



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.801 OF 2017

DIANA WANJIRU MACHARIA.....PLAINTIFF/APPLICANT

-VERSUS-

MARY WANGUI.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* application **16th October 2017**, brought under **Order 40 Rule 1** and **Sections 1A, 1B** and **3A** of the *Civil Procedure Act* and all other enabling provisions of law and wherein the Applicant has sought for these orders:-

- 1) That this Honourable Court be pleased to issue orders of temporary injunction restraining the Respondent from illegally and without colour of right constructing a toilet and building a permanent house on the parcel of land number Ruiru Kiu Block 10(Mahiira) 1266 belonging to the Applicant pending the hearing and determination of the main suit.**
- 2) That the costs of this application be in the cause.**

The application is supported by the following grounds:-

- 1) That the Applicant is the legal registered proprietor of the land parcel LR.No.Ruiru Kiu Block 10(Mahiira)/1266.**
- 2) That if the Respondent is allowed to continue constructing a toilet and building a permanent house on the suit parcel, the Applicant will suffer irreparable loss and damage.**
- 3) That the suit property should be preserved pending hearing and determination of the main suit.**
- 4) That no prejudice shall be occasioned to the Respondent if this application is allowed.**

Further, the application is supported by the *Affidavit* of **Diana Wanjiru Macharia** who averred that she is the legal registered proprietor of the land parcel **No.LR.No.Ruiru/Kiu Block 10 (Mahiira)/1266** and hold a **title deed** to the said land being **annexture DWM-1**, issued on **7th August 2013**. She further averred that she bought the said parcel of land from one **David Kiundo Mbugua**, vide a **Sale Agreement** dated **15th October 2008** as per **annexture DWM-2**. It was her contention that she was issued with a **Share Certificate** for **plot No.1172** by **Mahiira Housing Co. Ltd** on **15th October 2008** as per **annexture DWM-3** and she proceeded to pay the required fees for processing of the title deed which was issued in her favour as per **annexture DWM-4** and **DWM-5**. However, the Respondent has now illegally encroached onto the suit property being **Ruiru Kiu Block 10(Mahiira)/1266**, and has constructed a toilet and started building a permanent house thereon without color of right. She further contended that if this Court does not issue orders to bar the said encroachment and construction, then the Applicant will suffer irreparable loss and damages. She urged the Court to allow the instant application.

The application is contested by the Respondent herein **Mary Wangui Mwangi** who filed her **Replying Affidavit** and averred that contrary to the Plaintiff's asserts that she is the legal owner of the suit property, the Respondent is the owner of the suit land having been registered as such on **4th February 2013** as evident from **annexture MW-1**, a copy of title deed. Further that she purchased the said plot from **Mahiira Housing Company** on **July 2006** and the said property was pointed out to her. It was her contention that all the documents presented by the Applicant were issued long after she had acquired the property, therefore the Applicant could not acquire an interest in what the Respondent already owned. She urged the Court to dismiss the instant application with costs.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also

considered the cited authorities, the pleadings in general, the annexures thereto and the relevant provisions of law and the Court renders itself as follows:-

The property in dispute is **Ruiru/Kiu Block 10(Mahiira)/1266**, in which both the Plaintiff/Applicant and the Defendant/Respondent have **Certificate of title** in respect of the said parcel of land in their favours. For the Plaintiff/Applicant, her title deed was issued on **7th August 2013** and the suit property is approximately **0.0375 Hectares** from **Registry Map Sheet No.148/2/20**. In respect of the Defendant/Respondent, **Mary Wangui Mwangi**, her title deed was issued on **4th February 2013** for an area of **0.0375 Hectares** and **Registry Map Sheet is No.148/2/20**. Therefore the two title deeds are for the same parcel of land issued in the same year but different months.

The Defendant's/Respondent's title deed was issued earlier on **4th February 2013** and was signed by **the Land Registrar C.M. Gichuki/25**. The said **Land Registrar C.M. Gichuki** signed the second title deed in favour of the Plaintiff/Applicant on **7th August 2013**. From the above analysis, the Defendant's/Respondent's title is the first in time.

The Applicant has brought this suit under **Order 40 Rule 1**, which provides that:-

“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 y g 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.

