



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.524 OF 2017

MWANIKI KIRIKA.....PLAINTIFF/APPLICANT

-VERSUS-

MICHEAL NICHOLAS MWANGI.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's ***Amended Notice of Motion*** application dated **11th May 2017**, wherein the Applicant has sought for the following orders:-

- a) *Spent.*
- b) *Spent.*
- c) *That a temporary order of injunction be issued restraining the Defendant either by himself, his agents, servants, and/or employees from clearing, constructing, alienating, disposing, transferring or in any other manner whatsoever interfering with the Plaintiff's parcel of land comprised in title No.Thika Municipality/Block 11/821 pending the hearing and determination of this suit.*
- d) *That the Officer in Command, Thika Police Station be directed to assist and ensure compliance by the Respondent.*
- e) *That the costs of this application be awarded to the Plaintiff/Applicant.*

The application is premised on the following grounds and on the annexed ***affidavit*** of ***Mwaniki Kirika*** sworn on **10th May 2017**. These grounds are:-

- i) *The Plaintiff/applicant is the registered proprietor of the leasehold interest to all that piece of land known as/or otherwise described as Thika Municipality/Block 11/821.*
- ii) *That the Defendant has unlawfully, illegally and without any colour of right entered in the Plaintiff's said parcel of land and has commenced construction thereon.*
- iii) *That the Defendant's/Respondent's actions are highly injurious and prejudicial to the interest of the Applicant.*
- iv) *That the Defendant has hired goons who despite pleas from the Plaintiff to stop excavation and constructions have adamantly refused and have consequently threatened the Plaintiff with death if he ever set foot on the suit premises.*
- v) *That the Applicant is further apprehensive that if this Honourable Court does not grant the orders sought there may be bloodbath and the subject parcel of land may be wasted and alienated beyond his reach.*
- vi) *That the Applicant stands to suffer irreparable harm unless the Respondent is restrained from his actions.*

The Applicant ***Mwaniki Kirika*** in his ***Supporting Affidavit*** reiterated the contents of the grounds in support of the application and further averred that on or about **9th May 2017**, while on a routine check, he visited the suit premises where he is the registered owner and found out that there was an on-going clearing and construction of illegal structures on the suit premises. He annexed ***photographs*** of the ongoing

construction as **exhibit 2**. He further averred that upon inquiry from the workers hired to clear the land, he was directed to the Defendant/ Respondent who became hostile to the Applicant and threatened to harm him. However the Applicant managed to get his name and thus this suit.

He alleged that the Defendant's acts of entering, constructing and alienating the suit land is unlawful and illegal since the Applicant is in possession of the legal lease and certificate of lease. It was his further contention that the Respondent's actions are highly injurious and prejudicial to the interest of the Applicant and unless the Respondent is restrained, the Applicant stands to suffer irreparable harm. He urged the Court to allow his instant application.

The application is opposed and the Defendant/Respondent herein swore a **Replying Affidavit** on **7th July 2017**, and averred that he has been advised by his advocate on record that the instant application is incurably defective for lack of an affidavit in support of the same. He also averred that he is a stranger to all the allegations levelled against him by the Plaintiff. It was his contention that he has never claimed to be the owner of the suit property and he has never interfered with the same. He contended that he has no interest on the suit property and is neither a registered owner nor beneficial owner. He also denied ever having hired any goons as alleged by the Plaintiff herein and he urged the Court to struck out and/or dismiss the suit as the Plaintiff is on a fishing expedition. He further claimed that the whole suit is incompetent and that it ought to be dismissed and struck out accordingly.

The Applicant filed a further affidavit and averred that the Respondent is not candid with the Court as he had in fact commenced illegal construction on the suit property and only stopped the works upon being served with the Court Orders.

This application was canvassed by way of written submissions, which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law.

The Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others..Vs..Gatheru & Others (1990) KLR 554**, where the court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

It is also trite that at this interlocutory stage, the court is not supposed to determine the disputed issues with finality. The court is only supposed to determine whether the Applicant is deserving of injunctive orders sought. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & 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 views of the dispute before hearing oral evidence”.

