



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.741 OF 2017

FRANCIS MBAYA KIMANI).....1ST PLAINTIFF/APPLICANT

(Administrator of the Estate of ESTHER WANGUI KIMANI)

SAMUEL GIKONO GITEE).....2ND PLAINTIFF/APPLICANT

(Administrator of the Estate of ELIZABETH WANJIRU GITEE)

VERSUS

DOMINIC NJENGA KIRUTHI.....1ST DEFENDANT/RESPONDENT

LIMURU SUB-COUNTY.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR, KIAMBU COUNTY...3RD DEFENDANT/RESPONDENT

RULING

By a **Notice of Motion** dated **11th September 2017**, the Plaintiffs/Applicants have sought for injunctive restraining orders against the Defendants/Respondents seeking orders that the said Defendants/Respondents be restrained by themselves, their servants, agents and/or employees from alienating and in any manner and way interfering with land parcel **No.Plot 92/133 Rongai Market**, situated in **Limuru, Kiambu County** pending the hearing and determination of this suit.

The application is supported on the grounds that the Plaintiffs/Applicants are the legal allottees of the suit land having been allotted the same in **1967**, and that the Defendants/Respondents have illegally encroached on the same by acquiring an illegal title deed over the same.

The application is also supported by the **Supporting Affidavit** jointly sworn by the Plaintiffs/Applicants herein, who averred that they are the administrators of the estate of **Esther Wangui Kimani** and **Elizabeth Wanjiru Gitee alias Wanjiru Gikonyo**, who were allocated the suit plot in **1967** by the **Kiambu County Council**, and have been carrying business thereon since then. However, when the Plaintiffs/Applicants tried to sell the suit property six years ago, they were given Clearance Certificate by the 2nd Defendant/Respondent and it showed that they did not owe any money. Further that the 1st Defendant started building on the suit property in **November 2016**, after the passing on of the sole surviving joint legal allottee.

It was their contention that the 1st Defendant/Respondent has had the land illegally and fraudulently transferred in his favour despite being an illegal allottee. It was their contention that they are the legal allottees but the 1st Defendant/Respondent is building on the said land without their consent and he should be stopped and evicted from thereon to give vacant possession to the Plaintiffs/Applicants.

This application is contested and 1st Defendant/Respondent filed a **Replying Affidavit** and averred that the application lacks merit and should be dismissed. It was his contention that the allotment letter referred by the Plaintiffs/Applicants does not refer to any identifiable plot and with the LR Number, then the Plaintiffs'/Applicants' claim has no legal basis. He also contended that his plot is **LR.No.Limuru Town/133**, while the Plaintiffs'/Applicants' claim is for **Plot No.Limuru Town 92**, which has no relationship with the 1st Defendant's/Respondent's plot. It was his contention that he purchased **LR.No.Limuru Town/133**, from one **Reuben Mbugua Gichana** upon performing all due diligence and he obtained his Certificate of title on **5th January 1996**. That he took up possession immediately and no one had any claim until the **year 2010**, when **Esther Wangui Kimani**, placed a **Caution** on the suit plot claiming that she has allotment letter for **LR.No.Rongai Market/92**, which was distinct from his plot. He also contended that the 1st Plaintiff/Applicant had also filed **SPMCC No.329 of 2015** in **Limuru Court** seeking for his eviction which suit is still pending in court. He also contended that if the construction which he started in

2016 is stopped and wherein he has injected **Kshs.3 million**, he will suffer irreparable loss as the excavated parcel of land is risky as the soil therein is hanging and may collapse if not supported. He urged the Court to dismiss the instant application. The 1st Defendant/Respondent also filed a **Preliminary Objection** and urged the Court to dismiss the suit on the grounds that:-

i. The entire suit is bad in law as it does not disclose any cause of action.

ii. That the suit is time barred.

The Plaintiffs/Applicants filed a **further Affidavit** and averred that their plot is **No.92/133 Rongai Market**, whereas the 1st Defendant's/Respondent's is **Limuru Town/133**, and therefore the 1st Defendant/ Respondent should restrict himself to his said plot.

The application was canvassed by way of written submissions which this Court has carefully considered. The Court has also considered the annexures to the application and the cited authorities.

The 1st Defendant/Respondent has raised a **Preliminary Objection** which this Court will have to determine first before embarking on the merit of the instant **Notice of Motion**.

A **Preliminary Objection** was described in the **Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696**, as:-

“...So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of Limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further, a **Preliminary Objection** has the effect of bringing a matter to an end preliminarily. See the case of Quick **Quick Enterprises Ltd...Vs...Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings.”

The 1st Defendant/Respondent has alleged that the suit herein is bad in law as it discloses no cause of action. Further, that the suit is time barred. If the Court is to find that there is no cause of action and that this suit is time barred, then the Court would have no option but to strike out the suit. Therefore, what the 1st Defendant/Respondent has raised herein is a **Preliminary Objection** as described in the **Mukisa Biscuits Case (supra)**

Is the **Preliminary Objection** herein merited?

