



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC CASE NO.353 OF 2017**

SUSAN WAMBUI GITONGA.....PLAINTIFF/APPLICANT

-VERSUS-

THE REGISTERED TRUSTEE,

PCEA CHURCH BIBILION, LIMURU.....1<sup>ST</sup> DEFENDANT/RESPONDENT

THE CHAIRMAN,

PCEA CHURCH BIBILION, LIMURU.....2<sup>ND</sup> DEFENDANT/RESPONDENT

THE SECRETARY GENERAL,

PCEA CHURCH BIBILION, LIMURU.....3<sup>RD</sup> DEFENDANT/RESPONDENT

THE TREASURER,

PCEA CHURCH BIBILION, LIMURU.....4<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* application dated 17<sup>th</sup> March 2017, brought under various provisions of law and has sought for the following orders:-

- 1) That this Honourable Court be pleased to issue an order of prohibitory injunction restraining the Respondents and/or or their agents and/or servants from selling, dealing, entering, remaining and/or in any way whatsoever carrying out any illegal activities, including constructing and or erecting any illegal structures on the suit property or in any way whatsoever interfering with the Applicant's quiet possession of the suit property or any portion therefore pending the hearing and determination of this suit.
- 2) That this Honourable Court be pleased to issue an order of eviction against the Respondents from all that parcel of land known as Ruiru/Kiu Block 7/161.
- 3) That this Honourable Court be pleased to order the Respondent and/or their agents and/or servants to demolish any illegal structure erected on the suit property.
- 4) That in the alternative, this Honourable Court be pleased to issue an order allowing the Applicant to demolish any illegal structures erected on the suit property and the costs of such demolition be borne by the Respondents.
- 5) That this Honourable Court be pleased to issue an order directing the Officer Commanding Station (OCS), Mwihoko Police Station and/or officers acting under his orders and/or directions to enforce the orders of the Honourable Court.
- 6) That costs of this Application be provided for.

This application is premised upon the grounds stated on the face of the application and on the *Supporting Affidavit* of Jane Wanjiku

Kamau, the holder of the *Power of Attorney* granted to her by the Plaintiff herein *Susan Wambui Gitonga*. These grounds are:-

- 1) *That the Plaintiff/Applicant is the registered owner/ proprietor of all that property described as Ruiru/Kiu Block 7/161, having bought the same in the year 2005, from one Edward Gicheri Gitau, (now deceased) and the title documents thereto transferred to her in September, 2010.*
- 2) *That since the Plaintiff/Applicant purchased the property, she has never sold and/or transferred the same to the Defendants/Respondents and/or any other person and therefore she is still the sole proprietor of the said property.*
- 3) *That despite all evidence of ownership of the suit property by the Plaintiff/Applicant, the Defendants/Respondents without any color of right, justification permission or consent from the Applicant, have encroached onto the property and through their agents and/or servants, have begun constructing illegal structures on the property.*
- 4) *That the Plaintiff/Applicant has made several requests and demands to the Defendants/Respondents to vacate the property and stop the trespass to no avail.*
- 5) *That the Plaintiff/Applicant reported the matter to the Police who upon conducting investigations established that the property belongs to the Plaintiff/Applicant, but the Defendants/Respondents have blatantly refused and/or declined to stop the trespass or vacate the property.*
- 6) *That the Plaintiff/Applicant who is out of the country most of the time has left the property in the hands of her mother who uses the property for her daily subsistence.*
- 7) *That since the Defendants/Respondents have now dispossessed the Plaintiff/Applicant's mother of the said property as they are currently putting up illegal constructions on the property. As a result, the Plaintiff's/ Applicant's mother is now left with no means of survival at all.*
- 8) *That the Plaintiff/Applicant deserves to enjoy quiet possession of her property in a beneficial manner.*
- 9) *That the failure by the Defendants/Respondents to allow the Plaintiff/Applicant to enjoy possession of the suit property is causing untold suffering and misery to the Plaintiff /Applicant and her mother as they are not able to put the property to any beneficial use.*
- 10) *That if the orders sought in the application herein are not granted, the Plaintiff/Applicant will suffer injustice and irreparable loss and damage.*
- 11) *That it is in the interests of justice that the reliefs sought in the instant application are granted.*

