



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.390 OF 2017

BONIFACE MAINA MWANGI.....PLAINTIFF/APPLICANT

-VERSUS-

LEONARD MBOCHA CHEGE.....1ST DEFENDANT/RESPONDENT

GEOFFREY CHEGE MBOCHA...2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* application dated **24th March 2017**, brought under Section 68(1) of the Land Registration Act No.3 of 2012, Order 40 Rules 1(a) and 1(b), Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of law. The Applicant has sought for the following orders:-

1) Spent

2) Spent

3) That pending the hearing and determination of the main suit:-

a) ***An eviction order do issue compelling the 1st and 2nd Defendants by themselves, their servants, agents and/or legal representatives to move out of the Plaintiff's/Applicant's suit property situated in Githunguri, known as Githunguri/Gathangari/3029.***

b) ***The Officer Commanding Station, Githunguri do oversee, supervise the enforcement and provide security for the enforcement of the order of eviction against the two Defendants/Respondents, their agents, servants and/or legal representatives.***

c) ***An injunction do issue restraining the 1st and 2nd Defendants whether by themselves, their servants, their agents, and/or employees howsoever from trespassing, entering, demolishing structures on, occupying, removing any item and/or in any other matter interfering with and/or dealing with the Applicant's parcel of land known as Githunguri/Gathangari/3029 including the buildings standing thereon.***

d) ***An injunction do issue restraining the 1st and 2nd Defendants whether by themselves, their servants, their agents, and/or employees howsoever from transferring, selling, alienating, disposing, charging or otherwise in the Applicant's parcel of land known as Githunguri/Gathangari/3029 including the buildings standing thereon.***

e) ***An order of inhibition be registered against the title of the suit property Githunguri/Gathangari/3029 to remain on the register until the suit is heard and determined.***

4) That the Defendants/Respondents do bear the costs of this application.

The Applicant's application is premised on the following grounds:-

1) That the Applicant herein, by virtue of the Matrimonial Property Act, has a beneficial and legal interest in Githunguri/

Gathangari/3029, registered in the name of Mary Wanjiku Ng'ang'a, the Applicant's spouse.

2) That the Respondents who are strangers to the Applicant/

Plaintiff, have invaded the suit land Githunguri/Gathangari/

3029, and have begun putting up temporary structures of residence and have on various dates threatened the Applicant/Plaintiff with actual and physical harm when he tried to access the suit property.

3) That the Respondents have refused/failed and or neglected to vacate the suit premises despite them having no legal or equitable right to be on the suit premises and despite several notices from the area chief.

4) That the Defendants/Respondents have no legal or equitable right over the suit property granting them the right of actual and physical possession of the suit property.

5) That the Defendants/Respondents have interfered with the actual, physical and quiet possession of the suit property by the Plaintiff/Applicant herein.

The application is also supported by the affidavit of **Boniface Maina Mwangi**, the Applicant herein who averred that he legally married one **Mary Wanjiku Ng'ang'a** on 28th September 2013 at **St. Austin's Catholic Church** under the **Marriage Act** as is evident from **annexture BMM1**. He further averred that on or about 13th February 2015, during the subsistence of their marriage, they purchased a parcel of land in Githunguri being land parcel **No.Githunguri/Gathangari/3029**, and the same was registered in the name of his wife, **Mary Wanjiku Ng'ang'a** as is evident from **annexture BMM2**, which is a copy of the **official search**. It was his contention that it was their agreement as husband and wife that his wife would hold the property in trust for him and for the benefit of the two issues arising from their union.

He further contended that he has never sold, transferred, subleased or transferred or had any such dealings that would transfer or vest any legal or equitable right in respect of any third party and in particular the Defendants/Respondents herein. He also denied ever being a party to any dealings, signed any consent or issued such approval which would allow for the sale, transfer or alienation of the suit parcel of land. It was his allegations that on unknown date, the two Respondents/Defendants conspired to trespass, alienate, develop and/or otherwise take actual and physical possession of the suit parcel of land to the detriment of the registered and/or beneficial owners. Further that the Respondents have on diverse dates undertaken to put up structures of residence and/or perimeter fence on the suit parcel of land thus alienating it and restricting the rightful and quiet possession by the registered and/or beneficial owners of the said parcel of land.

That the Applicant approached the Respondent on or about the month of **February 2017**, to vacate the suit premises as they were trespassers but they resorted to violence, using crude weapons while evicting the Plaintiff/Applicant and threatened him. Further that the Respondents have no intentions of vacating the suit property unless ordered by the Court. He further alleged that the action of the Defendant has caused prejudice upon him and has breached his right. Therefore it is the interest of justice, fairness and constitutionality that the Court do grant

the orders sought.

This application is vehemently opposed and the 1st Respondent, **Leonard Mbocha Chege** filed his **Replying Affidavit** on 23rd May 2017 together with **Supporting Affidavits** of **Mary Wanjiku Ng'ang'a**, the wife of the Applicant herein and **Lucy Wangui Ndua**, the initial registered owner of the suit property.

