



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC CASE NO.717 OF 2017**

**JORAM NDUNG'U KAGWI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MARY WANGUI KAGWI.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion** application dated **22<sup>nd</sup> August 2017** brought by the Plaintiff/Applicant herein **Joram Ndungu Kagwi** and which is premised under Order 40 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The Applicant has sought for the following orders:-

**1) That this Honourable Court be pleased to issue orders to lift the restriction placed on LR.Limuru/Kamirithu 1719 vide DC's letter Reference No.KW/LND/9/6 VOL.1/24 AND DCC's letter reference No.LM/LND/9/3 VOL.IV/49, DTO 28/3/17 dated 2/7/17 and 29/3/17 respectively by Mary Wangui Kagwi, the Defendant/Respondent herein.**

**1) That this Honourable Court be pleased to issue an injunction to have the Defendant/Respondent vacate the suit property which is solely owned by the Plaintiff/Applicant.**

**2) That the Defendant/Respondent, her servants and/or agents or otherwise howsoever be restrained and restricted from interfering howsoever with the Plaintiff's/Applicant's property being LR.Limuru/Kamirithu 1719 the suit property.**

**3) The costs of this application be awarded to the Plaintiff/Applicant.**

The application is premised upon the following grounds:-

**1) That the Plaintiff/Applicant is the registered owner of the suit land being LR.Limuru/Kamirithu 1719 the suit property.**

**2) That the Defendant/Respondent who is a daughter in law to the Plaintiff/Applicant pleaded with the Plaintiff/Applicant herein to be given refuge and temporary stay on the suit property by the Plaintiff/Applicant, to enable her to readjust her life style after her husband left her.**

**3) That the Defendant/Respondent has issued threats of disenfranchising the Plaintiff/Applicant of his property to an extent of colluding with the authority to place a restriction on the suit property which belongs solely to be Plaintiff/Applicant.**

**4) That the Plaintiff/Applicant has already gifted his children in equal shares all that parcel of land namely LR.Longonot/Kijabe Block 2/1965 (Utheri wa Lari) through a meeting held on the 1<sup>st</sup> June 2017, where the Defendant/Respondent was present.**

**5) That accordingly, the Defendant/Respondent threaten and intend, unless restrained by this Honourable Court, to disenfranchise the Plaintiff/Applicant of his land.**

The application is also supported by the **Affidavit** of **Joram Ndungu Kagwi** the Applicant herein who averred that he solely owns the suit property **Limuru/Kamirithu/1719** and therefore enjoys the exclusive **use** and **enjoyment** of the said property. That he allowed the Defendant/Respondent to temporary stay on the suit property after she was left by her husband who is the Applicant's son. However, the Defendant/Respondent has put a restriction on the suit property which action is malicious and has infringed on the Applicant's right of ownership of property and is done in bad taste. That the said action is illegal trespass and will disenfranchise him. He urged the Court to allow the instant application.

The application is contested by the Respondent herein **Mary Wangui Kagwi**, who filed a **Replying Affidavit** on **6<sup>th</sup> October 2017** and averred that the Applicant who is her father-in-law allowed her to construct a semi-permanent house in the suit premises but after a few months, the Applicant threatened to sell the suit property despite the fact that the Applicant was residing thereon. That she reported the matter to the DO (District Officer) who liaised with the DC to have the caution placed on the suit land. Further that the Applicant's wife, **Naomi Wambui Ndungu** has also caused the suit land to be cautioned as the Applicant had planned to sell the suit land secretly. She also alleged that the suit herein was *resjudicata* as there was a similar suit filed at the **Chief Magistrates Court at Kiambu** in the **year 2009** and the said suit was dismissed for want of prosecution.

