



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.186 OF 2017

LUCY WARUIRU GATHU.....1ST PLAINTIFF/APPLICANT

ANNE RUGURU KIHOTO.....2ND PLAINTIFF/APPLICANT

TERESIA NJOKI KARORI.....3RD PLAINTIFF/APPLICANT

MONICAH WANJIRU NJUGUNA.....4TH PLAINTIFF/APPLICANT

ZIPPORAH WAITHERA THUO.....5TH PLAINTIFF/APPLICANT

-VERSUS-

SAMSON NUIGAI KIMANI.....1ST DEFENDANT/RESPONDENT

SAMMY MBUGUA KIMANI.....2ND DEFENDANT/RESPONDENT

JACKLINE MWENDE NGALA.....3RD DEFENDANT/RESPONDENT

PERIS MUTHONI THUO.....4TH DEFENDANT/RESPONDENT

RULING

By a *Plaint* dated 23rd February 2017, the Plaintiffs/Applicants sought for various orders against the Defendants/Respondents herein. Among the orders sought are:-

- a) *Cancellation/revocation of the Lease Agreement entered between the Plaintiffs' mother and the Defendants.*
- b) *A permanent injunction restraining the Defendants, their servants, agents or any other person claiming under them from entering, trespassing, building, occupying or in any way dealing with LR.No.Ndeiya/Makutano/T.2.*

The Plaintiffs had alleged in their claim that the suit property *Ndeiya/Makutano/T.2* measuring 3.2 Hectares was registered in the name of their mother *Peris Muthoni Thuo*, who is over 90 years of age and is also illiterate. However, on diverse dates, the Defendants/Respondents herein without any colour of right or reasonable cause entered into a *Lease Agreement* with the Plaintiffs'/Applicants' aged mother without the knowledge and consent of the Applicants which lease was to last for 10 years. It was their contention that the suit property is a family land which she inherited from their father to hold in trust for the Plaintiffs/Applicants.

Simultaneously, the Plaintiffs/Applicants filed a *Notice of Motion* application even dated, premised under *Order 40 Rule 1* and *Section 3A* of the *Civil Procedure Act* and sought for the following orders:-

1) *Spent*

2) *Spent*

3) *That the Defendants whether by themselves, their servants, agents or anybody acting under their instructions be restrained by an injunction from entering, taking possession, constructing, leasing or in any manner dealing with the property known as*

Ndeiya/Makutani/T.2 pending the hearing and determination of this suit.

4) That costs of this application be provided for in any event.

This application is premised upon the grounds stated on the face of the application being that:-

i. That the Plaintiffs are the biological children of the registered owner Peris Muthoni Thuo of all that parcel of land known as Ndeiya/Makutano/T.2.

ii. That the suit premises which consist of 3.2 Hectares is family land and the Defendants herein took advantage of the registered owner and deceived her into signing a Lease Agreement without the Plaintiffs'/Applicants' knowledge.

iii. That the lease is for a portion consisting of 0.5 Acres where the Defendants went ahead and registered the lease at the Land's Office against the title for ten years.

iv. That actions by the Defendants are not only provocative but could lead to breach of peace.

It is also supported by the *affidavit* of Anne Ruguru Kihoto, the 2nd Plaintiff herein who averred that she had authority of her Co-Plaintiffs/

Applicants to swear the said affidavit. She reiterated the contents of the grounds in support and further averred that she only realized that the suit property had been leased out in **December 2016**, when she made a visit and noted that chunk of the suit land had been fenced off and a small permanent structure had been constructed and connected with electricity as is evident from *annexture ARK-1*.

Further that when she visited the Land's Office, she noted from the *Official Search* that a portion of **0.5 acres** from the suit property had been leased to the Defendants/Respondents as is evident from *annexture ARK-2*. However, their mother denied that she had leased the said land and they thus decided to file this suit and application as the suit land is owned by entire family and only registered in the name of their mother Peris Muthoni Thuo, to hold it in trust for the whole family. She urged the Court to allow the instant application.

The application is contested and Samson Mungai Kimani, the 1st Defendant/Respondent swore a *Replying Affidavit* on **14th March 2017**, and averred that the suit property Ndeiya/Makutano/T.2 is not registered in the names of the Plaintiffs/Applicants and therefore they have no legal or equitable interest over the suit property. He contended that the *Lease Agreement* between the Defendants and Peris Muthoni Thuo is lawful and valid as the same complied with the relevant laws. Further that the allegations of deceit and misrepresentation are mere speculations as the particulars are not set out in the *Plaint*. It was their contentions that the suit property Ndeiya/Makutano/T.2, is still registered in the name of Peris Muthoni Thuo, and the Plaintiffs'/Applicants' interest thereon is not affected by the lease as the leased land will revert to the Lessor after the termination of the lease.

The Respondents further contended that the application has been overtaken by events as the Defendants/Respondents have already taken possession of the Leased premises, connected electricity, fenced the area and have operationalized their projects and the lease has been registered and therefore given the Defendants unfettered freedom to use the demised premises. The Respondents urged the Court to disallow the instant application.

On **25th May 2017**, Peris Muthoni Thuo the mother to the Plaintiffs/Applicants filed a *Notice of Motion* application seeking to be enjoined in the suit as an Interested Party on the basis that the Plaintiffs/Applicants have filed a suit seeking prayers against the suit property wherein she is the registered proprietor but she is not a party to the suit. The said application was not opposed and Peris Muthoni Thuo was *enjoined as a 4th Defendant* vide an *Amended Plaintiff* filed on **2nd February 2018**.

