



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.10 OF 2017

MARY NJERI MBUGUA.....PLAINTIFF/APPLICANT

-VERSUS-

ALICE MUTHONI.....DEFENDANT/RESPONDENT

RULING

By a *Notice of Motion* application dated **18th January 2017**, brought under various provisions of law, the Plaintiff/Applicant herein **Mary Njeri Mbugua** has sought for the following orders against the Defendant/Respondent **Alice Muthoni**:-

a) Spent.

b) That a temporary injunction be issued restraining the Defendant/Respondent, her agents, servants, workmen or anyone claiming through her from selling, alienating, disposing off or in any way interfering with Plaintiff's/Applicant's land parcel No.Loc.16/Ndungu Chege/1763 until this case is heard and determined or until further orders of this court.

c) That the costs of this application be provided for.

The application is premised upon the following grounds:-

i. That the Plaintiff/Applicant is the registered owner of Loc.16/Ndunyu Chege/1763.

ii. That sometimes on or around 28th November 2016, the Defendant/Respondent started to put up structures on the Applicant's land.

iii. That the Respondent's intention is to illegally displace the Applicant from her legally acquired and registered property.

Further, the application is supported by the affidavit of **Mary Njeri Mbugua**, the Applicant. She reiterated that as a registered owner of the suit property, she enjoyed quiet possession of the suit property until on or around **28th November 2016**, when upon inspection of the same, she found structures erected thereon. Upon inquiry, she noted it was the Defendant/Respondent putting up the construction. It was her contention that she has severally requested the Respondent to stop the construction on the suit property but she has continued to encroach on it. She also contended that the Respondent has threatened to continue constructing on the said property unless she is stopped by an order of this Court. She urged the Court to allow the application.

The application is contested by the Respondent herein **Alice Muthoni Mbugua** who swore a *Replying Affidavit* on **20th November 2017** and averred that she is the surviving wife of **Francis Mbugua Kagutha**, now deceased and the personal representative of the deceased estate, who died on **11th February 2011**. She also averred that the deceased (**Francis Mbugua Kagutha**) had filed *Civil Suit No.801 of 2005* at the **Thika Chief Magistrate's Court at Thika** wherein an injunction order was issued against the land parcel **No.LR.No.Loc.16.Ndunyu Chege/1762, 1763 and 1764** as per *annexture 4*. It was her contention that she only learnt from the instant suit that **Virginia Wambui Mbugua** who was her co-wife fraudulently transferred the suit property **Loc.16/Ndungu Chege/1763** to herself notwithstanding the injunction order and which property **Mary Njeri Mbugua**, the Plaintiff herein now purports to have inherited. She also alleged that she has been informed by her advocate on record that the order being sought herein by the Plaintiff/Applicant may be used to evict her from her parcel of land that she now occupies. Further that the suit property is matrimonial property and she is a beneficiary of the estate of **Francis Mbugua Kagutha** and therefore the order sought herein should be declined.

The application was canvassed by way of written submissions. The *Law Firm of M/S Wambui Ngugi & Co. Advocates* for the Plaintiff/

Applicant filed their written submissions on **13th December 2017** and urged the Court to allow the orders sought. The Plaintiff/Applicant in her submissions relied on **Section 26(1)** of the **Land Registration Act 2012**, which states as follows:-

“The certificate of title issued by the registrar upon registration, or to a purchaser 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.....”

Further, the Plaintiff relied on the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012), eKLR**, 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 a substitute 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 crystalized right which can be protected by an order of injunction.”

The **Law Firm of Prof. Kiama Wangai & Co. Advocates** for the Defendant/Respondent filed their submissions on **18th December 2017** and urged the Court to dismiss the instant application. The Respondent further submitted that from the pleadings herein, it would be fair and just to decline to issue order sought herein until the main suit is heard through *viva voce* evidence. It was also submitted that if the orders sought herein are granted, the Plaintiff/Applicant will use them to terrorize the Defendant/Respondent by interfering with her quiet possession of the suit property herein. The Court was urged to dismiss the instant application.

This Court has now carefully read and considered the rival submissions. The Court has also considered the pleadings in general and the annexures thereto. Further, the Court has considered the cited authorities and the relevant provisions of law and the Court makes the following rendition.

It is evident that the Applicant herein has sought for injunctive order which is governed by **Order 40 Rules 1(A) & (B)** of the **Civil Procedure**

Rules, which provides as follows:-

“Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

It is also evident from the above provisions of law that the Court has discretion to grant temporary injunction in instances where the property in dispute is in danger of being wasted, damaged or alienated.

The disputed property herein is **Loc.16/Ndungu Chege/1763**, which is registered in the name of the Plaintiff/Applicant as from **15th July 2015**. The Applicant obtained the suit property through transmission as the property was initially registered in favour of **Virginia Wambui Mbugua**, the Applicant’s mother on **4th May 2009**. However the said **Virginia Wambui Mbugua** who was the wife of **Francis Mbugua Kabutha**, the initial proprietor of the suit property died on **20th September 2010** as per the **Death Certificate** availed by the Defendant/Respondent.