In his **Replying Affidavit**, **Leonard Mbocha Chege**, averred that he purchased the suit property **Githunguri/Gathangari/3029**, from the registered proprietor **Mary Wanjiku Ng'ang'a**, vide the **Sale Agreement** dated 30th November 2016. It was his further averments that at all material times, the negotiations for the purchase of the suit land was done between himself and **Mary Wanjiku Ng'ang'a**, who was the registered owner of the suit property which was **charged to Family Bank Ltd**. He contended that he has been paying the purchase price directly to **Family Bank Ltd** to settle the loan arrears on behalf of the Chargor and to facilitate the discharge of the charge and transfer of title to his name. It was his further contention that **Mary Wanjiku Ng'ang'a**, had bought the property from the previous registered owner, **Lucy Wangui Ndua** and therefore he is an innocent purchaser for value without notice.

He also contended that he lawfully took possession of the property pursuant to the agreement for sale entered between himself and the registered owner **Mary Wanjiku Ng'ang'a** and he is therefore in lawful possession of the suit premises as a **bonafide purchaser for value**. He urged the Court to dismiss the instant application.

In her **Supporting Affidavit**, **Mary Wanjiku Ng'ang'a** admitted to having married the Applicant on 28th September 2013 at **St. Austin Catholic Church, Nairobi** but further averred that their marriage has irretrievably broken down since August 2016, and they are now in the process of finalizing their separation. She also averred that on 4th May 2014, she purchased the suit property, **Githunguri/Gathangari/3029** from **Lucy Wangui Ndua** from her own income and the said suit property was registered in her name as a sole proprietor and that it was never a matrimonial property. She contended that she has since sold the suit property to **Leonard Mbocha Chege**, for **Kshs.3,500,000/=** and the said **Leonard Mbocha Chege** has paid a substantial sum of the purchase price part of which has gone directly to **Family Bank** towards payment of a loan wherein she had used the title of the suit property as security. It was her contention that she is the sole registered owner of the suit property which is not a matrimonial property and she wishes to transfer the same to **Leonard Mbocha Chege**, the 1st Defendant herein. She supported the 1st Defendant response to the instant application.

Lucy Wangui Ndua, also swore her **Supporting Affidavit** and averred that she was the registered owner of the suit property which she sold to **Mary Wanjiku Ng'ang'a** on 4th May 2014 vide the attached **Sale Agreement**. That **Mary Wanjiku Ng'ang'a** paid the

purchase price solely and there was no other party to the transaction.

The Court directed the parties to canvass the application by way of written submissions in which the parties complied. The Plaintiff filed his submissions on **31st July 2017** and urged the Court to allow the instant application. He relied on various decided cases among them the case of **Suleiman...Vs...Amboseli Resort (2004) eKLR 589**, wherein the Court held that:-

“A fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been wrong”.

The Respondents filed their written submissions on **24th October 2017** and also relied on various decided cases among them the case of **Mrao Ltd...Vs...First American Bank Ltd & 2 Others (2003) KLR**, where the Court held that:-

“.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Plaintiff's/Applicant's case is very strong and straight forward. Moreover as the remedy is an equitable one, it may be denied where the Plaintiff/Applicant's conduct does not meet the approval of the court of equity or his equity has been defeated by laches”.

This Court has carefully considered the pleadings in general, the annexures thereto, the written submissions and the cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that the suit property, **Githunguri/Gathangari/3029** is registered in the name of one **Mary Wanjiku Ng'ang'a**. There is a certificate of official search dated **11th January 2017**. There is also no doubt that the said suit property is charged to **Family Bank Ltd** as is evident from the said Certificate of official search. It is also not in doubt that the said **Mary Wanjiku Ng'ang'a**, sold the suit property to **Leonard Mbocha Chege** vide the sale agreement dated **30th November 2016**. In the said agreement, it is stated that the purchaser is in vacant possession of suit property. It is therefore not in doubt that the Defendants are in occupation of the suit property by virtue of having purchased the suit property from **Mary Wanjiku Ng'anga**. Further, it is evident that **Mary Wanjiku Ng'ang'a** had purchased the suit property solely from **Lucy Wangui Ndua** vide the sale agreement dated 4th May 2014. The said **Lucy Wangui Ndua** in her affidavit averred that she only transacted with **Mary Wanjiku Ng'ang'a** and nobody else.

It is also not in doubt that the Plaintiff/Applicant and **Mary Wanjiku Ng'ang'a** got married on **28th September 2013** at **St. Austin Catholic Church** as per the **Marriage Certificate BMM1**. However, the said **Mary Wanjiku Ng'ang'a** averred in her affidavit that their union has irretrievably broken down and they are in the process of finalizing their judicial separation. Though the Plaintiff/Applicant has alleged that the suit property is a matrimonial property, the said **Mary Wanjiku Ng'ang'a** denied the same and said she purchased the said property using her own savings.

