



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.227 OF 2018 (OS)**

**IN THE MATTER OF: SECTIONS 7 AND 3B OF THE LIMITATIONS OF ACTIONS ACT CAP 22**

**AND**

**IN THE MATTER OF: ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION OVER ALL THAT PARCEL OF LAND KNOWN AS RUIRU/RUIRU EAST BLOCK NO.2/5787 & RUIRU/RUIRU EAST BLOCK 2/5788.**

**BETWEEN**

**JULIUS KARANJA.....PLAINTIFF**

**VERSUS**

**ALICE MUTHONI KAHUNI.....DEFENDANT**

**RULING**

The matter for determination is the Notice of Motion application dated **13<sup>th</sup> August 2018**, brought by the Plaintiff/Applicant under **Section 3A of the Civil Procedure Act** and **Order 40** of the **Civil Procedure Rules** against the Defendant/Respondent seeking for orders that:-

***1) That the Honourable Court be pleased to issue an injunction and order that the Defendant, her servant, agents and/or person claiming under her name be restrained from entering, alienating, subdividing or registering any mutation, selling, offering for sale, transferring or in any other manner dealing with land parcel Nos.Ruiru/Ruiru East Block 2/5787 & Ruiru/Ruiru East Block 2/5788 pending the hearing and determination***

***of this suit.***

***2) That the Honourable Court be pleased to issue an injunction and orders that the Defendant, her servant, agents, and/or person claiming under her name be restrained from any activities of demolishing any structures in the suit premises pending the hearing and determination of this suit.***

***3) That the Defendant deposits the original mother title Nos. Ruiru/Ruiru East Block 2/5787 & Ruiru/Ruiru East Block 2/5788 in court pending hearing and determination of this suit.***

***4) That the orders herein be enforced by the officer in charge of station Juja Police Station.***

***5) That the court be pleased to make any other orders it deems fit.***

***6) That costs be in the cause.***

The Application is premised on the grounds that the parties herein had entered into a written contract for the purchase of the suit land and the Plaintiff/Applicant entered the suit property and took possession in **1999** and has developed the same and now has permanent structures in which he is in and control to the exclusion of all others. That the Plaintiff's occupation has been open without force, without permission or license and has been uninterrupted for a period exceeding twelve(12)years. Further that the Plaintiff/Applicant has already constructed permanent structures in the suit property and lives there and has got no other known home for him and his family but the Defendant/Respondent is now threatening to demolish his house and forcefully evict the Plaintiff/Applicant and resell the suit property and the Plaintiff will suffer irreparable loss and damage.

In his **Supporting Affidavit**, the Plaintiff/Applicant averred that on **4<sup>th</sup> November 1999**, he entered into an agreement for sale of the suit properties and has occupied and utilized the suit land since. He averred that the Defendant/Respondent was the owner of the **Ruiru/Ruiru East Block 2/172**, and later subdivided the same and the suit properties were excised from it each measuring approximately **0.0359 Ha.** as evidenced by annexure **JKM-2 the Mutation Form**. He further averred that despite registration of the new parcel numbers, the Defendant/Respondent has never transferred the suit properties to him nor has there been registration of the suit land to his name. He averred that he has taken occupation of the suit land and developed it and has further demarcated the suit properties in concise manner and fenced it. He then reiterated the grounds on the face of the application.

It was his contention that the Defendant/Respondent has however threatened to demolish his structures and sent strangers to his house claiming to have purchased plots from her and insisting on gaining entry to his property. He further averred that he will suffer irreparable loss if the Defendant/Respondent is allowed to proceed with illegal occupation and further harassment.

The application is opposed by the Defendant/Respondent who filed **Preliminary Objection** dated **24<sup>th</sup> September 2018**, and averred that the suit as filed is bad in law as adverse possession cannot be invoked in circumstances of such cases and an Applicant is a purchaser and can only enforce specific performance.