The principles that should guide the court while determining whether to grant or not to grant the orders sought are the ones set out in the case of **Giella...Vs...Cassman Brown & Company Ltd 1973 E.A 358**. These principles are:-

- 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.***

Has the Applicant established the above stated criteria?

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success at the trial. The Plaintiff has alleged that he is the registered owner of the suit property, **Thika Municipality/Block 11/821**, and he attached a **Certificate of Lease** issued on **22nd May 1998** as an exhibit. The Applicant also attached a lease document registered under Registered Land Act on **13th May 1998** as exhibit too. Therefore relying on the two documents, the Court finds that the Plaintiff/Applicant *prima-faciely* is the **absolute** and **indefeasible** owner of the said suit property. Further as provided by Section 26(1) of the Land Registration Act, the Plaintiff's/Applicant's Certificate of Lease or title can only be challenged if it was acquired through **fraud, misrepresentation, unprocedurally** or through **corrupt scheme**. A finding of whether the said Certificate of lease was acquired through the above stated manner so that it can be challenged or impugned can only be made through due process or through a court process.

It is also evident that there are some construction or erection of structures on the suit property. The Plaintiff alleged that when he visited the site and found construction going on, he inquired on who had authorized the said construction and the workers took him to the Defendant/Respondent. The Defendant/Respondent had denied being the one on the site or suit property and has denied ever putting up any structures on the Plaintiff's alleged property. However, the Applicant has alleged that after he served him with the Court Order, the said construction did stop.

Though the Defendant has not owned up to the fact that he is the one putting up the alleged structures on the suit property, he has not denied that after he was served with the Court Order, the alleged construction stopped and that the workers on the site led the Plaintiff to him. That being the case, the Court finds that indeed the Plaintiff is the owner of the suit property and the Defendant/Respondent has encroached on it without justification. Therefore the ***Court finds that the Applicant has established that he has a prima-facie case with probability of success at the trial.***

Having found that the Plaintiff/Applicant has established that he has a *prima-facie* case with probability of success, the Court finds no reasons to deal with the other conditions stated in ***Giella...Vs...Cassman Brown (supra)*** as these conditions are sequential. See the case of ***Kenya Commercial Finance Co. Limited..Vs...Afraha Education Society (2001) 1EA 8Z***, where the court held that”-

“The conditions in the case of Giella ..Vs.. Cassman Brown for granting of temporary injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then the third condition can be addressed.”

The Defendant/Respondent had on his part alleged that the application herein is bad in law as it did not conform with the provisions of the Civil Procedure Rules such as failure to annex an affidavit to the ***Amended Notice of Motion*** and that the Civil Procedure Rules do not allow for amendment of Notice of Motions. However, the Court finds that the issues raised by the Respondent are procedural technicalities and do not go to the root of the application or affect the substantive issues raised. The Court will be guided by ***Article 159(2)(d)*** of the ***Constitution*** which behoves the court to uphold substantive justice but not to look so much at procedural technicalities. It states as follows:-

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a)

(b)

(c).....

(d) justice shall be administered without undue regard to procedural technicalities.

Further ***Order 51 Rule 10(2)*** provides that:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

Equally, in this matter, the Court finds that the issues raised by the Respondent are merely procedural technicalities that do not affect the substance of the application.

For the above reasons, he Court disallows the Respondent’s objection to the instant ***Notice of Motion*** application dated ***11th may 2017*** and ***finds that the Plaintiff/Applicant’s said application is merited and it is allowed entirely in terms of prayer No.(c) and (d) with costs being in the cause.***

It is so ordered.

Dated, Signed and Delivered at Thika this 20th day of April 2018.

L. GACHERU

JUDGE

In the presence of

M/S Cheserek holding brief for Mr. Tumu for Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk.

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

L. GACHERU

JUDGE

