



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC CASE NO.400 OF 2017**

**KAGAI WARUINGI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**ALICE MUTHONI WARUINGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**TERESIA NJOKI WARUINGI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

By a *Plaint* dated 27<sup>th</sup> March 2017, the Plaintiff herein *Kagai Waruingi* sought for orders against the Defendants/Respondents herein who are his blood sisters. Among the orders sought in the *Plaint* are:-

- a. A permanent injunction restraining the Defendants from trespassing, cultivating, building and/or erecting any structures and/or doing other acts of waste on LR.No.Kiamba/ Thimbigua/1776.
- b. Eviction Order and demolition of any building or structures erected on the aid suit premises.

The Plaintiff has alleged in his claim that he is the registered proprietor of LR.No.Kiambaa/Thimbugua/1776, and that the Defendants have illegally encroached and trespassed on it thus putting up illegal structures thereon.

Simultaneous to the *Plaint*, the Plaintiff/Applicant filed a *Notice of Motion* application dated 27<sup>th</sup> March 2017, and sought for the following orders:-

1. That on order of temporary injunction be issued restraining the Defendants/Respondents, their servants, agents and/or employees from trespassing, encroaching and/or erecting any buildings on the suit premises Kiambaa/Thimbigua/1776, and/or doing any acts of waste on the suit premises until the final determination of the main suit.
2. That costs of this application be provided for.

This application is premised upon the following grounds:-

- a. That the Plaintiff is the absolute registered owner of all that parcel of land known and described as LR.Kiambaa/Thimbigua/ 1776 pursuant to the provisions of the Land Registration Act 2012.
- b. That despite the Plaintiff being the sole registered owner of the subject property the Defendants have encroached, trespassed on the subject property whereby they have started erecting some buildings and other structures without the Plaintiff's knowledge.
- c. That the Defendants started their illegal acts sometimes in the month of September 2016 and they are still invading the Plaintiff's said suit property.
- d. That the Defendants have no beneficial interest over the subject suit property since Applicant is the sole absolute registered owner of the subject suit premises.
- e. That the Defendants continued illegal acts and doing other acts of waste on the suit premises are causing the Plaintiff

untold suffering, mental anguish and also denying him the right of use of the said subject at suit property.

**f. That the Plaintiff has severally requested the Defendants to stop forthwith from doing their illegal and unlawful acts but they have failed and/or refused to comply with the Plaintiff's numerous requests.**

**g. That as a result of the Defendants illegal and unlawful acts, the Plaintiff has suffered loss and irreparable damage.**

**h. That it is in the interest of justice that the orders sought for herein be granted.**

Further the application is supported by the affidavit of the Applicant **Kagai Waruingi**, who reiterated all the contents on the grounds in support of the application. He urged the Court to allow the instant application.

The application is opposed by the Respondents who jointly filed a **Replying Affidavit** dated **12<sup>th</sup> July 2017**, and averred they are blood sisters to the Plaintiff/Applicant herein and their late father, **Paul Waruingi Kagia** had four wives. They further averred that their mother **Margaret Wambui Wairungi**, and both of their parents are now deceased. They also averred that their father shared his parcel of land among his four houses and the house of **Margaret Wambui Waruingi** who was their mother got **10 acres**. The said parcel of land was registered as **Kiambaa/Thimbugua/1776** in the name of the Plaintiff/Applicant to hold it in trust for the family of **Margaret Wambui Waruingi**, the Respondents included.

It was their further allegation that they have been living on the suit property and they knew the Applicant was holding the parcel of land in trust for them as beneficiaries and therefore, they have not encroached or trespassed on the suit property since they have been living thereon all their entire lives. They contended that the Applicant knew very well that they are entitled to their share of the parcel of land which is subject of this suit. Therefore it is misleading for the Applicant to call them trespassers and also misleading for him to seek injunctive orders against them to bar the Respondents from entering the suit land knowing very well that they have been in occupation of their respective portions for many years.