The Defendant/Respondent further filed a Replying Affidavit and denied allegations made in the Supporting Affidavit and averred that she has not transferred the suit land to the Plaintiff/Applicant as he refused to pay title fees. It was her contention that the Plaintiff/Applicant is denying other people access to their homes by blocking them as he is not the sole purchaser and as such the police visited the area and prevailed upon him. She further averred that other people owning plots have been forced to demolish a fence as they have no access. She averred that she is only demanding the Applicant to give other plot owners access and pay title fees of **Kshs.200,000/=** being **Kshs.100,000/=** per plot.

The Plaintiff/Applicant filed a further Affidavit and averred that the **Kshs.200,000/=** was not a term of sale and the title fees sought is an attempt by the Defendant/Respondent to rip where she has not sown as she sought to introduce new contractual terms to the agreement unilaterally. He averred that it was the Defendant's/Respondent's obligation to provide all the necessary consents transfer and original title deeds to the suit properties and execute all instruments of transfer to enable him register the suit properties in his name having paid the purchase price in full. He further averred that he has attempted to provide a road through his property for other purchasers and the plight of other plot owners and difficulties experienced are as a result of the Defendant's/Respondents illegal action.

It was his contention that he purchased the properties with clear boundaries and demand for access to third parties through the suit properties is unfounded and as such the Defendant/Respondent is infringing on his rights and confirms intentions to interfere with his quiet possession. He further alleged that his capable of handling all fees pertaining to the transfer of the suit property to his name as required by law as long as the Defendant/Respondent executes all the necessary documents to enable him register the property in his name.

The application was canvassed by way of written submissions to which the Court has now carefully read and considered.

The court will first deal with the Preliminary Objection. This is because of what is raised is found to be a real Preliminary Objection and is upheld, then it is capable of bringing the suit to an end preliminarily. See the case of **Quick Enterprises Ltd...Vs...Kenya Railways Corporation, Kisumu HCC 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 alone”.***

The Respondent herein has alleged that the suit as filed is bad in law as adverse possession cannot be invoked in circumstances of such a case.

The question now for determination is whether what the Respondent has alleged amounts to proper **Preliminary Objection**. **‘Preliminary Objection’** was described in the case of **Mukisa Biscuits Manufacturing**

**Ltd...Vs...West End Distributors Ltd (1969)** to mean:-

***“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.***

Further, it is clear that **Preliminary Objection** must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained. See the case of **Avatar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the Court held that:-

**“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

The Respondent in her submissions has alleged that the Applicant’s occupation has not been interrupted going by his pleadings. However, the Applicant has alleged that he has been in occupation of the suit property from the time of purchase which was in 1999. The Applicant alleges this allegation is not a pure point of law and the same should be disregarded.

Further, on whether the Applicant has been on continuous occupation or whether the said occupation has been interrupted is a matter of evidence which cannot be determined at the Preliminary Objection stage through a Preliminary Objection. The Respondent also averred that the Applicant herein is a purchaser of the suit property and his right can only be enforced through specific performance. This allegation of being a purchaser though not denied by the Applicant, he has alleged that his possession of the suit property became adverse as against the Respondent when the Respondent breached the contract. However, the Court finds that these are issues which can only be determined in the main trial.

Having carefully considered the available evidence and the submissions, the Court finds that the issues or objection raised by the Respondent are not pure points of law and do not fall under the description of what amounts to Preliminary Objection as stated in the case of **Mukisa Biscuits Case(supra)**.

For the above reasons, the **Court dismisses the Preliminary Objection with costs to the Applicant.**

On the **Notice of Motion** application dated **13<sup>th</sup> August 2018**, the Applicant has sought for injunctive orders against the Respondent over **LR.No.Ruiru/Ruiru East Block 2/5787 & 5788** pending the hearing and determination of the suit.

