



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.863 OF 2017

AGNES WANGUI MUNYI.....PLAINTIFF/APPLICANT/RESPONDENT

VERSUS

STANLEY SHIUNDU AMUKAYA.....1ST DEFENDANT/RESPONDENT/APPLICANT

MOLYN CREDIT LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

The matters for determination before this Court are two *Notices Of Motion* Applications and a *Preliminary Objection*. The first is the Notice of Motion Application dated **1st September 2016**, by the Plaintiff/

Applicant. The second Application by the Defendant is the one dated **5th December 2017**. The Plaintiff/Applicant has also filed a *Preliminary Objection* dated **20th February 2018**, to the Defendant's Application. On the **13th of March 2018**, the Court directed that all the Applications be heard together.

The Application dated **1st September 2016**, by the Plaintiff/ Applicant herein sought for the following orders;

- 1. That pending the hearing and determination of the suit, an order of temporary Injunction do issue restraining the Respondents either by themselves, their servants or agents from entering, alienating, disposing, occupying or in any other manner from interfering with the Applicant's occupation and quiet possession of both LR No.Ruiru/Ruiru East Block 2/7210 and Plot A (formerly excised from Ruiru/Ruiru East Block 2/7211).**
- 2. That the OCS Ruiru Police Station do ensure compliance with an order that may be issued by this Court.**
- 3. That the cost of the Application be borne by the Respondents.**

The Application is based on the grounds stated on the face of it which are;- that the Applicant is the registered owner of **LR.No.Ruiru/Ruiru East Block 2/7210**, and she also purchased part of subdivision of **LR.No. Ruiru/Ruiru East Block 2/7211**, and the said portion has been described as **plot A**, in the approved subdivision and amalgamation plans. She has built a commercial building spread on both suit properties and the Defendants/Respondents are trying to dispossess her and evict her tenants forcefully by claiming that her land is **Ruiru/Ruiru East Block 2/9073**, which secured a loan and later sold under public auction, yet she has never taken a loan and the suit land is not the same one that the Defendants/Respondents are describing.

In her *Supporting Affidavit*, she averred that she bought **LR.No. Ruiru/Ruiru East Block 2/7210**, from **Peter Kimani Ng'ang'a** and transferred to her and she later bought a portion of that adjoining land owned by the same vendor, the subdivision was approved by the **District Physical Planning Officer, Thika** on **9th May 2011**, and identified as **Plot A** and the subdivision plan proposed the amalgamation of **Plot A** of **Ruiru/Ruiru Block 2 /7211 to Ruiru/Ruiru East Block 2/7210**, of which she was the registered owner. Further that the amalgamation was done and approved by the **District Physical Planning Officer** and the **Land Control Board** gave its approval as evidenced by **annexture AW-5**. Unfortunately the vendor died before they could finalize the process and Letters of Administration of his Estate have not been taken out. She averred that she had put a three storied building that has spread on both parcels of land which she has let to University students.

That on **3rd June 2016**, the **1st Defendant/Respondent** went to the building to levy distress as against **Peter Ng'ang'a Kimani**, claiming rent arrears for occupation and when she challenged the eviction, the **1st Defendant/Respondent** claimed to have purchased the premises from the **2nd Defendant/Respondent** for **Kshs.3,000,000/=** in **September 2015**, and averred that her building is not **Ruiru/Ruiru East Block 2/9073**, to which the late **Peter Kimani** had taken a loan from the **2nd Defendant/**

Respondent and put it up as security. She further averred that she is not a party to the Charge and she would suffer irreparable loss if her tenants are evicted.

The Application is opposed and the 1st Defendant/Respondent filed his **Replying Affidavit** on **19th October 2018**. He averred that he is stranger to the suit as he does not have any association to the properties quoted by the Plaintiff/Applicant and he has never levied any distress onto the properties **Ruiru/Ruiru East Block 2/7210** and **Ruiru/Ruiru East Block 2/7211**, as alleged by the Plaintiff/Applicant. He bought the

property **Ruiru/Ruiru East Block 2/9073** and it was transferred to him but the former owner **Peter Kimani Ng'ang'a** requested him to continue staying in the suit property and pay **Kshs.80,000/=** rent and when he defaulted amounting to **Kshs.480,000/=** owing from **January 2016 to June 2016**, he levied distress and an order to that effect was issued. He averred that the property being **Ruiru/Ruiru East Block 2/9073**, and the suit properties are distinct and separate and therefore the application is a waste of judicial time.

