



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.702 OF 2017

MWANGI MUCHAI.....PLAINTIFF/APPLICANT

-VERSUS-

DANIEL WAINAINA MAKERI.....1ST DEFENDANT/RESPONDENT

SIMON CHEGE MURAYA.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **7th August 2017**, brought by the Plaintiff/Applicant herein seeking for the following orders:-

1) Spent.

2) Spent.

3) That this Honourable Court be pleased to issue orders of temporary injunction restraining the 2nd Defendant by himself and/or by his employees, servants and/or agents from interfering with the Plaintiff's occupation and quiet use and enjoyment of the suit land Loc.1/Chomo/20, pending the hearing and determination of this suit.

4) That this Honourable Court be pleased to issue a prohibitory order against the 2nd Defendant prohibiting him from carrying on any dealings with title to the suit land Loc.1/Chomo/20, pending the hearing and determination of this suit.

5) That the costs of this application be provided for.

This application is premised upon the following grounds:-

a) That the 1st Defendant has previously been the registered owner of all that parcel of land known as Loc.1/Chomo/20, having been so registered as proprietor on 10th February 2011.

b) That the 1st Defendant has however from information gathered from the 2nd Defendant disposed of the land to the 2nd Defendant, the latter who has effected transfer of the land into his names.

c) That the Plaintiff has been in possession of the suit land from the year 1964 when he

purchased the said land from Makeri Muriu to date. The said Makeri Muriu however passed on about the year 1968, before transferring the land to the Plaintiff.

d) That the Plaintiff has extensively developed the land by planting 500 coffee bushes, avocado trees, nappier grass, food crops and gravellia trees thereon.

e) That the 1st Defendant has in a fraudulent scheme crafted between him and the 2nd Defendant, alienated the suit land to the 2nd Defendant.

f) That the Plaintiff is therefore reasonably apprehensive that the 2nd Defendant may at any time illegally cause his eviction from the suit land occasioning him great detriment by destroying his developments on the suit land and thereby also defeating his claim for adverse possession that is still pending.

g) That it is mete and just to grant the orders sought herein.

The application is further supported by the *Affidavit* of **Mwangi Muchai**, the Plaintiff/Applicant herein who reiterated most of the contents of the grounds in support of the application and further averred that on **11th May 2012**, she filed a suit for adverse possession against the 1st Defendant, being **Nairobi HCCC No.258 of 2012 (OS)**, in which he stated that the 1st

Defendant's title to the suit land be declared extinguished on account of his adverse possession thereon for a period **in excess of 48 years** and that he be registered as the proprietor thereon. That the full suit is yet to be determined but the 1st Defendant his fraudulently transferred the land to the 2nd Defendant and consequently, the Assistant County Commissioner, Gatanga in a meeting held on **20th July 2017**, purportedly gave him until **1st August 2017**, to vacate from the suit land. Further that both Defendants come from the same village as the Plaintiff and therefore the 2nd Defendant is well aware of the dispute pertaining to the Plaintiff and the 1st Defendant and that Plaintiff has been in occupation of the suit land and so he is not an innocent purchaser for value without notice. He was therefore apprehensive that the 2nd Defendant might illegally cause his eviction from the suit land and consequently he urged the Court to preserve the status quo pertaining until the suit is heard and determined.

The 1st Defendant entered appearance through **the Law Firm of Mwicigi Kinuthia & Co. Advocates**, and opposed the instant Notice of Motion application. He filed his **Grounds of Objection** dated **22nd September 2017**, together with his **Replying Affidavit** even dated.

In his **Grounds of Objection**, the 1st Defendant/Respondent averred that the suit is bad in law and offends the provisions of Section 6 of the Civil Procedure Act as there is in existence another suit, **Nairobi ELC No.258 of 2012 (OS)** between the Plaintiff and the 1st Defendant over the same subject matter **LR.Loc.1/Chomo/20**. He urged the Court to dismiss the suit.

In his **Replying Affidavit**, the 1st Defendant/Respondent, **Daniel Wainaina Makeri**, averred that there is a similar suit involving the suit property and same parties herein being **ELC No.258 of 2012 (OS)**. He further averred that his advocate on record has informed him that there cannot be two suits on the same subject matter and same parties. He urged the Court to dismiss one of them. He further denied that the Plaintiff is entitled to claim of the suit property by adverse possession. It was his contention that the land herein first belonged to **Makeri Muriu**, who allowed the Plaintiff and his wife to cultivate the same. He urged the Court to dismiss the instant **Notice of Motion** application.

The 2nd Defendant/Respondent did not enter appearance nor file his **Replying Affidavit** and therefore he has not opposed the application.

