



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.433 OF 2017

ANDREW NGAITHO KAIRU.....PLAINTIFF/APPLICANT

-VERSUS-

SUSAN NJOKI WAWERU.....DEFENDANT/RESPONDENT

RULING

By a *Plaint* dated *8th April 2017*, the Plaintiff/Applicant herein *Andrew Ngaitho Kairu*, sought for Judgement against the Defendant in the following terms:-

- a) A prohibitory injunction restraining the Defendant either by herself, her servants, officers, agents, employees or anyone claiming under them from residing, dealing or trespassing on the said property being Plot No.089 portion of LR.No.13166 Nairobi and Plot No.153.*
- b) An eviction order against the Defendant either by herself, her sons, her servants, officers, agents, employees or in any other manner whatsoever and however from interfering with the Plaintiff's peaceful occupation and enjoyment of the said property being Plot No.089 portion of LR.No.13166 Nairobi.*
- c) Costs of this suit.*
- d) Any other relief this Honourable court deems just to grant.*

Simultaneously, the Plaintiff/Applicant filed a *Notice of Motion* application even dated and sought for these orders:-

- 1) That a temporary injunction and/or prohibitory order do issue restraining the Defendant either by herself, her sons, servants, agents, employees, or anyone claiming under them from harassing, intimidating, dealing or trespassing and however from interfering with the Plaintiff's peaceful occupation and enforcement of the said property being Plot No.089 portion of LR.No.13166 Nairobi pending the hearing and determination of this application and the main suit.*
- 2) That an injunction and/or prohibitory order be issued restraining the Defendant/Respondent either by herself, her sons, servants, officers, agents, employees or in any other manner whatsoever and however from interfering with the Plaintiff's peaceful occupation and enjoyment of the said property being Plot No.089 portion of LR.No.13166 Nairobi.*
- 3) That the above orders be enforced through the assistance of OCS Kahawa West Police Station.*
- 4) That costs of the Application be provided for.*

This application is supported by the following grounds:-

- 1) The Plaintiff is the owner of all that piece and parcel of land known as Plot No.089 portion of LR.No.13166 Nairobi.*
- 2) The Plaintiff had permitted the Defendant to reside in the said property as a licensee but due to her belligerent conduct, the Plaintiff allocated her an alternative site on Plot No.153 portion of his share in LR.No.13166 measuring $\frac{1}{4}$ of an acre or thereabout so that he could be left in peace but the Defendant initially accepted to move out but later changed her mind.*
- 3) However, following the Defendant's interference with the Plaintiff's peaceful and quiet occupation of the said parcel of land,*

the Plaintiff revoked the licence and asked her to leave which she has adamantly refused.

4) The Defendant has instead resorted to violence and together with her sons, assaulted the Plaintiff's wife and badly injured the Plaintiff's son on two different occasions on 18th March 2016 and 29th August 2016.

5) That the Plaintiff and his family are now living in fear and are apprehensive that in view of what has transpired, anything can happen to their lives and property unless the court intervenes to protect them.

6) That it is necessary in the interest of justice that an injunctive order be granted as the Plaintiff/Applicant stands to suffer irreparable loss and damage if the orders sought are not granted.

Further, this application is also supported by the **affidavit** of **Andrew Ngaitho Kairu**, the Applicant herein who reiterated most of the contents of the grounds in support of the application and further averred that the Respondent herein is the wife of his son, **Peter Njoroge** who was married by the said **Peter Njoroge** in **1980**. Further that the Applicant invited them to live in his property being **Plot No.089 a portion of LR.No.13166 Nairobi**. He further averred that his said son and the Defendant had various quarrels and in the year **1996**, the said **Peter Njoroge** disappeared without trace to date and no one knows his whereabouts.

It was his further averments that after the disappearance of his son, the relationship between his family and the Defendant/Respondent, who is his daughter-in-law continued to deteriorate but he continued to support her and her children. In **January 2016**, he offered the Defendant/Respondent and her sons $\frac{1}{4}$ acre from **Plot No.153** which is within **LR.No.13166**, by giving her the original Ballot paper and Share Certificate and also showed her the beacons to the said land. It was his contention that the Defendant/Respondent and her sons promised to move out within a period of two weeks. However, instead of moving out, the Defendant and her sons roughed up and threatened to assault his son **John Kahura** on **18th March 2016** and the matter was reported to the police.