Accordingly, the said Peris Muthoni Thuo filed *Grounds of Opposition* to the instant *Notice of Motion* and averred that she is a *bonafide* registered proprietor of the suit land LR.Ndeiya/Makutano/T.2 and she also averred that she wilfully entered into a *Lease Agreement* with the Defendants/Respondents and therefore the Plaintiffs/Applicants lack capacity or *locus standi* to file this suit. Further that the orders sought in the application are incapable of being granted by the court given the circumstances of the case. She urged the Court to dismiss the instant *Notice of Motion*.

Anne Ruguru Kihoto swore a further *affidavit* and gave a history of how the suit property herein Ndeiya/Makutano/T.2 came to be registered in the name of Peris Muthoni Thuo, their mother and 4th Defendant herein.

The Court directed that the instant *Notice of Motion* be canvassed by way of *written submissions*. The Defendants/Respondents filed their submissions on **23rd April 2017** and urged the Court to dismiss the instant application. However, the Plaintiffs/Applicants did not file their written submissions and relied on their filed affidavits.

This Court has carefully considered the instant *Notice of Motion* and the pleadings in general. The Court too has carefully read the written submissions and the cited authorities and makes the following findings:-

The application is anchored under *Order 40 Rule 1* of the *Civil Procedure Rules*, which provision of law grants court discretion to issue temporary orders of injunction where the property in dispute is in danger of being *wasted, damaged, alienated* and/or *sold off*.

Further the application is premised under *Section 3A* of the *Civil Procedure Act* which gives the court inherent power to make such orders that are necessary in ensuring end of justice is met and to prevent abuse of the court process. It is also instructive to note that temporary injunctions are issued where there is evidence of immediate *danger* to property by *sale* or other *disposition*. See the case of

“To justify temporary injunction, there must be evidence of immediate danger to property by sale or other disposition”.

The orders sought herein are injunctive orders which are equitable reliefs granted at the discretion of the court and which 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, at this juncture, the court will not deal with the disputed issues conclusively especially given that the available evidence is only affidavits evidence. See the case of Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999, where the Court held that:-

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

The Court will only be concerned with a determination of whether the Applicant is deserving of the injunctive orders sought using the usual laid down 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....”

In determining whether the Applicants are deserving of the orders sought, the Court will rely on the principles set out in the case of Giella...Vs...Cassman Brown & Co. Ltd 1973 E.A 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.*

Has the Applicants herein established the above stated threshold?

Firstly, the Applicants needed to establish that they have a prima-facie case with probability of success. Prima-facie case was described in the case of Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR 123, to mean infringement of a right and which calls upon the accused party to answer to it. The Plaintiffs/Applicants have admitted that the suit property herein Ndeiya/Makutano/T.2 is registered in the name of Peris Muthoni Thuo. There is no doubt that the said Peris Muthoni Thuo has leased a portion of suit property to the Defendants herein. The Plaintiffs/Applicants alleged that the said Peris Muthoni Thuo is holding the suit land in trust for her family.

Order 40 Rule 1(a) is applicable when the suit property is in danger of being **wasted, damaged** or **alienated**. The Defendants have leased a portion of the suit property which is approximately **0.5 Acres** out of **3.2 Acres**. The Plaintiffs/Applicants have sought for injunction to restrain the Defendants from entering or dealing with suit property Ndeiya/Makutano/T.2 but not a portion of it which is **0.50 Acres** as per the **Lease Agreement** in force.

The 4th Defendant Peris Muthoni Thuo, has denied that she is holding the suit property in trust for her family especially the Plaintiffs/Applicants herein. The issue of trust cannot be determined through affidavits evidence. It will await the calling of evidence in the main suit. However, it is evident that the Defendants have taken over possession of the **0.5 Acres** after signing of the **Lease Agreement**. Injunctions are issued to prevent occurrence of an event. It would be of no use to grant injunctive orders when an event has already taken place. See the case of Jane Kemunto Mayaka....Vs...Municipal Council of Nakuru & Others, HCCC No.124 of 2005, where the Court held that:-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure the Applicant and are not issued where such an event has taken place....”

Further, the issues raised by the Plaintiffs/Applicants who are not the registered owners of the suit property have been contested by the 4th Defendant herein, Peris Muthoni Thuo. The said contested issues can only be determined at the main trial. For the above reasons, the Court finds that the Applicants have not established that they have a *prima-facie* case with probability of success at the trial.

On irreparable damages which cannot be compensated by an award of damages, it is evident that the Defendants herein have only leased a portion of the suit property and not a whole of it. If the Lease is terminated, that portion will revert back to the registered owner. Further there is no evidence that the Plaintiffs/Applicants have been utilizing this portion of land and that the Lease Agreement has now affected their utilization of the same and thus causing irreparable loss to them.

Consequently, the Court finds that there is no evidence that the Applicants herein 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, 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 balance of convenience, the Court finds that it is not in doubt. Even if it is in doubt, the balance of convenience would tilt in favour of maintaining the *status quo*, and the *status quo* herein is that the Defendants are in possession and use of **0.50 Acres** which they leased from the 4th Defendant (**Peris Muthoni Thuo**) herein out of **Ndeiya/Makutano/T.2**. The 1st – 3rd Defendants should continue to utilize the said portion of land until the suit is heard and determined.

Having now carefully considered the instant **Notice of Motion** dated **23rd February 2018**, the **Court finds it not merited and consequently, the said application is dismissed entirely with costs to the Defendants/Respondents.**

Further the Court finds that the **suit property herein falls within the territorial jurisdiction of Kikuyu Senior Principal Magistrate’s Court. The suit herein is transferred forthwith to Kikuyu Senior Principal Magistrate’s Court for hearing and determination.**

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of July 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Nganga holding brief for Mr. Charagu for the Plaintiffs/Applicants

Mr. Tumu holding brief for Mr. Njuguna for the Defendants/Respondents

Lucy – Court clerk

L. GACHERU

JUDGE

13/7/2018