the suit property. Consequently the court finds and holds that the Plaintiff/ Applicant has not established that she has a prima facie case.

The principles as set out in the case of Giella ...Vs... Cassman Brown requires that the Applicant meets all the three limbs. These principles are sequential in order so that if one of them fails, then it follows that the others automatically fails. See the case of Kenya Commercial Finance & Co. Ltd...Vs... Afraha Education Society (2001) 1EA 86, where the Court held that:-

“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella.vs..Cassman Brown & Co. Ltd 1973 EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed. (emphasis mine).”

The Court having found that the Plaintiff/Applicant has not established a prima facie case with probability of success, it then follows that the other two principles on whether the Applicant will suffer irreparable loss and whether the balance of convenience lies in her favour automatically fails. Therefore, the Court finds and holds that the Plaintiff/Applicant has not met the threshold for grant of injunctive orders, and is not entitled to the orders sought.

2. Whether the Defendant's/ Applicant's Application dated 3rd July 2017 is merited.

The Defendant/ Applicant has also sought for injunctive orders seeking to restrain the Plaintiff/Respondent from interfering with the management of the suit property until the hearing and determination of the suit. Having also sought for injunctive orders the Defendant/ Respondent is also bound to satisfy the Court that he has met the principles as set out in the case of Giella...Vs... Cassman Brown.

It is not in doubt that the Defendant/ Applicant is the registered owner of the suit property, It is further not in doubt that the Plaintiff/ Respondent's son evicted the said Defendant/Respondent from the suit property and has been collecting rent for the suit property. As the registered owner of the suit property, the Defendant/Applicant is prima facie the absolute and indefeasible owner and is therefore entitled to all the rights and privileges thereto. By being deprived the **use** and **enjoyment** of the rights therefore, it is the Court's considered view that the Defendant/ Applicant has established a prima facie case as per the definition of a **prima facie** case as set out in the case of Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (supra)

Having found that the Defendant/Respondent has established a prima facie case, the Court must go further and establish whether the said Defendant/Applicant will suffer irreparable loss. **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 Plaintiff/Respondent has acknowledged that she took possession of the suit property and that it is her family that is currently managing the suit property. The Defendant/ Applicant has averred that the said Plaintiff's/Respondent's son has been collecting rent from the said property and not remitting to him. The Court further finds and holds that the Defendant/ Applicant will suffer irreparable loss that cannot be compensated by way of damages. More so because an owner of a suit property cannot be expected to take damages in lieu of his rights over

the suit property. See 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”.

Therefore, the Court finds and holds that the Defendant/ Applicant will suffered irreparable loss. More so because the Court has also held that the Plaintiff/ Respondent has not establish a prima facie case and not shown to the satisfaction of the Court that she has any rights over the suit property.

The third Principle is that if the Court is in doubt then it is required to decide the case on a balance of convenience. The Court is not in doubt.

Having considered the available evidence, the Court finds and holds that the Defendant/ Applicant has met the threshold for grant of the injunctive orders and is therefore entitled to the orders sought hence his Notice of Motion Application dated **3rd July 2017**, is merited.

The Upshot of the foregoing is that the **Notice of Motion Application** dated **29th February 2016** , is found **not merited** and the same is dismissed entirely with costs to the Defendant/Respondent.

However the **Notice of Motion Application** dated **3rd July 2017** is found **merited** and the same is allowed entirely with costs to the Defendant/ Applicant.

It is so ordered.

Dated, signed and Delivered at Thika this 3rd day of December, 2020.

L. GACHERU

JUDGE

3/12/2020

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

No Appearance for the Defendant/ Respondent

L. GACHERU

JUDGE

3/12/2020