The 1st Defendant/Respondent has alleged that the suit is bad in law as it discloses no cause of action. He averred that the Plaintiffs/Applicants allotment letter issued in **1967** for **Plot No.92 Rongai Market** but no Certificate of Lease was issued. It is trite that **Preliminary Objection** is raised purely on points of law and no facts should be ascertained. For court to arrive at a finding or whether a Lease was issued out, it will have to ascertain facts herein. Further, that the Plaintiff/Applicant have not pleaded fraud on the part of 1st Defendant/Respondent in obtaining the Certificate of title. It is trite that court of justice strive to sustain suits rather than terminate them through a summary dismissal. Striking out is a draconian action which should only be resorted in very plain and obvious cases which cannot be salvaged by amendments. See the case of **DT Dobie & Co Ltd....Vs...Joseph Mbatia Muchina & Another, Civil Appeal no 37 of 1988**, where the Court of Appeal expressed itself as follows;

“A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon on plain and obvious cases and the discretion should be exercised with extreme caution. The Court must see that the plaintiff has no case at all either as disclosed in the statement of claim or in such affidavits as he may file with a view to amendment and must not dismiss an action really because the pleadings was highly impossible and one which was difficult to believe could be proved”

The court went on further to hold that:-

“A court of Justice should aim at sustaining a suit, rather than terminating it by summary dismissal”

See also the case of **Francis Kamande....Vs...Vanguard Electrical Services, Civil App.No.152 of 1996**, where the Court of Appeal held that:-

“No suit can be dismissed unless it is so hopeless and it is plainly obvious that it discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment”.

Further, the 1st Defendant/Respondent has alleged that the suit is time barred. However, the Plaintiffs/Applicants alleged that the 1st Defendant/Respondent started to construct on the suit plot in **November 2016**, or after the death of the remaining surviving sole proprietor. Therefore, the Court finds that this **suit is not time barred and should not be struck out**.

The upshot of the foregoing is that the ***Court finds the Preliminary Objection herein not merited and the same is dismissed entirely with costs being in the cause.***

On the merit of the ***Notice of Motion*** dated ***11th September 2017***, the Court finds that it is seeking for injunctive orders which are equitable reliefs granted at the discretion of the court. See the case of ***Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554***, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

Further, the court is not called upon at this stage to decide the disputed issues with finality. See the case of ***Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999***, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

All that the court is supposed to determine is whether the Applicants has established the laid down criteria for grant of injunctive orders as stated in the case of ***Giella....Vs...Cassman Brown & Co. Ltd 1973 E.A 358***. These criterias 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.***

Have the Plaintiffs/Applicants herein established the above criteria?

The Plaintiffs/Applicants alleged that their mothers were allotted ***Plot No.92 Rongai Market, in Limuru Town in 1867***. However, they do not have Certificate of title to the said ***Plot No.92***. The 1st Defendant/ Respondent who holds a Certificate of title to ***Plot No.Limuru Town/133***, has alleged that he purchased the suit property from one ***Reuben Mbugua Gichana***, after carrying out due diligence in ***1995***. He was later registered as the owner of the suit property in ***1996***, as is evident from a copy of his title deed.

The issue of whether ***Plot No.92 Rongai Market*** and ***LR.No.Limuru Town/133*** is one and the same plot or whether they are two plots is not an issue to be determined at this interlocutory stage. That is an issue that can only be determined after calling of evidence in the main trial. The 1st Defendant/Respondent has a title deed to the suit property and has commenced construction. Injunctive orders are issued to an threatened event but not on an event that has already occurred. See the case of ***Jane Kemunto Mayaka....Vs...Municipal Council of Nakuru & Others, HCCC No.124 of 2005***, where the Court held that:-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure the Applicant and are not issued where such an event has taken place.....”

Even without determining the disputed issues at this interlocutory stage, the Court finds that the 1st Defendant/Respondent has a title deed and unless cogent evidence is brought forward, this Court finds no reason to restrain a title holder of such Certificate of tiles at the interlocutory stage.

No evidence has been tendered to show that the Plaintiffs/Applicants have been in occupation and that the action of the 1st Defendant/Respondent will cause irreparable loss or suffering to them. Further, the Court finds that it is not in doubt and will not decide this matter on a balance of convenience.

Having now carefully considered the instant ***Notice of Motion*** dated ***11th September 2017***, the Court finds that the Plaintiffs/Applicants have not established any of the grounds for grant of injunctive orders. The ***Court finds that the said application is not merited and consequently, the Court dismisses the Notice of Motion application dated 11th September 2018, entirely with costs to the 1st Defendant/***

Respondent.

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of March 2019.

L. GACHERU

JUDGE

29/3/2019

In the presence of

No appearance for Plaintiffs/Applicants

Mr. Mugo holding brief for M/S Muhuhu for the 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Lucy - Court Assistant

Court – Ruling read in open court in the presence of the above stated advocate.

L. GACHERU

JUDGE

29/3/2019