Further that the application is ill-conceived as the Applicant has not made full disclosure of the facts especially on how he acquired the suit property. The Respondents therefore alleged that the Applicant is not deserving of the orders sought and they urged the Court to dismiss the instant application with costs.

The Applicant filed a further affidavit and denied that he is holding the suit property **Kiambaa/Thimbugua/1776** in trust for the Defendants/Respondents. He averred that the Defendants/Respondents should vacate the suit property and move to **Kiambaa/Thimbugua/1774**, which is registered in the name of their deceased father. He reiterated that the suit property herein was legally transferred to him by his deceased father in **1983** and the Defendants/Respondents never raised any objection over the said ownership. Further that the Defendants/Respondents have never sued him to challenge his ownership of the suit property or invoking the issue of trust against the Applicant.

He also contended that the Respondents are not entitled to share the suit property at all as the title deed issued to him in 1983 does not raise the issue of trust at all in favour of the Defendants/Respondents or any other beneficiaries at all. He also reiterated that he is the **legitimate** and **absolute** owner of the suit property and therefore his application should be allowed.

The Court directed that this instant **Notice of Motion** be canvassed by way of written submission. The parties did comply with the said directions and Plaintiff/Applicant. **Kagai Waruingi** filed his written submissions on **27<sup>th</sup> July 2017** and urged the Court to allow the instant application. The **Law Firm of F. N. Njanja & Co. Advocates** for the Defendants/Respondents filed their written submissions on **13<sup>th</sup> December 2017** and urged the Court to dismiss the instant application with costs.

This Court has now carefully considered the instant **Notice of Motion** application, the annexures thereto, the written submissions and the relevant provisions of law and the Court makes the following finding;

There is no doubt that the Applicant and the Defendants/ Respondents are blood brothers and sisters. They are all siblings and son and daughters of **Paul Waruingi Kagai** and **Margaret Wambui Waruingi**. There is also no doubt that the suit property herein is a subdivision of land parcel **No. Kiambaa/Thimbugua/386**, which was initially owned by the father of the parties herein. It is also not in doubt that the said land **Kiambaa/Thimbugua/386**, was subdivided into four parcels of land, the suit land **Kiambaa/Thimbugua/1776**, being one of such subdivisions.

The Applicant has alleged that the suit property was given to him by his father **Wairungi Kagai** in the **year 1983** and a title deed was issued to him on **9<sup>th</sup> March 1983**. Therefore as the registered owner of the said suit property, he is deemed to be the absolute and indefeasible owner.

However, the Defendants/Respondents have alleged that the suit property was registered in the name of the Plaintiff/Applicant to hold it in trust for the house of **Margaret Wambui Waruingi**, their mother and who was one of the four wives of **Paul Waruingi Kagai**. The Respondents alleged that they have lived on the suit property all their lives and the Applicant cannot seek to restrain them now or seek to evict them from the suit property given that they are also beneficiaries of the estate of their father, the late **Paul Waruingi Kagia**, and the Plaintiff is holding the suit property in trust for them.

The above are the undisputed facts. 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 **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & 2 Others, Civil Appeal No.213 of 1999**, where the Court held that:-

**“grant of injunction being discretionary, the appellate court only interferes in exceptional circumstances.....”**

The Court also takes into account that at this juncture, it is not called upon to decide the disputed facts conclusively or with finality. All that the court is called upon 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 the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought based on the usual criteria....”**

The principles that will guide the court in determining whether the Applicant is deserving of the orders sought are the ones laid down in the case of *Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 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.**

Therefore, this Court will consider the above principles and juxtapose them with the available evidence to arrive at a finding of whether the application herein is merited or not merited.

Firstly, the Applicant needed to establish that he had a prima-facie case with probability of success at the trial. The Court of Appeal in the case of *Mrao...Vs...First American Bank of Kenya Ltd & Others (2003)KLR*, described prima-facie case to mean:-

**“A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

So has the Applicant herein established that he had a prima-facie case with probability of success?