Since the Applicant has sought for injunctive orders, the principles to be applied herein are the ones laid down in the case of **Giella...Vs... Cassman Brown** and later repeated in other judicial pronouncements. See the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

**“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.”**

As the Court considers the above principles and juxtapose them with the available evidence, the Court will take into account that it is not supposed to determine the merit of the case. All the court is supposed to determine is whether the Applicant is deserving of the injunctive orders based on the usual criteria. See the case of **Edwin Kamau Muniu...Vs...Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

**“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All that the Court is entitled at this stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”**

The Applicant first needed to establish that he has a *prima-facie* case with a probability of success at the trial. *Prima-facie* case was described in the case of **Mrao Ltd....Vs...First American Bank Ltd & 2 others (2003) eKLR 125**, the Court described *prima-facie* case to mean:-

**“A prima facie case means more than arguable case. It means that the evidence must show an infringement of a right and the probability of success of the Applicant’s case at the trial”.**

It is not in doubt that the Applicant herein bought the two parcels of land from the Respondent in 1999. There is a Sale Agreement attached to the Applicant’s pleadings. The Respondent has not denied having sold the said parcels of land to the Applicant. However, the Respondent contention is that the Applicant has failed to pay **Kshs.200,000/=** for title deeds acquisition. The said contention has been denied by the Applicant. The issue of payment of **Kshs.200,000/=** is a contested issue which can only be determined after calling of evidence at the main trial. Further the Respondent has not denied that she has trespassed on the Applicant’s parcels of land and even attempted to demolish structures thereon. It is evident that the Applicant has constructed his residential home on the suit land. The issue of non-payment of **Kshs.200,000/=** can be addressed through a claim of the same as civil debt but not threatening to demolish the Applicant’s structures on the suit property. The Court finds that the Applicant has established that he has a *prima-facie* case with probability of success.

On the second limb of whether the Applicant will suffer irreparable loss, it is evident that on the suit property stands the Applicant’s family home. The Respondent has not denied the same. If the Respondent is allowed to alienate the suit property and/or demolish the said family house, then the Applicant will indeed suffer irreparable loss which cannot be compensated by an award of damages. The Court in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, described **‘irreparable harm’** as **simply injury or harm that cannot be compensated by damages and would be continuous.**

As the Court has observed, on the suit land, stands the Applicant’s family home. If the same is demolished, the Applicant will suffer irreparably and lack of quiet enjoyment of one’s home and the state of living in fear of having the home demolished or sold off cannot be adequately compensated by an award of damages.

On the third limb of if the court is in doubt to decide on a balance of convenience, the court finds that it is not in doubt. However, if it is to decide on the said balance of convenience, the same shifts in favour of the Applicant who has his family home on the suit land and has lived thereon for a long time.

The Applicant has sought for the deposit of the original mother title **Ruiru/Ruiru East Block 2/5787 & 5788** to court pending the hearing and determination of this suit. Since there is a dispute as to whether the Applicant is supposed to pay **Kshs.200,000/=** for acquisition of the said title deeds, the court finds that the best thing herein is to secure or preserve the said title deeds. For the above reasons, the Court finds that prayer No.6 is also deserving.

On the enforcement of the orders herein, by **OCS Juja Police Station**, the Court finds that there is no evidence that the Respondent will disobey the Court Orders herein. There would be no need to involve the police at this juncture. See the case of **James B. O. Anunda...Vs... Rose Anunda (2016) eKLR**, where the Court held that:-

***“My view is that the Plaintiff has not established a basis upon which the security agencies ought to be called upon to ensure observance of law and order. Security agencies ordinarily have no role to play in civil disputes involving litigants and they ought not to be involved by being enjoined as parties. The participation of the security agencies ought to be limited to instances where there could be breach of the peace necessitating their being called upon to ensure the observance and the maintenance of law and order..... Indeed there is no provision in the Civil Procedure Rules for use of the security agencies for execution of court orders”.***

Having now carefully considered the instant **Notice of Motion** dated **13<sup>th</sup> August 2018**, the Court finds it merited and it is allowed entirely in terms of **prayers no.3,5,6** with costs being in the cause.

It is so ordered.

**Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of September 2019.**

**L. GACHERU**

**JUDGE**

**12/9/2019**

In the presence of

M/S Gichio for the Plaintiff/Applicant

M/S Kirama holding brief for Mr. Kihete for Defendant/Respondent

Lucy - Court Assistant

**Court** – Ruling read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**12/9/2019**