The application herein was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the cited provisions of law and decided cases (authorities),

and the Court makes the following findings:-

Indeed the Plaintiff/Applicant filed this suit against the Defendants/Respondents and sought for various orders among them;- ***A declaration that the transfer of this suit land LR.Loc.1/Chomo/20, from the 1st Defendant to 2nd Defendant was fraudulent.***

Further, the 1st Defendant has raised an Objection to the effect that there is similar suit being ***ELC No.258 of 2012 (OS)***, involving the same parties and same subject matter. The 1st Defendant relied on Section 6 of the Civil Procedure Act which provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Indeed the Court has considered the provisions of the above stated Section of law and the pleadings in general and there is no doubt that there exist another suit in ***Milimani Court***, being ***ELC NO.258 of 2012(OS)***, wherein the Plaintiff has sought for a declaration that he is entitled to be registered as the proprietor of the suit property ***LR.Loc.1/Chomo/20*** by virtue of adverse possession. The said suit is ongoing.

The 1st Defendant has urged the Court to dismiss the suit herein. The Plaintiff has admitted existence of the two suits in court over the same parcel of land and same parties except for 2nd Defendant in the instant suit but averred that the cause of actions are different. The Plaintiff alleged that the first suit deals with the issue of adverse possession whereas the second suit deals with the issue of fraudulent transfer of the suit property from 1st Defendant to 2nd Defendant during the pendency of ***ELC No.258 of 2012 (OS)***.

Indeed the situation herein is the one referred to by Section 6 of the Civil Procedure Act, which provides that;- ***No court shall proceed with a trial of any suit in which the matter in issue is also directly or substantially in issue in a previously instituted suit.*** The previously instituted suit herein is ***ELC No.258 of 2012(OS)***. The matter in issue is ***LR.Loc.1/Chomo/20***, which is also directly and substantially in issue in ***ELC No.258 of 2012(OS)***, and involves the same parties. It is therefore mandatory that this suit cannot proceed while there is in existence a previously instituted suit being ***ELC No.258 of 2012(OS)***. The remedy herein is to stay this suit until the previously instituted suit is heard and determined.

However, it is evident that during the pendency of ***ELC No.258 of 2012 (OS)***, the 1st Defendant did transfer the suit property to the 2nd Defendant. This is not the proper juncture to determine whether the said transfer was fraudulent or not but it is evident that the Plaintiff in ***ELC No.258 of 2012(OS)*** is seeking to be declared the registered owner of the suit property by virtue of adverse possession. Since the suit property is now registered in the favour of 2nd Defendant, the 2nd Defendant may wish to exercise the rights of a registered proprietors such as right to possession

and occupation. That would mean the eviction of the Plaintiff/Application herein from the suit property. That would also be before his claim in ***ELC No.258 of 2012 (OS)*** has been determined.

It is therefore prudent to maintain the status quo herein. The *status quo* to be maintained is that the Plaintiff/Applicant is in possession and that *status quo* should be the one to remain in force until ***ELC 258 of 2012(OS)***, is heard and determined. As was held in the case of ***Noormohammed Janmohammed...Vs...Kassam Ali Virji Madham (1953) 20 LRK 8***;-

“the purpose of temporary injunction is to preserve the status quo”.

See also the case if ***Yego...Vs...Tuiya & Another (1986) KLR 726***, where the Court of Appeal held that:-

“The status quo that could be preserved was the status quo that existed before the illegal acts on the part of the defendant.....”

Therefore the Court finds that it is prudent to maintain the existing *status quo* that pertained before the suit property was transferred to the 2nd Defendant.

Having now carefully considered the instant ***Notice of Motion*** application dated ***7th August 2017***, and the annexures thereto, the Court finds that the Applicant has established the threshold for grant of injunctive orders as laid down in the case of ***Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358***. Consequently, the Court finds that the *status quo* herein

would best be maintained by allowing prayers No.3 and 4 of the instant ***Notice of Motion***. Further, the Applicant is entitled to costs of this application.

Consequently, ***the Court allows prayers No.3 and 4 of the Notice of Motion application dated 7th August 2017, with costs to the Applicant.***

Further as provided by Section 6 of the Civil Procedure Act, ***this suit is stayed until the hearing and final determination of ELC No.258 of 2012 (OS), which is pending at Milimani Environment and Land Court.***

It is so ordered.

Dated, Signed and Delivered at Thika this ***16th*** day of ***February 2018***.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

Mr. Anyonje holding brief for Mr. Mwicigi Kinuthia for 1st Defendant/

Respondent

In person- 2nd Defendant/Respondent (present)

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above parties and absence of the Plaintiff/Applicant

L. GACHERU

JUDGE

16/2/2018