He further contended that the hostility continued and on **29th August 2016**, the Defendant/Respondent and her five sons indeed assaulted his son, **John Kahura** and grievously caused harm on his head with a blunt object and threatened to kill him. The Defendant/Respondent and her sons were apprehended and arraigned at **Kiambu Law Courts** in **Criminal Case NO.2272 of 2016**. He is therefore apprehensive that the Defendant/ Respondent will continue with her cruel actions unless she is restrained through an injunctive order from interfering with the Applicant's peaceful occupation and enjoyment of the suit property. He urged the Court to allow his application.

The application is opposed and the Defendant/Respondent herein **Susan Njoki Waweru**, swore a **Replying Affidavit** and admitted that she got married to **Peter Njoroge Ngaitho** in **1983** and together they have five children. Further that due to intimidation of her husband by the Plaintiff and his sons, the said **Peter Njoroge Ngaitho**, her husband disappeared without trace in **1996**. It was her contention that she has lived on the suit property since **1983** to date which is a period of **over 34 years** and the Plaintiff/Applicant should give her $\frac{1}{4}$ acre from the suit land through adverse possession.

She further alleged that **Plot No.153** from **LR.No.13166**, has a pending case which outcome is unknown as is evident from **annexture SMW-1**. She further contended that since the Plaintiff is willing to give her $\frac{1}{4}$ acre from **No.153**, then he can give her the said $\frac{1}{4}$ acre from the undisputed parcel of land, where she has settled for the last **34 years**. She also contended that she should not be forced to move to a land parcel which has a dispute because there is a risk of being evicted if the pending dispute is determined otherwise.

It was her further contention that the criminal case is a fabricated one as he could not have assaulted and robbed her in-laws. The Defendant also disputed the jurisdiction of this Court as she alleged that the suit property is in **Kahawa West** which falls within the **territorial jurisdiction of Nairobi**. She urged the Court to dismiss the instant application.

The application was canvassed by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court has also considered the relevant provisions of law and it renders itself as follows:-

Indeed the suit property herein falls within **Nairobi** area. The Court has seen the proposed subdivision of **LR.No.13166**, and it is clear that it emanated from the **Director, City Planning Department, Nairobi City Council**. Therefore the suit property falls within the **territorial jurisdiction of Nairobi** and this suit ought to have been filed in **Milimani Environment and Land Court** instead of **Thika Environment and Land Court**.

Be that as it may, is the Applicant's application merited?

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 **Isaac Awoundo & 4 Others..Vs.. Mr. Kulal Ltd, Civil Appeal No.191 of 1997**, where the Court of Appeal held that:-

"Grant of injunction being discretionary will only be interfered with if it is shown that the Judge acted on wrong principles or failed to take into account a relevant factor or took into account an irrelevant factor or short of this that the discretion is plainly wrong".

Further, the Court will take note that at this juncture, it is not supposed to deal with the disputed issues with a finality or conclusively, based on affidavits evidence. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & 2 Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

The Court at this juncture is only supposed to determine whether the Applicant is deserving of the injunctive orders sought based on the laid down criteria. These criterias were clearly elucidated in the case of *Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358*, and later repeated in various judicial pronouncements. See the case of *Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR*, the Court held that:-

“The conditions for granting a temporary injunction is East Africa are well known and these are: First, the Applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries ..Vs..Trufoods (1972) EA 420.*”

Has the Applicant established that he has a *prima-facie* case with probability of success as was described in the *Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR 123*, where the Court held that:-

‘A *prima-facie* case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the Applicant’s case at the trial’.

