



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.872 OF 2017

CATHERINE WANJIRU CHEGE.....PLAINTIFF/APPLICANT

-VERSUS-

TERESIAH GATHIRU.....DEFENDANT/RESPONDENT

RULING

Coming up for determination is the Plaintiff's/Applicant's **Notice of Motion** application dated **20th December 2017**, brought under **Order 40 Rule 1(a)** of the **Civil Procedure Rules** and **3A** of the **Civil Procedure Act** and wherein the Applicant has sought for the following orders:-

- 1) The Honourable Court be pleased to issue an order of injunction restraining the Defendants, their agents or anybody else whatsoever from in any way trespassing/encroaching on Plot No.4/399 of Land Parcel LR.No.Juja/Juja East Block 1/399, pending the hearing and determination of this suit.**
- 2) The costs of this application are borne by the Defendant/Respondent.**

The application is premised on the following grounds:-

- a) The Plaintiff/Applicant is the legal and rightful owner of Plot No.4 of land parcel LR.No.Juja/Juja East Block 1/399 having bought it from Joseph Ndungu Wamutwe and Susan Wanja Ndungu on or about 31st day of March 2014.**
- b) The Plaintiff/Applicant has been utilizing the said piece of land since the year 2014.**
- c) On the 27th day of September 2017, the Defendants/ Respondents entered the Plaintiff's/Applicant's Plot No.4/399 of land parcel Juja/Juja East Block 1/399 and started digging trenches and excavating thereto.**
- d) The Defendant/Respondent has started developing/ constructing a permanent house on the suit property.**
- e) It is only fair and just that the orders sought be granted.**
- f) If the orders sought are not granted, the Plaintiff stands to suffer irreparable loss and damage.**

The application is also supported by the **affidavit** of **Catherine Wanjiru Chege**, the Applicant herein who reiterated the contents of the grounds in support of the application and further added that the Defendant has continued to trespass on the said parcel of land with impunity and without regard to her rights and interests. Further that she has not condoned, connived or consented to the acts of the Defendant and that the said acts were done without her knowledge and/or consent. She urged the Court to allow her said application

The application is contested and **Teresiah Gathiru** filed her **Replying Affidavit** on **7th February 2018**, and stated that the instant applicant is based on **speculation**, is **unfounded**, **frivolous** and is **vexatious** and should be dismissed with costs. She alleged that she purchased the suit property on **18th October 2014** for **Kshs.200,000/=** from the registered owner **Joseph Ndungu Wamutwe**, in the presence of **Susan Wanja Ndungu**. The suit property is **Plot No.4/399** on **LR.No.Juja/Juja East Block 1/399**. She also averred that upon payment of the **purchase price** of **Kshs.200,000/=**, she was issued with the **Share Certificate** which was marked as **TWG-1** and she took possession of the same. Further that she built a residential house where she resides with her family. That it is wrong and illegal for the Plaintiff to claim ownership as she had prior to the purchase visited the suit plot with the vendor and confirmed vacant possession of the same. She contended that she is the owner of the suit property and the Applicant's allegations that she is a trespasser are **unfounded** and **misguided**. She urged the Court to dismiss this 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 and it makes the following findings:-

The Application herein is anchored under **Order 40 Rule 1(a)** which grants the court discretion to issue temporary injunctive orders wherein the suit property in dispute is in danger of being **wasted, alienated, damaged** and/or **disposed off**. Further the application is also anchored under **Section 3A** which donates the power to court to make any such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.

The discretion donated to court under **Order 40 Rule 1(1)** must be exercised judicially and on legal sound principles. 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”.

Further as the court exercises its discretion in determining whether to grant or not to grant the orders sought, the Court will also caution itself that at this interlocutory stage, it is not supposed to determine the disputed issues with a finality especially based on affidavits evidence. The Court is only supposed to determine whether the Applicant is deserving of injunctive orders 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 on the usual criteria....”

The Court will rely on the principles set out 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.**

Has the Applicant herein satisfied the above principles? The Applicant needed to establish that she has a *prima-facie* case with probability of success at the trial. *Prima-facie* case was described in the case of **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean ‘an infringement of the right’ of the Applicant.

The Applicant has alleged that she purchased the suit property from one **Joseph Ndungu Wamutwe** and his wife **Susan Wanja Wamutwe** on **31st March 2014**. She attached a copy of a **Sale Agreement** dated **31st March 2014**. She also attached a copy of the **Share Certificate No.324**, which was issued to her on the same date **31st March 2014**. It was her contention that the Defendant encroached on her suit property in **September 2017** and she caused her advocate to issue her with a **Demand Letter** dated **5th October 2017**. However, the Defendant alleged that she also purchased her suit property from the same **Joseph Ndungu Wamutwe** in the presence of **Susan Wanja Ndungu**. Though she attached the **Share Certificate** dated **10th October 2014**, she did not produce any **Sale Agreement** between herself and the said **Joseph Ndungu Wamutwe**. Further **Joseph Ndungu Wamutwe** signed his witness statement on **20th December 2017** and stated that he sold the suit property to **Catherine Wanjiru Chege**, the Plaintiff/Applicant herein but not the Defendant. Both parties have acknowledged that the Plot was initially owned by **Joseph Ndungu Wamutwe**. The said **Joseph Ndungu Wamutwe** allegedly sold the suit plot to the Plaintiff/Applicant in **March 2014**. Even if he also sold the same to the Defendant in **October 2014**, he had no capacity to do so because he had allegedly sold it to the Plaintiff in **March 2014**. Therefore the Court finds that the Plaintiff/Applicant has established that she has a *prima-facie* case with probability of success at the trial.

On the irreparable loss, though the Respondent has alleged that the purchase price that the Plaintiff paid was **Kshs.230,000/=** and is quantifiable which can be compensated by an award of damages, the Plaintiff’s right to own her suit property cannot be equated to the amount of money that the Respondent is willing to pay as 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”.

Therefore the Plaintiff’s right to own property has been infringed by the Respondent who purchased the suit property after the Plaintiff had already purchased it and this Court cannot find and hold that the Plaintiff can adequately be compensated by an award of damages as her right has crystallized and cannot be defeated. See the case of **Olympic Sport House Ltd...Vs...School Equipment Centre Ltd HCC No. 190 of 2012**, where the court held that:

“Damages are not and cannot be 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 crystallized right which can be protected by an Order of Injunction”

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 and would not decide on the balance of convenience.

The Defendant allegedly purchased the suit property about **6 months** after Plaintiff had purchased it. Her purchase is questionable because she did not attach any **Sale Agreement**. She cannot claim that she has already built her residential house and should the orders issued herein then that would amount to eviction. Prior to **October 2017**, the Defendant lived elsewhere and should continue living that elsewhere and out of the suit property until the suit is heard and determined.

Therefore the Court finds that the necessary order herein is to maintain *status quo* that prevailed before, and that *status quo* is what prevailed before the Defendant moved into the suit land. See the case of **Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000**, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

For the above reasons, the **Court finds the Plaintiff's/Applicant's Notice of Motion application dated 20th December 2017, is merited and the same is allowed entirely in terms of prayer No.3 with costs to the Applicant.**

Further the parties to prepare the main suit for hearing expeditiously so that the disputed issues can be resolved at once.

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. Kaburu Miriti for Plaintiff/Applicant

Mr. Wairegi holding brief for Mr. Kuria for Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

13/7/2018