In her *Supporting Affidavit*, *Lucy Wanjiku Kamau*, averred that the Plaintiff/Applicant bought the suit property from one *Edward Gicheri Gitau (deceased)* on 25<sup>th</sup> November 2005 after entering into a *Sale Agreement* with the said vendor and for purchase of *Ruiru/Kiu Block 7/161*, for a consideration of *Kshs.150,000/=*. She further averred that the said *Edward Gicheri Gitau* was the registered owner of the suit property having acquired a lease of *99 years* on 1<sup>st</sup> August 1996. She further averred that the said suit property was transferred to the Plaintiff/Applicant on 25<sup>th</sup> September 2010, after the Plaintiff paid fully the purchase price and met all the conditions as set out in the sale agreement dated 25<sup>th</sup> November 2005. Subsequently, the suit property was registered in the name of the Applicant on 8<sup>th</sup> October 2010 and a certificate of title (lease) was issued marked *JWK5*.

It was her contention that since the Plaintiff purchased the suit property, she has never sold and/or transferred or attempted to sell and/or transfer the same to the Defendants/Respondents and/or any other person. However, the Defendants unlawfully and without color of right or justification and consent of the Plaintiff trespassed onto the suit property, took possession and commenced construction of illegal structures thereon as shown by photographs annexed as *JWK 7(a-c)*. It was her further contention that the Plaintiff has severally requested the Defendants/Respondents to vacate the said property and stop the trespass to no avail. The Plaintiff has even reported the matter to *Mwihoko Police Station* vide *OB Report of No 30/26/07/2016*.

Further, it was contended that the Defendants/Respondents are currently putting up an illegal structure on the said suit property thus preventing the Plaintiff from utilizing the said property and this has caused pain and anguish to her. She therefore, urged the Court to allow the instant application.

The Defendants opposed the instant application by first filing a *Notice of Preliminary Objection* on 24<sup>th</sup> May 2017, which Objection was opposed by the Plaintiff. The Court directed the parties to canvass the said *Preliminary Objection* by way of *Written Submissions*. The

Plaintiff filed her submissions on 10<sup>th</sup> July 2017, but the Defendants failed to file their submissions and/or prosecute the said *Notice of Preliminary Objection*, wherein they had alleged the suit as drawn and filed was *fatally* and *incurably defective* as the Defendants are not persons known in law and have no capacity to sue and being sued.

After the defendants failed to prosecute the said *Preliminary Objection*, the same was marked as abandoned on 12<sup>th</sup> July 2017, and parties were directed to prosecute the instant *Notice of Motion*.

Subsequent thereto, the Defendants filed a *Replying Affidavit* sworn by *Samuel Kiarie Gikaru*, a Committee Member of the Council of

Elders of the **PCEA Church, Bibironi**. He averred that there is nobody known as registered trustee of **PCEA Church Bibironi, Limuru** registered or otherwise and the purported Defendants herein are not persons known in law. He further averred that **PCEA Bibironi Church** courtesy of the Presbyterian Foundation, a duly incorporated religious trust and registered in Kenya has been in exclusive and physical possession of the suit premises since the year **2002**. He also averred that the said Foundation entered into sale agreements of sale and purchase of the suit property herein **Ruiru/Kiu Block 7/161**, with one **Edward Gicheri Gitau**, the registered proprietor. That the said church purchased two plots from the said vendor, the other plot being **Ruiru/Kiu Block 7/160**. He alleged that the sale agreements for the two plots were entered and executed on **28<sup>th</sup> June, 2002** after the purchaser paid the full purchase price of **Ksh.130,000/-** per plot.

The deponent further averred that the said plots were sold with vacant possession and the purchaser was granted immediate possession. Thereafter, the purchaser requested the vendor to transfer the two plots to itself but the vendor breached the said sale agreements and only transferred one property being **Ruiru/Kiu Block 7/160**, but not **Ruiru/Kiu Block 7/ 161**, the suit property. However, the purchaser has been in possession of the suit property since **2002**, having **continuous, open, exclusive, undisturbed and uninterrupted occupation, use and enjoyment** of the suit premises without permission of the registered proprietor and therefore are entitled to be registered as the owners by virtue of adverse possession.

