



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.109 OF 2018

MARION WAMBUI MUNANU.....PLAINTIFF/APPLICANT

-VERSUS-

BERNARD MWANGI MUNANU.....1ST DEFENDANT/RESPONDENT

BONIFACE KAMANDE MWANGI.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant herein *Marion Wambui Munanu* filed a *Plaint* dated *4th April 2018* on *9th April 2018* and sought for orders that:-

- a) A permanent injunction against the 1st and 2nd Defendants restraining them, their servants or authorized agents from trespassing, selling, alienating, transferring, charging, operating any business, entering upon, using or in any way interfering with the parcel of land known as Thika Municipality/Block 11/532.*
- b) The Officer Commanding Station, Thika Police Station to assist in enforcement of this court's orders.*
- c) Costs of this suit.*

In her *Plaint*, she alleged that she is the owner of *Thika Municipality Block 11/532*, and has been in possession of the same for *over 12 years* and has been operating a car-wash business with the help of one of her sons who is now deceased. Further that after the death of her son, the Defendants entered and trespassed on the suit land, took over the car wash business without the Plaintiff's consent after stealing and hiding her documents of ownership. She also alleged that the Defendants/

Respondents have denied her any proceeds from the land and business and have neglected her needs and their continued stay on the land have caused her financial loss as well as mental, physical and emotional suffering.

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

- 1) That the Defendants/Respondents be ordered to produce to this court and deliver to the Plaintiff/Applicant all her documents of ownership relating to the parcel of land known as Thika Municipality/Block 11/532 in their possession.*
- 2) That a permanent injunction be issued against the Defendants/Respondents preventing them, their servants or authorized agents from trespassing, alienating, selling, operating any business, charging, transferring, using or in any way interfering with the parcel of land known as Thika Municipality/Block 11/532 pending the hearing of this suit.*
- 3) That in the alternative, the Plaintiff/Applicant be awarded maintenance money in the tune of Kshs.20,000/= per month pending the hearing of this application and the main suit.*
- 4) That the Officer Commanding Station, Thika Police Station assist in the enforcement of this court's order.*
- 5) That the costs of this application be in the cause.*

The application is premised upon the grounds stated on the face of the application and on the affidavit of the Plaintiff/Applicant herein. Among the grounds in support are that the Applicant is aged over *80 years* and is ailing and unable to look after herself without assistance. However, the Defendants/Respondents have denied her any proceeds from the land and car wash business and as a result thereof she has suffered mentally, physically and emotionally. In her affidavit, she averred that she has been rescued by her daughter *Nancy Njoki Munanu*, who has taken her in and live with her at her (*Njoki's*) matrimonial home. She urged the Court to consider her plight and order the

Defendants/Respondents out of the suit property and return her back to it. The Applicant urged the Court to allow the application.

The application is contested and the Respondents swore a **joint Replying Affidavit** and denied all the averments made by the Applicant in her **Supporting Affidavit**. They further averred that the Applicant has always lived at their rural home at **Kigumo** until when the said **Nancy Njoki Munanu**, secretly removed her from there. Further that when the Applicant resided at **Kigumo** family home, all the family members participated in her maintenance and she never underwent any suffering. They contended that the Plaintiff is old and illiterate and is incapable of signing the documents presented by court. They further contended that the Plaintiff/Applicant does not own the suit property and therefore the entire suit is **misconceived** and **bad in law**. They urged the Court to dismiss the instant application with costs.

The Plaintiff/Applicant also filed a further affidavit on **14th June 2018**, and averred that her daughter **Nancy Njoki Munanu**, took her to her home with the Applicant's permission so that she may take care of her and also remove her from constant abuse that she had suffered from the Defendants/Respondents and their families. Therefore the said **Nancy Njoki (her daughter)** did not force or coerce her in any way to leave with her but the Applicant agreed to move because of the constant abuses from the Defendants/Respondents.

The application was canvassed by way of **written submissions** which this Court has carefully read and considered. The application is anchored under **Section 3A** of the **Civil Procedure Act** which donates the power to this court to make such orders that are necessary in ensuring end of justice is met and also to prevent abuse of the court process Further the application is brought under **Order 40 Rules 1, 2 & 4** of the Civil Procedure Rules, which gives the court discretion to issue temporary orders of injunction in instances where the suit property is in danger of being **alienated, disposed off, wasted** and/or **damaged**. As usual the said 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”.

The Plaintiff/Applicant has sought for temporary injunction against the Defendants herein. She had a duty to establish that the suit property herein was in danger of being **wasted, damaged, alienated** and/or **disposed off** in any other way so that the court can grant the orders sought.

As the Court embarks on the determination of the instant application, it will also take into account that at this juncture, it is not required to decide the disputed issues with finality or conclusively, especially by relying on affidavits evidence. All that the court is required at this interlocutory stage is to determine whether the Applicant is deserving of the injunctive orders sought and based on the usual criteria. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

The criteria that will guide this court is the one set out in the case of **Giella Vs Cassman Brown & Company Ltd 1973 E.A 358**. These criterias 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 been able to establish the threshold for grant of injunctive orders?