The Applicant has alleged that he is the registered owner of the suit property and indeed has attached a copy of the title deed to his affidavit in support of this application. He also admitted that the Defendants/ Respondents are his blood sisters. However, the Respondents have alleged that the Plaintiff/Applicant was registered as a proprietor of the suit property to hold it in trust for them or the house of **Margaret Wambui Waruingi**, who was one of the wives of the late **Paul Waruingi Kagai** their father, and who had four wives and who distributed his initial land parcel **No.Kiambaa/Thimbigua/386**, among his four wives (houses). That the house of **Margaret Wambui Waruingi** their mother was given **Kiambaa/Thimbigua/1776**, the suit property and the Plaintiff/Applicant was registered as a proprietor to hold it in trust for his siblings.

The Applicant has denied existence of any trust and also denied that he is holding the suit property in trust for the Respondent. However the existence of trust is a disputed issue which cannot be adequately canvassed at this stage through affidavit evidence. The said evidence can only be canvassed at the main trial after calling of evidence and testing the same through cross-examination.

The Applicant did not dispute that the Defendants/Respondent have always lived on the suit property. If indeed the Respondents have been residing on the suit property all along, then the Plaintiff/Applicant cannot seek to injunct them now before the issue of trust has been resolved in the main trial. Though the Plaintiff/Applicant is the registered proprietor of the suit property and the same was registered in his name in 1983, Section 30(g) of the said Registered Land Act (now repealed) customary trust is one of an overriding interest and therefore the Applicant's title is subject to the said overriding interest. However, that is an issue that can only be dealt with at the main trial.

Therefore, after a careful consideration, the Court finds that the Applicant has not established that he has a *prima-facie* case with probability of success at the trial and that the Respondents have infringed on any of his rights.

On the second limb of whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, he did not dispute that the Respondents have been using the suit property all their life time. If that is the case, then the Applicant will not suffer any loss at all with the Respondents continued stay on the suit property as they await the determination of the issue of trust. In any event, if after the trial the court finds that the Respondents were not justified in remaining on the suit property, then the Applicant can be adequately 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 third limb of if the court is in doubt to decide on the balance of convenience, this court finds that it is not in doubt. However, even if the court was to decide on the balance of convenience, the same would tilt in favour of the Respondents who have been using the suit land and should remain in such use and occupation until the issue of whether there is existence of trust or not is resolved. Therefore the Court finds that the balance of convenience herein would best be achieved by issuing an order of maintenance of *status quo* and the *status quo* herein is that the Defendants/Respondents are to remain in occupation of their respective portions of land that they have been using and occupying. In any event, the Applicant has sought for eviction in the main suit. In the event the trial Court finds in his favour, then definitely the Court will allow an order of eviction and the Defendants/Respondents herein will be evicted from the suit property.

The Court therefore direct that *status quo* herein should be maintained. See the case of Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR, where the Court of Appeal held that:-

**“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.**

Having now carefully considered the instant *Notice of Motion* dated 27<sup>th</sup> March 2017, the *Court finds it not merited and consequently, the said application is dismissed entirely with costs being in the cause.*

Parties to prepare the suit for hearing by complying with Order 11 within a period of 45 days from the date hereof.

It is so ordered.

**Dated, Signed and Delivered at Thika this 22<sup>nd</sup> day of June 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

M/S Nganga holding brief for Wanjohi Gachie for Plaintiff/Applicant

No appearance for Defendants/Respondents

Lucy - Court clerk.

**Court** – Ruling read in open court in the presence of the above stated advocate and absence of the advocate for the Defendants/Respondents.

ii) The matter to be transferred to Kiambu Chief Magistrate court forthwith for hearing and determination.

**L. GACHERU**

**JUDGE**

**22/6/2018**