From the pleadings and the averments of the Plaintiff/Applicant and the Respondent, it is clear that the Applicant invited the Respondent herein and her husband to live on the suit property in **1980s**. The Respondent averred that she moved into the suit property in **1983** and if that is the case, then she has lived thereon for a period of about **34 years**. The Respondent moved into the suit property by virtue of being a daughter-in-law to the Applicant herein. It is also admitted by both the Applicant and the Respondent that the husband to the Respondent, one **Peter Njoroge**, who is a son to the Applicant disappeared without trace in the year **1996**. The Respondent herein was left with five sons whom she has brought up single handedly though the Applicant has alleged that he has been assisting her in the upbringing of the Defendant’s children and her upkeep.

The Applicant has urged the Court to restrain the Defendant/Respondent, her sons, and anyone claiming under her from among other activities, dealing or trespassing on the suit property being **Plot No.089**, which is a portion of **LR.NO.13166 Nairobi**. It is very clear that the Respondent and her sons have lived on this suit property from **1983** when she got married to the son of the Applicant. Restraining her from dealing or trespassing on the suit property would mean keeping her from the property. That would be tantamount to issuing an order of eviction which is a final order which order cannot be issued at this stage without calling of evidence and testing the same.

Further, the Applicant has alleged that the Respondent has been very disrespectful of him and has even assaulted his son one **John Kahura**, and because of the said assault, she was charged with an offence of **Assault at Kiambu Law Courts**. However, the Respondent has alleged

that the said criminal case is a fabrication because the Applicant wants to evict the Respondent from the suit premises wherein she has lived for the last **34 years**. It is apparent that the Respondent has not been convicted in the said criminal case and this Court cannot hold and find at this juncture that she is guilty of the alleged assault.

Further, the allegation made by both the Applicant and the Respondent can only be verified by calling of evidence at the main trial. The Respondent is living on the parcel of land that she has occupied since **1983** when she was married to **Peter Njoroge**, the son of the Applicant, whose whereabouts has been unknown since **1996**. The occupation of the Respondent on the suit property has been with the consent of the Applicant. The Applicant cannot turn around and state that the Respondent is trespassing on the suit property. No evidence at all has been availed to ascertain that the Respondent has infringed on the Applicant’s rights. The allegations made by the Applicant have to be ascertained through calling of evidence.

The Applicant further alleged that he had given the Respondent **Plot No.153** within the said **LR.No.13166** but she failed to move therein. The Respondent alleged that **Plot No.153** has a dispute which outcome is unknown and since the Applicant is willing to give her $\frac{1}{4}$ acre, then the said $\frac{1}{4}$ acre should be curved from the suit property. If at all **Plot No.153** has a dispute, then the Respondent is rightfully apprehensive of the outcome of the said dispute. Supposing at the end of the dispute, the said parcel of land is given to the other claimant, what would happen to the Respondent herein? She will be out in the cold with her children and a husband whose whereabouts is unknown. This Court finds that the issues raised by the Applicant herein can rightfully be determined after calling of evidence at the main trial. For now the Court finds that the Applicant has been unable to establish that he has a *prima-facie* case with probability of success at the trial and that his rights has been infringed.

On the second aspect of whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that the Respondent has been on the suit land since **1983**. The Applicant has not been utilizing this portion of land where the Respondent lives and use with her children. The Respondent is not a new entrant and if at all the Court finds that the Respondent did not deserve to be on the suit property, then Applicant can be compensated by an award of damages and the Respondent ordered to vacate the suit premises. There is no evidence availed to this Court to confirm that Applicant 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*, where 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 a balance of convenience, the Court finds that it is not in doubt. However even if the Court is in doubt, it is apparent that the balance of convenience would tilt in favour of maintaining the *status quo*. The *status quo* herein means the Respondent and her sons to remain in occupation and use of the portion of land that they have been using and occupying on the suit property until the suit is heard and determined. 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 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 8th April 2017, the *Court finds it not merited and the same is dismissed entirely with costs being in the cause.*

Further, the Court finds that the *suit property herein falls within the territorial Jurisdiction of Nairobi County*. Therefore this suit ought to have been filed in *Milimani ELC*. Consequently, the *Court directs that this matter be transferred to Milimani Environment and Land Court for full hearing and determination thereof.*

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of June 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

(Present in person) for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the Defendant/Respondent.

L. GACHERU

JUDGE

19/6/2018