The deponent further deposed that if the orders sought are granted, the Defendants will suffer irreparable loss and damage as the orders sought have potential of being final in nature. He urged the Court to dismiss the Plaintiff's/Applicant's instant **Notice of Motion**.

The Court directed the parties to canvass the said **Notice of Motion** by way of **written submissions**. The Plaintiff/Applicant through the **Law Firm of Gumbo & Associates** filed the said **written submissions** on **25<sup>th</sup> July 2017**, and relied on various provisions of law and several decided cases. The Plaintiff urged the Court to allow the application since she is the registered owner of the suit property.

However, the Defendants once again failed to file their **Written Submissions**, even after being given several opportunities to do so. The matter was reserved for Ruling without the **Written Submissions** of the Defendants and at the date of writing this Ruling, there were no written submissions filed on behalf of the Defendants/Respondents.

The Court has now carefully considered the pleadings in general and the annexures thereto. The Court has also considered the **Written Submissions**, the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

There is no doubt that the Plaintiff/Applicant herein has sought for injunctive orders and mandatory injunction too. It is trite that injunctive orders are granted at the discretion of the Court. However, the said discretion must be exercised judiciously. See the case of **Giella...Vs... Cassman Brown & Co. Ltd, (1973) EA 358**, where the Court held that:-

***“The granting of an Interim Injunction is an exercise of judicial discretion and an appellate Court will not interfere, unless it is shown that the discretion has not been exercised judicially”***

However, the grant of the mandatory injunction by the Court stem from the inherent power of the Court as donated by Section 3A of the Civil Procedure Act. Further the grant of mandatory Injunction at the Interlocutory stage is done in very exceptional circumstances. See the case of **Bella Maison Ltd...Vs...Yaya Tower Ltd, Nairobi HCCC No.2225 of 1992**, where the Court held that:-

***“Mandatory Injunction can be granted under the inherent jurisdiction and not under Order 39 of Civil Procedure Act”.***

Further as the Court combs through the available evidence to determine whether the Applicant is deserving of the orders sought, it will take into account that at this stage, the Court is not entitled to make a final determination of the disputed facts. It is not supposed to delve into substantive issues and make a final decision on the disputed facts. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora and 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 view of the dispute before hearing oral evidence.”***

All that the Court is entitled to at this stage is to determine whether the Applicant is deserving of the injunctive orders based on the usual

criteria. The criteria to be considered is the one laid down in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358**, where the Court held that;

**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.**

Further, in determining whether to grant mandatory injunction which orders are only granted in very special or exceptional circumstances, this Court will be guided by the principle laid down in the case of **Kenya Breweries Ltd & Ano...Vs...Washington O. Okeyo (2002)/EA 109**, where it was held that:-

***“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special***

*circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application". See Volume 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948.*

There is no doubt that the Plaintiff/Applicant herein is the registered proprietor of the suit property **Ruiru/Kiu Block 7/161**, having been registered so on **8<sup>th</sup> October 2010**. There is also no doubt that the Plaintiff/Applicant entered into a sale agreement for purchase of this property from **Edward Gicheri Gitau (deceased)** on **25<sup>th</sup> November 2005**. There is no doubt that the Defendants also alleged that the Presbyterian Foundation on behalf of **PCEA Church, Bibironi** had also entered into a sale agreement with the said **Edward Gicheri Gitau (deceased)** for purchase of the same parcel of land **Ruiru/Kiu Block 7/161**, in the year **2002**.

However, the said **Edward Gicheri Gitau** breached the said sale agreement and failed to transfer the suit property to the said purchaser **PCEA Church, Bibironi**. The Defendants have in their possession a sale agreement. However, a sale agreement cannot supercede a certificate of title or lease. The Plaintiff/Applicant is the holder of a certificate of lease and on the face of it, then she is the absolute and indefeasible proprietor herein. See **Section 26(1)** of the **Land Registration Act** which states that:-

*“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as **prima facie** evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-*