The 2nd Defendant/Respondent also in opposing the Application through its **Finance Director**, filed its **Replying Affidavit** sworn on **19th October 2016**, and averred that it's a stranger to the matter as it does not have any association with the properties quoted by the Plaintiff/Applicant. He averred that it's a **Credit and Financial Advisory Company** and has only transferred Title No. **Ruiru/Ruiru East Block 2/9073**, to the 1st Defendant/Respondent through its **Statutory Power of Sale** when **Peter Ng'ang'a Kimani**, defaulted on repayment of loan wherein he had charged the property in issue and upon transfer, it has never had any dealings with the said property. He alleged that the Plaintiff/Applicant was misadvised to enjoin it as the suit properties do not concern it and therefore the Application lacks merit.

The Defendant's/Respondent's Application is dated **5th December 2017**, brought under **Order 40 Rule2(2)** and **4** of the **Civil Procedure Rules** and **Sections 90** and **96** of the **Land Act 2012** and all other enabling provisions of law seeking the following orders;

- a) **That the Plaintiff/Respondent be ordered to deposit rent arrears from January 2016 to December 2017 of Kshs. 4,500,000/-**
- b) **That pending the hearing and determination of this suit the Plaintiff/Respondent be ordered to deposit monthly rent of Kshs.187,500/= to the Applicant on or before the 5th day of every consecutive month with effect from December 2017.**
- c) **That pending the hearing and determination of this suit the Plaintiff/Respondent be ordered to deposit monthly rent of Kshs.187,500/= to this Court on or before the 5th day of every consecutive month.**
- d) **That the Plaintiff/Applicant be ordered to deliver vacant possession of LR.No.Ruiru/Ruiru East Block 2/9073 to the 1st Defendant/Applicant.**
- e) **That the costs of this Application be provided for.**

The Application is based on the grounds that the 1st Defendant is the registered proprietor of **LR.No.Ruiru/Ruiru East Block 2/9073**, having purchased it through a public auction and upon completion of the purchase, the 2nd Defendant discharged the Charge and obtained a Consent to transfer after which a transfer was effected in his favour and a Title issued on the **18th January 2016**. Having invested on the suit property, he expected a return of monthly rent of approximately **Kshs.187,500/=**. He averred that the Plaintiff obtained orders through false misrepresentations.

In his **Supporting Affidavit**, the 1st Defendant/Respondent averred that he learnt through the **Star Newspaper** that the suit property was being auctioned, which auction was scheduled to take place on **5th August 2015**, and on the said date, he attended the auction and he successfully bid and was issued with a **Certificate of Sale** and a **Memorandum of Sale** and after payment a discharge was executed, they obtained the Consent and the transfer was registered and he was issued with a title deed.

It was his allegations that upon purchase of the suit property a son of **Peter Kimani** approached him to allow them manage the property sitting on the Title **No.Ruiru/Ruiru East Block 2/9073**, for a monthly rent of **Kshs.187,500/=**. He agreed to the proposal but when they continued to occupy the premises without paying rent, he levied distress for rent owing from the month of **January 2016 to June 2016**, and the Plaintiff has denied him access and she is a stranger as she was not a party to the sale. He averred that he instructed a rent valuer for the property. He urged the Court to balance the interests of both parties even where the Court finds that the Plaintiff/Applicant has established a *prima facie* case as the current *status quo* prejudices his rights.

The Application is opposed and the Plaintiff filed a **Replying Affidavit** on **22nd February 2018**, and averred that the Application is mischievous and an abuse of the Court process as the Defendant has failed to disclose to the Court that parties had filed submissions and awaiting a Ruling after she had filed an Application seeking injunctive orders and without Notice applied that the matter be transferred to Thika and sneaked in the instant Application. More so the Defendants are seeking mandatory order of injunction and they are yet to file their Defence. She averred that she has been advised by her Counsel on record that for the Defendant to be granted this order they must do it by way of a **Plaint, Counter-claim** or an **Originating Summons**. She wondered why the 1st Defendant has not enjoined **Erastus Kimani Ng'ang'a**, who approached him to manage the suit properties and further that though the 1st Defendant has filed other Applications in the lower Court the suit has been dismissed.