Following the death of the said **Virginia Wambui Mbugua**, the Plaintiff/Applicant filed **Succession Cause No.2155/2011** at **High Court of Kenya at Nairobi** and obtained a grant in **Letters of Administration** of the estate of the said **Virginia Wambui Mbugua** on **19th March 2012**. There is no evidence that anybody ever raised any objection to the said Grant or even sought to have it revoked, in particular the Respondent herein. Further on **5th April 2015**, the Plaintiff/Applicant obtained Certificate of Confirmation of Grant and after the Grant was confirmed, the Plaintiff/Applicant became the absolute proprietor of the suit property through transmission. There is no evidence that the Respondent herein had objected to the said Confirmation of Grant. Subsequent to the Confirmation of Grant, the Plaintiff/Applicant was registered as the proprietor of the suit property on **15th July 2015** as is evident from **annexture MNM-A**.

Therefore having obtained the Certificate of title (registration), the Plaintiff/Applicant qualified under **Section 26(1)** of the **Land Registration Act 2012** to be the **absolute** and **indefeasible** proprietor of the suit property herein. The said proprietorship can only be challenged if the same was acquired fraudulently, through misrepresentation or through corrupt scheme. There is no evidence tendered to show that the Applicant’s title herein has been challenged.

The Respondent has alleged that her deceased husband **Francis Mbugua Kagutha** had filed **Civil Suit No.801 of 2005** at **Thika Chief Magistrate’s Court** and in it, an injunction order was issued against land parcels **Loc.16/Ndunyu Chege/1762, 1763 and 1769**. Indeed the

aid suit had been filed by the said **Francis Mbugua Kagutha** against the Defendant/Respondent herein. The said Order was indeed an Inhibition Order issued against the said titles on **10th June 2008** which Order was issued during the *ex parte* stage. However, the Respondent has not informed the Court what was the outcome of the interparties hearing of the said application and also whether the main suit was concluded or not. If concluded, what was the determination? For now the Court cannot hold and find with certainty that there is in existence valid Court Order inhibiting any dealing on the named parcels of land, **Loc.16/Ndunyu Chege/1763**, the suit property being one of them.

However, it is evident that this suit property is registered in the name of the Plaintiff/Applicant and without any evidence of challenge of the said Certificate of title, the Court *prima-faciely* holds and finds that she is the **absolute** and **indefeasible** owner of the same as provided by **Section 26(1)** of the **Land Registration Act**.

As an indefeasible and absolute owner of the suit property, the Plaintiff/Applicant has her rights enumerated and protected by **Sections 24(a)** and **25(1)** of the **Land Registration Act**. These rights cannot be defeated except by the operation of law.

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..”

However, the Applicant has alleged that the Defendant/Respondent has encroached on her suit property and has even started construction of a permanent structure thereon. The Respondent has not disputed that fact. If indeed the Respondent is constructing on the suit property without the permission of the Plaintiff/Applicant, then the said action will lead to change of character of the suit land thus wasting the same. An act of wastage or wasting of the suit property is one that can give the court discretion to grant or issue temporary injunction as stated in **Order 40 Rule 1**.

The Court will further be guided by the principles set out in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358**, which principles states as follows:-

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 established the above stated criteria to warrant the court grant the orders sought?

As held earlier by the Court, the Applicant is the registered owner of the suit property and thus *prima-faciely*, the absolute and indefeasible owner of the said property. The act of encroachment and construction by the Respondent goes against the spirit of **Sections 24(a)** and **25(1)** of the **Land Registration Act** and should amount to wastage. Thus, the Court finds that the Applicant has established that she has a *prima-facie* case with probability of success at the trial.

On the second limb of if order not granted, the Applicant can adequately be compensated by an award of damages, this Court will echo the findings in the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, wherein the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.

Equally, the Applicant crystalized right herein can be compensated by an order of injunction.

On the third limb, this Court is not in doubt at all because the Applicant is in possession of a valid title which she obtained after the suit property devolved to her through **Confirmation of Grant** which grant had not been challenged. Further the fact that the Respondent is in possession of **Limited Letters of Administration** to the Estate of the late **Francis Mbugua Kagutha**, does not cast any doubt in the mind of the court. The said letters were obtained after the suit was filed herein and by the time of his death, the suit property was not in the name of the said deceased **Francis Mbugua Kagutha** but **Virginia Wambui Mbugua** and no evidence that the said **Francis Mbugua Kagutha** had challenged the proprietorship of the said **Virginia Wambui Mbugua**, his wife. Therefore this Court will not decide on the balance of convenience.

Having now carefully considered the pleadings herein, the instant **Notice of Motion** application and the written submissions, the Court finds that the **Notice of Motion** dated **18th January 2017** is merited and it is allowed entirely in terms of prayer No.(b) with costs to the Applicant herein.

It is so ordered.

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

L. GACHERU

JUDGE

In the presence of

Mr. Waweru holding brief for M/S Wambui Ngugi 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 and absence of Defendant/Respondent.

L. GACHERU

JUDGE

19/6/2018