In his application, the Applicant alleged that the Respondents are strangers to him and have invaded the suit property and thus they are trespassers. However from the documents attached to the pleadings and the affidavit of the 1st Respondent, it is evident that the Respondents got into possession after purchasing the suit property from the registered owner **Mary Wanjiku Ng'ang'a**. Though the Plaintiff/Applicant has alleged that the suit property is a matrimonial property, there is no evidence attached to confirm that indeed he participated in the purchase of the said suit property. **Mary Wanjiku Ng'ang'a** is the registered owner of the suit property and as provided by **Section 26(1) of the Land Registration Act**, she is deemed to be *prima-faciely* the **absolute and indefeasible owner** of the same. The said Section reads as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchase 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.**

As a registered **absolute and indefeasible** owner of the suit property,

Mary Wanjiku Ng'ang'a has her rights protected by virtue of **Section 24(a)** and **25(1) of the Land Registration Act** which provides:-

24. 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:

25.(1) 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 leased, 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 and to require noting on the register, unless the contrary is expressed in the register.

The said **Mary Wanjiku Ng'ang'a** had a right to deal with the said property as she deemed right and proper to herself. Such a right includes disposing it off to a willing buyer. The 1st Defendant is such a willing purchaser and he took possession of the suit property after paying part of the purchase price and executing the sale agreement.

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.”

In deciding whether to grant the injunctive orders sought, the Court will be guided by the principles laid down in the case of **Giella Vs Cassman Brown & Company Ltd 1973 E.A 358**. There principle 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.**

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success as was described in the case of **Mrao Ltd...Vs First American Bank Ltd & 2 others (2003) eKLR 125**, where the Court stated that:

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court on a tribunal property directing itself with concludes that there exist a right which has apparently been infringed by the opposite party as to call for a explanation on rebuttal from the latter”

Has the Applicant established that he has a *prima-facie* case with probability of success?

The Applicant has alleged that the suit property is a matrimonial property and that he has a beneficial interest over the same. Apart from alleging that the suit property is a matrimonial property, he did not avail any evidence that he contributed to its purchase or that he participated in the negotiations and the transaction. It is evident that the suit property was purchased in the **year 2014**. However, **Mary Wanjiku Ng'ang'a** alleged that she used her own money to purchase the same. Further, **Lucy Wangui Ndua** averred that the Applicant was never involved in the transaction of the suit property herein. The said **Mary Wanjiku Ng'ang'a** is the registered owner of the suit property and sold it to the 1st Respondent and allowed him vacant possession. Therefore the Applicant has not established that any of his rights have been infringed by the Defendants herein. The Court finds that the Applicant has not established that he has a prima-face case with probability of success at the trial.

On the second limb, the Court finds that there is no evidence that the Applicant was in possession of the suit property before it was purchased by the 1st Respondent. Applicant had not put up any structures on the suit property. Though he alleges that the suit property is a matrimonial property, the same can be quantified and the Applicant be compensated in monetary terms. Therefore the Applicant has not established that he will suffer irreparable loss which cannot be compensated by an award of damages. See the case of **Wairimu Mureithi..Vs...City Council of**

Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, the Court held that:-

“However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

On the balance of convenience, the Court finds that it is not in doubt. However, even if it was to decide on the balance of convenience, the Court finds that it tilts in favour of the Respondents who purchased the suit property from the registered owner and were granted vacant possession of the same. See the case of of Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Further, the Applicant has sought for eviction order against the 1st and 2nd Defendants. This is a mandatory order which is granted in very special or exceptional circumstances. The principles for granting of mandatory injunctions were enunciated in the case of Kenya Breweries Ltd & Another ...Vs... Washington O. Okeyo (2002) eKLR, where the Court held that:-

“A mandatory injunction can be granted in an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not usually be granted. However, if the case is clear and one which the court thinks 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 match on the Plaintiffs.... a Mandatory injunction will be granted on an interlocutory application”.

And also on Locaball International Finance Ltd ..vs.. Agro Export & ano.(1986)/ALL ER 901 where the court held that;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, the court had to feel a high degree of assurance that at the trial, it would appear that the injunction has rightly been granted, that being a different and higher standard than was required for a prohibiting injunction”

Having found that the Respondents got into the suit property having purchased the same from Mary Wanjiku Ng’ang’a, the registered owner and having found that there is no evidence at this juncture to confirm that the suit property is a matrimonial property, the Court finds that the Applicant cannot be heard to say that the Respondents are strangers. The applicant has not shown existence of any special circumstances to warrant grant of mandatory injunction.

The Applicant has also sought for an inhibition order to be registered on the suit property as provided by Section 68(1) of the Land Registration Act which provides:-

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease OR charge”.

However, the Applicant herein has not shown good cause why the Court should issue such an inhibition order which is to be registered against the title of the suit property since the registered owner duly sold the suit property to the 1st Respondent and allow him vacant possession.

Having now carefully considered the instant Notice of Motion dated 24th March 2017, brought by the Plaintiff/Applicant herein, the Court finds it not merited and consequently the said application is dismissed entirely with costs to the Respondents.

It is so ordered.

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

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

No appearance for Defendants/Respondents

Esther - Court clerk.

Court – Ruling read in open court in the absence of the parties and their advocates.

L. GACHERU

JUDGE

9/4/2018