The Plaintiff also filed a **Notice of Preliminary Objection** dated **20th February 2018**, to the 1st Defendant's Application on the grounds that the 1st Defendant has made a claim of injunctive final orders without a substantive suit as the 1st Defendant has not filed a defence or Counter claim or a declaration.

The Applications were canvassed by way of written submissions. On her Application, the Plaintiff through the **Law Firm of Wanjohi Gachie & Co. Advocates**, submitted that she has proved her case for the injunctive orders and prayed to be granted the prayers as she is at risk of eviction. She relied on various decided cases amongst them the case of **Nelson Omolo Achola...Vs...George Omondi Ajwala(2013)eKLR**, in which the

Court in its dictum stated;

"The Plaintiff as the proprietor of the suit property has access, occupy and use the suit property. Failure to grant the orders sought would be tantamount to keeping the Plaintiff off the suit property which would cause irreparable harm to the Plaintiff."

Further on the 1st Defendant's Application, the Plaintiff in support of her **Preliminary Objection** submitted that the issue for determination is whether the Defendant's Application for final injunctive orders is appropriate and it lacks merit and urged the Court to dismiss it and this was reiterated with regards to the 1st Defendant's Application

The Defendants through the **Law Firm of Koceyo & Co. Advocates** also filed their written submissions on 25th November 2018 and submitted that the Plaintiff is not entitled to the prayers sought. They relied on various decided cases amongst them the case of **Paul Gitonga Wanjau... Vs....Gathuthi Tea farmers HCC NO.28 of (2015)eKLR**, in which the Court stated;

"By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, nor injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."

The Defendants despite being granted numerous opportunities failed to file submissions in support of their Application and in relation to the **Preliminary objection**.

The Court has now carefully considered the Applications and the submissions therein. The Court will first make a determination on the **Preliminary objection**. A plain reading of the 1st Defendant's application clearly reveals that the 1st Defendant/Applicant seeks orders of mandatory injunction. In considering an application for interlocutory mandatory injunction, a court must be satisfied that there are not only special and exceptional circumstances, but also that the case is plain and clear one. In the case of **Nation Media Group & 2 Others...Vs... John Harun Mwau [2014]eKLR**, the Court of Appeal held that:-

"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary injunction can only be granted in exceptional and in the clearest of cases."

Further In the case of **Robai Kadili Agufa & Another...Vs...Kenya Power & Lighting Co. Ltd [2015] eKLR**, the Court stated that:-

"The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. What is the Applicant's case then?"

The 1st Defendant has failed to file his Defence and Counter-claim in this instance matter. That being the case, how then is the Court supposed to decide on whether the case is clear or not. The only way that this Court would be able to determine on whether or not the case is clear is if the Court was able to look at the Defendants case. And in my opinion the only way the Defendant would have been able to put forth their case is by filing a Defence and a Counter claim. The Courts have held that for a Court to grant a mandatory injunction in the interim, the party must have put the said injunction in its claim. Therefore, the Court finds that the Plaintiff's **Preliminary Objection is merited and it is upheld**.

In the case of **James Archimedes Gichana...Vs...Pyrethrum Board of , Nakuru HCCC No.237 of 2007** as cited in the case of **Christopher Kanyi Nderitu & Another...Vs....Mwerua Farmers Cooperative Society (2017)eKLR**, the Court held that:-

"...where an applicant for injunction fails to demonstrate that he first sought an order of temporary injunction in his suit, his application is said not to be sound in either rule 1a and b of the said order and will be deemed to be incompetent."

Therefore in the absence of a Defence or Counter-claim the 1st Defendant's Application is therefore deemed incompetent.

Even if the Court was to consider the 1st Defendant's Application, the Court finds that the Application would hold water. The 1st Defendant is seeking for mandatory injunction, However just from the Plaintiff's Plaint and the reply to the Application, it is clear that the amounts of money that the 1st Defendant claim is disputed. The 1st Defendant has averred that he bought the plot of land from the 2nd Defendant and then one **Erastus Nganga** approached him to allow him to continue staying in the suit property and continue paying rent. The Court notes that in one instance the 1st Defendant states that **Peter Kimani** approached him while in another instance he claims that his son **Erastus Ng'ang'a** approached him. None of the two is a party to this suit and therefore this Court is unable to conclusively make a finding and in that case it is impossible to say that the case is a clear one. Consequently the **Defendants Application has no merit and it is dismissed**.