The Defendant further filed a **Preliminary Objection** on **2<sup>nd</sup> November 2017** and sought for the application to be dismissed on the following grounds:-

- 1) The application dated 22<sup>nd</sup> August 2017 is fatally defective as there is already a matter pending at the Kiambu Law Court in Civil Suit No.200 of 2009 between the same parties, over the same subject matter as the instant application.**
- 2) There is no suit for determination before this Honourable Court.**

The Plaintiff/Applicant opposed the **Notice of Preliminary Objection** and stated that:-

- 1) That there is no any other pending suit as between the two parties besides the one before this Honourable Court, as the suit the Defendant is relying on in her Notice of Preliminary Objection being Civil Suit No.200 of 2009 was dismissed on the 23<sup>rd</sup> July 2012.**
- 2) In the aforementioned Civil Case in Paragraph 1, the matter was directed to be heard by the Land Disputes Tribunal as it was found not to fall within the jurisdiction of the Magistrate's Court.**
- 3) The Land Disputes Tribunal Act which created the Land Disputes Tribunal has since been repealed by the Environment and Land Court Act No.19 of 2011 meaning that the Plaintiff's application is rightly before this Honourable Court and should be allowed.**

The Court directed that both the **Notice of Motion** application and the **Preliminary Objection** be canvassed together by way of written submissions.

In compliance thereof, the parties did file their written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. Further the Court has also considered the cited authorities and the relevant provisions of law and will render itself as follows:-

The Defendant/Respondent has filed a **Preliminary Objection**. Though the Court directed that both the **Notice of Motion** application and the **Preliminary Objection** be canvassed together, the Court will determine the **Preliminary Objection** first.

**Black Law Dictionary 9<sup>th</sup> Edition** described '**Preliminary Objection**' as:-

**"An objection that if upheld would render further proceedings before the tribunal impossible or unnecessary".**

Further **Preliminary Objection** was described in the case of **Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696** to mean:-

**"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".**

It is therefore important to determine the **Preliminary Objection** first because if the same is upheld, it may dispose off the application or the suit in general preliminarily.

The Court has considered the two points raised in the **Preliminary Objection**. Though the first objection may involve ascertaining of facts, the Court finds that the second objection stems from the Pleadings. In the case of **Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that:-

**"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."**

The Defendant herein has averred that there is no suit for determination before this Honourable Court. Indeed the Court has perused the court file and noted that the instant application was filed on **23<sup>rd</sup> August 2017** but there was no Plaint accompanying the same. The Application was therefore not anchored on any Plaint. Section 2 of the Civil Procedure described 'Suit' to mean all Civil Proceedings commenced in any manner prescribed and **Section 19** states that:-

**"Every suit shall be instituted in such manner as may be prescribed by the rules".**

**Order 3 Rule 1(c)** states that:-

**“Every suit shall be instituted by presenting a *Plaint* to the court or in such other manner as may be prescribed”.**

Indeed it is clear that suits are commenced by way of ***Plaint, Originating Summons*** or as a ***Petition*** but not through a ***Notice of Motion*** as done by the Plaintiff herein. The Plaintiff tried to cure the said anomaly by filing the ***Plaint*** on **27<sup>th</sup> November 2017**. However the filing of the ***Plaint*** did not cure the defect of the instant ***Notice of Motion*** as it was seeking prayers of injunction and for court to determine whether the injunction is merited, then the Court had to consider the ***Plaint*** and establish whether a prima-facie case has been established to warrant the grant of injunctive orders.

For the above reasons, the Court finds that the Preliminary Objection herein is merited as the application was filed while there was no suit for determination before the court. Consequently, the Court upholds the ***Notice of Preliminary Objection*** dated **31<sup>st</sup> October 2017**. The Court therefore proceeds to dismiss the instant ***Notice of Motion*** dated **22<sup>nd</sup> August 2017** with costs to the Defendant/Respondent. Since the said application has been dismissed through a ***Preliminary Objection***, there is no reason of considering the merit of the same.

The ***Preliminary Objection*** dated **31<sup>st</sup> October 2017** is upheld and ***Notice of Motion*** dated **22<sup>nd</sup> August 2017** is dismissed with costs to the Defendant/Respondent.

It is so ordered.

***Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of June 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

M/S Wanjiru Mwangi for Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

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

ii) Matter forthwith transferred to Limuru SPM Court for hearing and **determination**.

**L. GACHERU**

**JUDGE**

**19/6/2018**