



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 73 OF 2017**

**ALBERT MWANIKI NYAGA.....PLAINTIFF**

**VERSUS**

**JOSPHAT NTHIGA GACONI.....1<sup>ST</sup> DEFENDANT**

**GACONI KAMWAGIRE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a plaint dated 11<sup>th</sup> April 2017 and filed on 11<sup>th</sup> May 2017, the Plaintiff sought the following reliefs against the Defendants;

- a. A permanent injunction against the Defendants restraining them from carrying on any activities on land parcel No. Mbeere/Mbita/2192.*
- b. An order evicting the Defendants, their family members, servants and/or agents from land parcel No. Mbeere/Mbita/2192 owned by the Plaintiff.*
- c. An order compelling the Officer Commanding Kiritiri Police Station to aid with the eviction of the Defendants, their family members, servants and/or agents.*
- d. Mesne profits for the occupation and use of the property.*
- e. Costs of this suit.*

f. The basis of the suit was that the Plaintiff was the registered proprietor of *Title No. Mbeere/Mbita/2192* (hereinafter referred to as the “suit property”) and that the Defendants and their families had refused to vacate the suit property despite demand. The Plaintiff further pleaded that he had already entered into a sale agreement with third parties for the sale of a portion of the suit property and that if he defaulted, he stood to pay heavy penalties.

g. Contemporaneously with the filing of the suit, the Plaintiff filed a notice of motion also dated 11<sup>th</sup> May 2017 under certificate of urgency seeking various interim orders. The material ones for the purpose of this ruling are;

*a. That pending the hearing and determination of this suit, a temporary injunction do issue against the Defendant/respondents restraining them from carrying on any activities on Land Parcel No. Mbeere/Mbita/2192. (sic)*

b. That pending the hearing and determination of this suit, an order do issue against the Defendant/Respondents evicting them and their families, servants and/or agents from land parcel No. Mbeere/Mbita/2192 owned by the Plaintiff/Applicant. (sic)

c. That orders do issue to the Officer Commanding Kiritiri Police Station to aid with the eviction of the Defendant/Respondents.

d. The grounds for the application were the same matters pleaded in the plaint. The application was supported by an affidavit sworn by the Plaintiff on 11<sup>th</sup> April 2017 which reiterated his averments in the plaint. He contended that the Defendants' continued occupation and enjoyment of the suit property was financially detrimental to him and a violation of his constitutional right to property. He annexed a copy of the title deed and copies of two sale agreements.

e. The Defendants entered an appearance through the firm of E.K. Njagi & Co Advocates and filed a notice of preliminary objection dated 25<sup>th</sup> September 2017 to the said application and suit. There is no indication in the court file that a replying affidavit was filed. The Defendants raised the following objections in the said preliminary objection;

a. That the motion as taken out, drawn and filed is a non-starter, incurably defective and unsustainable.

b. That the motion as drawn and filed is res judicata.

c. That the Applicant is guilty of pertinent material non-disclosure which forms the very core of the instant suit and as such does not deserve the orders sought.

d. That the Applicants' misrepresentation of material facts and lack of candour is clearly manifest in the pleadings which renders it undeserving of the orders sought.

e. That as such the motion and the entire suit as drawn is bad in law, incompetent, an abuse of the process of the court and improperly before this court.

f. The Applicant is thus not entitled to the remedy sought.

g. When the said application came up for hearing on 25<sup>th</sup> September 2017, the parties agreed to submit on both the preliminary objection and application so that they are decided together. The parties further agreed to file and exchange written submissions within 42 days. The court fixed the matter for mention on 13<sup>th</sup> November 2017 to confirm compliance and fix a ruling date.

h. On 13<sup>th</sup> November 2017, the parties informed the court that they had not yet filed their submissions and they requested for more time. The court thereupon fixed the matter for ruling on 22<sup>nd</sup> February 2018 and allowed the parties to file and exchange submissions within 45 days. However, by the time of preparing the ruling only the Plaintiff had filed his submissions.

i. The court shall consider the preliminary objections raised by the Defendants first. The nature of a preliminary objection was aptly described by **Sir Charles Newbold P.** in the case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd [1969] EA 696 at page 701** as follows;

**“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.”**

9. If the above test is applied to the Defendants' notice of preliminary objection dated 25<sup>th</sup> September

2017, it is obvious that most of the matters raised do not constitute a preliminary objection properly so called. Most of them would require further particular and investigation of facts. The allegations relating to *res judicata*, non-disclosure of material facts, and mispresentation would certainly require additional particulars and material evidence to establish hence not suitable for determination in such a summary manner.