Firstly, the Applicant needed to establish that she has a *prima-facie* case with probability of success. A *prima-facie* case was described in the **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR** to mean an infringement of a right and probability of success of the case at the main trial.

The Applicant herein has alleged that she is the owner of the suit property and that the said land was being used by one of her sons who later died. She also alleged that after the death of her said son, the Defendants/Respondents took away her ownership documents plus identify documents and later entered and trespassed on the suit land denying her proceeds from the same.

On their part, the Defendants/Respondents denied that the Plaintiff ever owned the said land. They admitted that the said late **Kamande** used the land to run a car wash business but with the permission of the real owner who is not the Plaintiff herein. The ownership of the suit property **Thika Municipality Block 11/532** by the Plaintiff is disputed. The Plaintiff therefore needed to prove that she indeed owned the property for her to be entitled to an order of injunction. Further the Plaintiff alleged that the Defendants took away her ownership documents and hid them so that she cannot use them in court.

However, stealing of such documents is a criminal offence. There is no evidence that the Plaintiff/Applicant ever reported this theft to any police station. Again even if the Plaintiff's ownership documents were stolen, she could have carried a search at the Lands office and attached a Certificate of official search to her affidavit to confirm that indeed she owns the suit property and thus she deserved the orders sought. Without the Certificate of official Search or any other document to connect the Plaintiff with the suit property at this juncture, the Court cannot find and hold that she owns the suit property and that she deserved the injunctive orders sought. Further on the car wash business, she could also have attached previous copies of business licences to connect her to the car wash business. Again even if the documents were stolen, then that is a matter of evidence which can only be adduced at the main trial and not at the interlocutory stage.

The Court therefore finds that the Applicant has not established that she has a *prima-facie* case with probability of success at the trial.

On the second limb of whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages if orders sought are not granted, the Court finds that the Plaintiff did aver that the suit property was not in her possession but in possession of her deceased son. By the Defendants using the land, then that has not changed any aspect of the Plaintiff's possession of the suit property. It is alleged that the Defendants are carrying on with the car wash business which was being carried on by the Applicant's deceased son. That use of the land has not changed and therefore the Court cannot hold and find that there is any danger of the land being **damaged, wasted** and/or **alienated** and therefore need for injunctive orders.

The Plaintiff/Applicant also alleged that her deceased son used to support her using the proceeds from the car wash business. However that allegation has been disputed by the Defendants and therefore that is a disputed issue which needs to be canvassed at the main trial by calling of evidence. The Plaintiff/Applicant has averred that she lives with her daughter **Nancy Njoki Munanu**. She is therefore not left out in the cold and since the issue of her maintenance is contested, the Court cannot find and hold with certainty that she used to be supported by her late son using the proceeds from the car wash business and now with the Defendants/Respondents running it, she will suffer irreparable loss which cannot be compensated by an award of damages. In any event the **Kshs.20,000/=** per month that she is demanding can be quantified and paid in form of damages in the event she turns out to be a successful litigant at the end of trial. 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”.

Equally, the Court finds that the Applicant is capable of being compensated with damages in the event the main suit is decided in her favour.

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 at all. Even if the Court was in doubt, the balance of convenience would tilt in favour of denying the orders sought. The Court finds so because the order sought herein in **prayer No.4** is the only prayer sought in the main suit being **prayer No.(a)**. Granting the **prayer No.(4)** herein would mean granting a final order at this stage without the benefit of having heard evidence from both parties. It would therefore be inappropriate. See the case of **The Headmaster, Kiembeni Baptist Primary & Another...Vs...The Pastor of Kiembeni Baptist Church, Mombasa HCC App.No.103 of 2004**, where the Court held that:-

“When dealing with an application for interlocutory injunction, it is wrong to grant a permanent injunction whose effect is to conclusively decide the suit as issues of fact should be decided after hearing of evidence”. (See **Mbuthia...Vs...Jimba Credit Finance Corporation & Another (1988) KLR 1**).

Equally, in this case, the Court finds that it cannot grant the permanent injunctive order sought herein as it will be a final order which will settle the main suit at the interlocutory stage.

On whether to order the Defendants to produce the documents of ownership, the Court finds that there was no evidence at all that the Defendants/Respondents did steal and hide the same as there is no evidence of even reporting of the said theft to the police.

On whether the Plaintiff/Applicant did not sign the pleadings herein and the same were signed by other parties which offends **Order 4 Rule 2** of the **Civil Procedure Rules**, the Court finds that at this juncture, it will not deal with procedural technicalities but will only be concerned by substantive justice as provided by **Article 159(2)(d)** of the **Constitution of Kenya 2010**. Consequently, the Court will not make a finding on that aspect at this interlocutory stage.

Having now carefully considered the instant **Notice of Motion** dated **4th April 2018**, **the Court finds it not merited and it is consequently dismissed entirely with costs being in the cause.**

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 9th day of July 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

No appearance for Defendants/Respondents

Lucy – Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court in the absence of the parties and their advocates though date taken in their presence.

L. GACHERU

JUDGE

9/7/2018