Further, the application is anchored under **Sections 1A** and **1B** of the **Civil Procedure Act** which Sections empower the court to facilitate the **just, proportionate, expeditious** and **affordable** resolution of civil disputes before the court. Under **Section 3A**, the court has inherent power to make and/or issue such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.

As the Court embarks on determination of this application, it will bear in mind the above provisions of law and the available evidence.

At this juncture, the court is not supposed to determine the disputed issues with finality. However, the court is only supposed to determine whether the Applicant is deserving of the injunctive orders sought basing the said consideration on the laid down criteria. The criteria and/or principles to be considered are the ones set out in the case of **Giella...Vs....Cassman Brown & Company 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 Applicant herein established any of the stated principles?

This Court will now consider the above stated principles and juxtapose them with the available evidence and then come up with a finding as to whether the application is merited or not.

The Applicant needed to first establish that she has a prima-facie case with probability of success at the trial. As was held in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, a prima-facie case means more than an arguable case. It means that the right of the Applicant has been infringed which right need to be protected and that the said right is directly threatened by an act sought to be restrained.

Has is the Applicant herein established the above stated prima-facie case?

It was the Applicant's allegations that she is the legal registered proprietor of the suit property having purchased the same from one **Daniel Kiundo Mbugua** vide a **Sale Agreement** dated **15th October 2008**. However from the Respondent's document, the suit property was transferred to her on **5th July 2006**, with a transfer document even dated after having paid the full purchase price of **Khs.300,000/=** vide a **receipt No.7498** dated **5th July 2006** for plot **No.1172**, the suit plot. The Applicant also averred that after paying fees for processing of the title deed on **17th July 2013** and **24th July 2014**, she was issued with her title deed on **7th August 2013**.

However from the Respondent's document vide **receipt No.10142**, the Respondent paid title deed fee on **5th July 2006** for **plot no.1172** and that was two years before the Applicant allegedly purchased the suit property from the said **Daniel Kiundo Mbugua**. From the available evidence, there is no doubt that the Respondent's title deed was the first in time. However, it is evident that there are two title deeds available over the suit property. At this juncture, the Court cannot confirm with certainty which of the two title deeds is genuine. But from the face of it, the Respondent's title deed is the first in time and until contrary evidence is availed, the first in time always prevails. See the case of **Gitwany Investment Ltd & 3 Others...Vs...Commissioner of Lands, HCCC No.1114 of 2002**, where the Court held that:-

“The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”.

Further, if by **7th August 2013**, there was in existence another title deed in favour of the Respondent herein issued on **4th February 2013**, then the title deed for **7th August 2013** was issued **irregularly** or through **misrepresentation** and as provided by **Section 26(1)(a) & (b)** of the **Land Registration Act**, such a title can be challenged and/or impugned. However, the issue of whether the Plaintiff's/Applicant's title is capable of being impugned cannot be determined at this juncture but is a matter for determination after calling of evidence at the main trial. What is not in doubt is that the Respondent was the earlier registered proprietor of the suit property and the Applicant cannot be found to have established a *prima-facie* case with probability of success at the trial.

Having found that the Plaintiff/Applicant has not established a *prima-facie* case with probability of success at the trial, the Court finds no reason to deal with the other limbs of **Giella..Vs..Cassman(supra)** because the said principles are sequential. See the case of **Kenya Commercial Finance Co. Limited..Vs.. Afraha Education Society (2001) 1EA 87**, where the court held that”-

“The conditions in the case of Giella ..Vs.. Cassman Brown for granting of temporary injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then the third condition can be addressed.”

The upshot of the foregoing is that the Plaintiff/Applicant has failed to establish the laid down principles for grant of injunctive orders. Therefore this Court has no option but to find and hold that the Plaintiff's/Applicant's **Notice of Motion** application dated **16th October 2017** **is not merited**. Consequently, the Court **dismisses the said application entirely with costs to the Respondent**.

Further, the parties are directed to prepare the suit for hearing expeditiously so that the disputed issues can be determined at once. For that reason, the parties are granted leave of **30 days** from the date hereof to comply with Order 11 and thereafter fix the matter for Pre-trial directions before the **Deputy Registrar** of this Court.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of November 2018.

L. GACHERU

JUDGE

In the presence of

M/S Wambui holding brief for Mr. Mburu for Plaintiff/Applicant

M/S Cheserek holding brief for M/s Waithera Mwangi for Defendant/

Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

23/11/2018