10. The 1<sup>st</sup> and 5<sup>th</sup> objections allege that the application is incurably defective, bad in law, incompetent, and improperly before the court. Such objections are capable of determination as preliminary objections since they raise pure points. However, in the instant case, there are no particulars to enable the court and the Plaintiff to know precisely the nature of the defect, incompetence, or impropriety. The Defendants have not specified in what manner the law has been violated and which particular law has been violated by the Plaintiff. The court finds that these preliminary objections are vague and ambiguous hence incapable of determination.

11. The result of the foregoing is that the court finds no merit in the Defendants' notice of preliminary objection dated 25<sup>th</sup> September 2017 and the same is hereby dismissed. The court notes that the Plaintiff did not address any of the preliminary objections in his submissions hence is not entitled to costs. The Defendant's notice of preliminary objection is therefore dismissed with no order as to costs.

12. The court shall now consider the Plaintiff's application for an eviction order and an order for the OCS Kiritiri Police Station to aid in the eviction. In the absence of a replying affidavit and defence, the Plaintiff's averments in his application and suit remain uncontroverted. The court accepts that he is the registered owner of the suit property. The court also accepts that the Plaintiff has established a *prima facie* case with a probability of success at the trial within the meaning of the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**.

13. The second principle for the grant of an interlocutory injunction relates to adequacy of monetary damages. An injunction will not normally be issued unless the Plaintiff might otherwise suffer irreparable damage which cannot be adequately compensated for by an award of monetary damages. The Plaintiff's case is crystal clear. He wants to sell a portion of the suit property. He has identified two buyers with whom he has signed two separate sale agreements. The monetary value of the portions he wants to sell is known. He now wants an eviction order to enable him complete the sale transactions.

14. In my opinion, the Plaintiff has not demonstrated that he would suffer any irreparable loss unless the orders sought are granted. It is clear from the suit and application that the only loss he may suffer is financial. It is quantifiable. It has not been demonstrated that the Defendants would be unable to meet any award of monetary damages. The court, therefore, finds that the 2<sup>nd</sup> ground has not been demonstrated hence the application must fail.

15. The court is also of the view that the Plaintiff's application must fail for another reason. The Plaintiff, as proprietor of the suit property, has sought an eviction order and an order for the OCS Kiritiri Police Station to aid in the Defendants' eviction in the plaint. In my view, he cannot be granted such final orders at the interlocutory stage before the hearing of the suit. As the court held in the case of **Faith Karimi Muchangi & 2 others Vs Peter Njeru Mvungu Embu ELC No. 2 of 2017**, if such orders were granted at the interim stage, the Plaintiff would have succeeded in having the suit concluded on the basis of an application only. In the said case, I held that;

**“A scrutiny of the plaint and application reveals that the Plaintiffs are seeking essentially the same reliefs in both. The only difference is that whereas the orders in the suit are sought on a permanent basis, the ones in the application are sought on a temporary basis pending the hearing and determination of the suit. The danger of granting such orders as sought in the application is that they may essentially dispose of the entire suit at the interlocutory stage.”**

16. For the above reasons, the court shall disallow the Plaintiff's notice of motion dated 11<sup>th</sup> April 2017. Costs of the application shall be in the cause. The Defendant's notice of preliminary objection dated 25<sup>th</sup>

September 2017 is also hereby dismissed with no order as to costs.

17. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22<sup>nd</sup> day of FEBRUARY, 2018**

In the presence of the Plaintiff in person and the 1<sup>st</sup> Defendant but in the absence of the 2<sup>nd</sup> Defendant.

Court clerk Njue/Leadys.

**Y.M. ANGIMA**

**JUDGE**

**22.02.18**