The Court will now deal with the Plaintiff's Application. The issue for determination for this Application is whether the Plaintiff/ Applicant has met the threshold for grant of Interlocutory Injunction. The principles for grant of injunction have long been settled in the celebrated case of Giella... Vs...Cassman Brown (1975)E.A., in which the Court held that an Applicant has to establish:-

- a) *Whether the Plaintiff has established prima facie case with a probability of success.*
- b) *Whether the Plaintiff will suffer irreparable injury.*
- c) *That the balance of convenience tilts in their favour.*

a) Whether the Applicant has established a prima-facie case with probability of success.

The Applicant has averred that she bought the suit property and Lr.No.Ruiru/Ruiru East Block 2/7210, which is now registered in her name for which she produced a title deed. She further alleged that that she got a portion of LR.No.Ruiru/Ruiru East Block 2/7211, now renamed **Plot A** upon approval of subdivision but was unable to complete the transaction due to the fact that the vendor died before there was completion. She has produced in this Court documentation evidencing her allegations. Further these allegations have not been refuted by the Defendants and even so as to whether or not the documentations are in order, it is a matter that will be determined during trial and the Court is unable to make a determination on this at this stage. See the Case of Hosea Kiplagat & 6 Others...Vs...National Environment Management Authority & 2 Others (2015) eKLR, where the court held that:-

“At the interlocutory stage the Court should not venture into making definitive findings of fact law and particularly where the affidavits filed are contradictory as the court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case”.

The Plaintiff has further averred that she has built hostels on the suit properties and produced evidence of the building together with the receipts. This Court notes that there is danger of the rights of the Plaintiff being violated as there is distress that has been levied and having in hand a title deed. It is the **Courts opinion that, a prima-facie case has been established.**

In the case of Nguruman Ltd...Vs...Jan Bonde Nielson & 2 Others, C.A No.77 of 2012, the Court held that:-

“We reiterate that in considering whether or not a prima-facie has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or is, threatened which violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bonafide question to raise as to existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities”

b) Whether the Plaintiff will suffer irreparable injury.

It is her contention that she has put up hostels that she receives rent from. The Plaintiff has also indicated that she has been in occupation since she bought the suit land. On the other hand there is evidence that the 1st Defendant has already proclaimed on the suit property and levied distress. If the injunction is not allowed, then there is a high likelihood that the Plaintiff may be evicted from the suit property and if in the end the Court will decide in her favour, then there is a likelihood that the Plaintiff will have suffered irreparable harm. In the Case of Joseph Siro Mosioma... Vs...Housing Finance Corporation of Kenya & 3 Others, Nairobi HCCC No.265 of 2007 (4R), the Court held that:-

“On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”

Therefore, the Court finds that unlike the 1st Defendant who is not in occupation and who is claiming rent arrears, and damages may be a proper remedy for him, the Plaintiff does not have this luxury. It is the **Courts opinion that the Plaintiff/Applicant is likely to suffer irreparable harm.**

c) Where does the balance of convenience tilts

As earlier stated the Plaintiff/Applicant is the person in occupation of the suit properties currently. The balance of convenience always tilts in favour of maintaining the status quo. Currently the Plaintiff/Applicant having been in occupation and also noting that she is the one who is likely to suffer more harm, the balance of convenience definitely tilts in her favour.

The Court finds that the Plaintiff/Applicant has met the threshold for grant of interim orders. Consequently, the Court allows the Plaintiff's/Applicant's **Notice of Motion** application dated **1st September 2016** in terms of prayer No.3 with costs to be borne by the Respondents herein. Further, the Court allows the Plaintiff's **Notice of Preliminary Objection** dated **20th February 2018** with costs to be borne by the 1st Respondent. However, the **Court dismisses the 1st Defendant's Notice of Motion** application dated **5th December 2017** with costs to the Plaintiff/Respondent .

It is so ordered.

Dated, Signed and Delivered at Thika this 3rd day of April 2019.

L. GACHERU

JUDGE

3/4/2019

In the presence of

Mr. Kiptoo holding brief for Mr. Gachie for Plaintiff/Applicant/Respondent

No appearance for 1st Defendant/Respondent/Applicant

No appearance for 2nd Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

3/4/2019