*a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or*

*b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

The said title can only be challenged if it was acquired through **fraud, misrepresentation, illegally, unprocedurally** or **through corrupt scheme**. The Plaintiff's/Applicant's title has not been challenged under any of the above conditions. Therefore as a registered proprietor of the suit property who is deemed to be an **absolute** and **indefeasible** owner, the Plaintiff is entitled to enjoy her **rights** and **privileges** as provided by **Sections 24(a)** and **25(1) of the Land Registration Act** which provides as follows:

**Section 24(a)** of the said Act provides:-

**Subject to this Act—**

*a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*

Further under **Section 25(1)** of the said Act, provides as follows:-

*The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever,*

*but subject—*

*a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

Such rights include **access** to the property, **use, occupation** and **quiet enjoyment** of the same. The Applicant has alleged that the Defendants have encroached on the said suit property and have even constructed a structure thereon. The Defendants have not denied such occupation but they only stated that they are entitled to such occupation as they took possession in the year **2002** and have acquired right by virtue of adverse possession.

The issue of whether the Defendants are entitled to occupy the suit property by virtue of the sale agreement entered in the year **2002**, is not a matter that can be decided at this interlocutory stage. That is a disputed issue which can only be resolved after calling of evidence at the main trial. However, the Plaintiff/Applicant is the registered proprietor of the suit

property and there is no evidence that the same was acquired through **fraud** or **illegally**. Therefore she is entitled to enjoy her **rights** and **privileges** as a proprietor and the Court finds that the Applicant has established that she has a *prima facie* case with probability of success at the trial.

Having found that the Applicant has established that she had a *prima facie* case and that her rights have been infringed by the Defendants, this Court finds no reason to deal with the other conditions for grant of injunctive orders as they are sequential. See the case of **Kenya Commercial Finance Co. Ltd...Vs...Afraha Education Society (2001) 1EA 86**, where the Court held that:-

***“The sequence of steps to be followed in the inquiry into whether to grant an interlocutory injunction is sequential, so that the second condition can only be addressed if the first one is satisfied”.***

On whether the Applicant is entitled to mandatory injunction which orders if granted are capable of bringing this matter to a conclusion, the Court finds that there is no special circumstances that has been established to warrant grant of such mandatory orders. The issue of whether the Defendants are entitled to be registered as proprietors of suit property by virtue of adverse possession is a disputed fact which can only be decided after calling of evidence at the full trial. However for now, the Defendants should allow the Plaintiff/Applicant to enjoy her rights as a proprietor of the suit property. The Court finds that the Defendants should be prohibited from dealing with the suit property until the matter is heard and determined. Further, the Defendants should **voluntarily remove** and/or **demolish** any structures erected on the suit property and cease any further construction until the suit is heard and determined.

Taking into account that the Court finds no special circumstances to issue a mandatory order of eviction and/or demolition of the Defendants structure, the Court finds that it is necessary for the Defendants to voluntarily move out of the Plaintiff's suit premises and/or remove or demolish any of their structures on the said property until the suit is heard and determined. Failure to do so, the **OCS Mwihoko Police Station** to ensure that the orders issued herein have been complied with.

Having now carefully considered the Plaintiff's/Applicant's **Notice of Motion** application dated **17<sup>th</sup> March, 2017**, the Court finds it **merited** in terms of **prayers no. 1, 3 and 5**. The **Applicant is also entitled to costs of this application**.

However, on **prayer No.3**, the Defendants are **directed to remove or demolish the said structures within a period of 30 days from the date hereof**. **Failure to voluntarily** move and/or demolish the said structures within the given time, that is when the **OCS Mwihoko Police Station should ensure the said orders are complied with**.

Further, the parties are directed to comply with **Order 11** within a period of **45 days** from the date hereof. Thereafter, the parties to take a date for **pre-trial directions** before the **Deputy Registrar** and then set down the matter for **hearing** of the main suit so that the disputed facts can be resolved at once.

It is so ordered.

**Dated, Signed and Delivered at Thika this 9th day of March 2018.**

**L. GACHERU**

**JUDGE**

In the presence of:

Mr. Mochere holding brief for Malenye for Plaintiffs/Applicants

No appearance for Defendants/Respondents

Lucy - Court clerk.

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

**L. GACHERU**

**JUDGE**

**9/3/2018**