REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.728 OF 2017

MORRIS MBEVI MUVEA.....PLAINTIFF/APPLICANT

-VERSUS-

BONIFACE MWILU NZOMO.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's ***Notice of Motion*** application dated ***4th September 2017,*** brought under various provisions of law and has sought for the following orders:-

> ***1) Spent.***
>
> ***2) That this Honourable Court do issue an interim order restraining the Defendant and/or agents, servants or his employees from interfering, constructing or in any way making any dealings in respect of land parcel Muranga/Ithanga Phase 1/85, until the hearing and determination of this suit.***
>
> ***3) The costs of this application be in the cause.***

The application is premised on the following grounds:-

> ***a) That the Plaintiff/Applicant is the registered owner of land parcel No.Muranga/Ithanga Phase 1/85, having indefeasible title of the said land under the Registered Land Act Cap 300 Laws of Kenya. He is therefore entitled to quiet and peaceful possession, occupation and use of the said parcel of land.***
>
> ***b) That the Defendant/Respondent without the Plaintiff's consent is constructing permanent houses in the said parcel.***

It is further supported by the ***affidavit*** of ***Morris Mbevi Muvea***, the Applicant herein, who reiterated that he is the registered owner of the suit

land ***LR.No.Muranga/Ithanga Phase 1/85***, and he is therefore entitled to ***quiet*** and ***peaceful possession, occupation*** and ***use*** of the said parcel of land. He also averred that without any consent, the Defendant is constructing permanent houses on the said parcel of land. That unless the Defendant is restrained from any dealings in respect of the said parcel of land, the Applicant will suffer irreparable loss and damage and he therefore urged this Court to allow the said application.

The Respondent ***Boniface Mwilu Nzomo***, filed a ***Replying Affidavit*** and contested the instant application. He averred that the said application is filed in bad faith as he bought it in full knowledge of all the family members of the Plaintiff. He contended that he has been utilizing the said land parcel since ***1999,*** and has built on it. It was his contention that the Plaintiff has failed to disclose material facts that the Respondent has built on and cultivates the said land parcel and he has no knowledge how the Plaintiff obtained a title deed without the Respondent's notice. He urged the Court to dismiss the instant application.

The application was canvassed by way of ***written submissions***. The Applicant filed his submissions on ***18th December 2017***, and served them upon the Defendant/Respondent. However, the Respondent failed to file his written submissions despite being given several opportunities to do so.

This Court has now considered the instant ***Notice of Motion*** application and the annextures thereto. The Court has also considered the general pleadings and the written submissions as filed by the Plaintiff/Applicant, and renders itself as follows;-

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***."

Further, the Court will take note that at this stage, it is not mandated to determine the disputed facts with finality. All that the Court is supposed to do is to determine whether the Applicant is deserving of injunctive orders sought based on the usual criteria. See the case of ***Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002***, where the court held that:

> ***"In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All that the Court is entitled at this stage is whether the Applicant is entitled to an Injunction sought 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***. These criterias 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 herein established the above principles?

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success. It is not in doubt that the Applicant herein is the registered owner of the suit property having acquired the title deed for ***Muranga/Ithanga Phase 1/85*** on ***5th July 2013***. As a registered proprietor of the suit property, then as provided by ***Section 26(1) of the Land Registration Act***, the Plaintiff is deemed to be the ***indefeasible*** and ***absolute owner*** thereof. This ownership can only be challenged if the said title was acquired illegally. See ***Section 26(1)*** of the ***Land Registration Act***, which provides:-

> ***"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.***

It is also evident that the Applicant acquired the title deed after

Judgement was delivered in ***Succession Cause No.483 of 2001*** on ***16th February 2012***. In the said court's determination, the trial court found and held that the purported sale of ***3 acres*** to ***Boniface Mwilu Nzomo***, the Respondent herein ***was illegal*** and ***voidable*** and he ***can only claim refund of his purchase price***. There is no evidence that the Respondent ever appealed against that court's findings. The court further held that the deceased's land parcel ***No.Muranga/Ithanga Phase 1/85*** to ***devolve*** to ***Morris Mbevi Muvea***, the Applicant herein as the ***sole heir***. The Applicant therefore acquired the suit property through a ***Court Order*** which order has not been vacated. Even if the Respondent has alleged that he has been in possession of the suit land since ***1999***, the Court found his purchase of the suit land was illegal and voidable.

Therefore having found that the Plaintiff/Applicant acquired his title deed ***regularly*** and ***legally through a Court Order***, the Court finds that the Applicant has established that he has a *prima-facie* case with probability of success at the trial and further that as a proprietor of the suit property, his rights have been infringed by the Respondent's occupation of the suit property, which amount to depriving the Applicant the use and occupation of the same.

Having found and held that the Applicant is the registered owner of

the suit property and he is in possession of a valid title deed, then the Respondent's continuous occupation of the suit property would occasion

suffering to the Plaintiff/Applicant, who had to endure a grueling ***Succession Cause*** filed in the ***year 2004*** and which was determined in ***2012***. The Court finds that the Applicant will suffer irreparable loss which cannot be determined by an award of damages. See the case of ***Joseph Siro Mosioma...Vs...Housing Finance Corporation of Kenya & 3 Others, Nairobi HCCC No.265 of 2007 (4R)***, where the Court held that:-

> ***"On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction"***.

On the balance of convenience, the Court finds that it tilts in favour of the Plaintiff/Applicant who is a title holder over the suit property herein and the Respondent should be restrained accordingly.

Having now carefully considered the instant ***Notice of Motion*** dated ***4th September 2017***, the ***Court finds it merited and it is allowed entirely in terms of prayer No.2 with costs to the Applicant***.

Further, the Court directs the parties to comply with Order 11 within the next 45 days from the date hereof and then set down the main suit for hearing expeditiously so that the disputed issues can be resolved at once.

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this ***18th*** day of ***May 2018***.

L. GACHERU

JUDGE

In the presence of

Applicant in person present

Mr. Kamura holding brief for Mbiyu Kamau for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocate and the Plaintiff/Applicant in person.

L. GACHERU

JUDGE

18/5/2018