



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.782 OF 2017**

**(FORMERLY CIVIL SUIT NO.1200 OF 1980 - NAIROBI)**

**RICHARD KARIUKI KAMWENJI.....PLAINITFF/APPLICANT**

**-VERSUS-**

**TERESIA WAITHIRA KARIUKI.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* application **25<sup>th</sup> September 2017**, brought under **Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap 21 Laws of Kenya), Order 51 Rule 1** and all other enabling provisions of law. The Applicant has sought for orders of temporary injunction against the Respondent and/or agents, servants/employees restraining them from entering, trespassing, erecting buildings and/or in any way dealing with the land parcel **No.Ndumberi/Ndumberi/738**, and costs of the application be in the cause.

The application is supported by the following grounds:-

- 1) That the Applicant bought 2 acres of the land from LR.Ndumberi/Ndumberi/738 from Zakaria Kimuhu (who was the owner) in the year 1980.**
- 2) That the Applicant paid the whole purchase price and when Zakaria Kimuhu (deceased) delayed in transferring the said 2 acres, the Applicant filed suit at the High Court.**
- 3) That on 22<sup>nd</sup> May 1980, the court issued a Decree that the deceased Zakaria Kimuhu do transfer 2 acres of parcel of land known as LR.Ndumberi/Ndumberi/738 (which was the subject of the suit) to the Applicant.**
- 4) That the Respondent has encroached on and is developing LR.Ndumberi/Ndumberi/738, causing the Applicant immense suffering, loss and damage.**
- 5) That it is in the interest of justice that the present application be allowed as prayed.**

The application is also supported by the *affidavit* of **Richard Kariuki Kamwenji**, who averred that the suit herein was between himself and the late **Zakaria Kimuhu** and the Respondent herein is a stranger to this suit.

Further, that he bought **2 acres** of land out of **LR.Ndumberi/**

**Ndumberi/738** from **Zakaria Kimuhu** who was the owner in **1980** and he paid the whole purchase price. However the said **Zakaria Kimuhu** delayed in transferring the said **2 acres** and Applicant filed the suit. Further, that on **22<sup>nd</sup> May 1980**, the court issued a **Decree** in his favour and directed the said **Zakaria Kimuhu** to transfer the **2 acres**. However, the Respondent has now encroached on the suit property by developing thereon thus causing suffering, loss and damage to the Applicant. The Court was urged to allow the instant application.

The application is opposed and **Teresiah Waithira Kariuki**, the administrator of the **Estate of Zakaria Kimuhu** filed a **Replying Affidavit**. She averred that the suit land herein **LR.Ndumberi/Ndumberi/738**, is registered in the name of her late husband and his brothers **Njoka Nyaga, John Mbugua Nyaga** and **George Kimuhu Nyaga**. Further that the Applicant has unlawfully lodged a caution against the suit land. She admitted that indeed on **22<sup>nd</sup> May 1980**, the Applicant was issued with a **Decree** in **Civil Suit No.1200 of 1980**. However the said **Judgment** and **Decree** were reviewed by Justice H. G. Platt on **28<sup>th</sup> February 1983** and the said Judgment was vacated in favour of the Respondent herein as per **annexture TWK-3**.

Further that todate, the said Order of Justice Platt has never been challenged. She also alleged that upon intervention by the village elders, the Plaintiff/Applicant had agreed to transfer the suit land to her as per the **Consent form** signed by **Kiambu Land Control Board Chairman** on **29<sup>th</sup> July 1987** and marked **TWK-4**. She urged the Court to dismiss the 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 instant **Notice of Motion** application and the annexures thereto.

The application is anchored under **Sections 1A & 1B** of the **Civil Procedure Act**, which deals with the overriding objective of the Act which is to facilitate the **just, proportionate, expeditious** and **affordable**

resolution of civil disputes governed by the said Act.

Further the application is anchored under **Section 3A** and **63(e)** of the same Act which Sections allows the court 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.

There is no doubt that the suit herein was filed in **1980** by the Plaintiff/Applicant against one **Zakaria Kimuhu** who was a husband to the Defendant/Respondent. There is also no doubt that a Judgment had been entered in favour of the Plaintiff on **22<sup>nd</sup> May 1980** wherein **Zakaria Kimuhu** was directed to transfer **2 acres** from land parcel **No.LR.Ndumberi/Ndumberi/738** to the Applicant. However, the said Judgment was reviewed and vacated on **28<sup>th</sup> February 1983** as is evident from **annexture TWK-3**. The **Green Card TWK-3** also shows that the entry **No.5** wherein **Richard Kariuki Kamwenji** was entered as proprietor of **200/840 shares** of the suit land, was vacated on **29<sup>th</sup> April 1986** and **Zakaria Kimuhu & Others** were reinstated as proprietors of the suit property.

Further, on **5<sup>th</sup> November 1997**, the Plaintiff/Applicant herein placed a **Caution** on **Zakaria Kimuhu's share**.

There is also no doubt that the file herein was misplaced in the Civil Registry and vide a **Notice of Motion application** dated **19<sup>th</sup> June 2017**, the Respondent herein sought to have the file herein reconstructed. However, the Plaintiff/Applicant had opposed the said reconstruction. Further after the application for reconstruction was allowed, the Plaintiff/Applicant filed the instant suit.

The Applicant has alleged that the Respondent has encroached on the instant suit property which he alleges that it belongs to him vide a Judgment of the court issued on **22<sup>nd</sup> May 1980**. However, it is evident that the said Judgment was vacated on **28<sup>th</sup> February 1983**, and the suit property reverted back to **Zakaria Kimuhu & Others**.

It is evident that temporary injunction is issued when the suit property is in danger of **being wasted, alienated** and/or **disposed off**. See **Order 40 Rule 1**, which provides:-

**“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.**

Also see the case of **Noormohammed Janmohammed...Vs...Kassam Ali Virji Madham (1953) 20 LRK 8:-**

**“the purpose of temporary injunction is to preserve the status quo”.**

The suit herein was filed in **1980** and Judgment in favour of the Plaintiff was initially entered on **22<sup>nd</sup> May 1980**. However, the same was vacated on **28<sup>th</sup> February 1983** and an entry was entered in the **Green Card** on **29<sup>th</sup> April 1986**, to reflect the said order of reinstatement of the suit property to **Zakaria Kimuhu & Others**. The Plaintiff/Applicant is therefore not the registered owner of the suit property.

Further, the Plaintiff placed a **Caution** on the suit property on **5<sup>th</sup> November 1992** and his alleged interest on the suit property has been protected by the said Caution.

Before the Court file had been reconstructed, which reconstruction was opposed by the Plaintiff/Applicant, the Applicant had not found it fit to seek for temporary orders of injunction. Why did he find it necessary to seek for injunction after the court file was reconstructed and in any event, he had opposed the said reconstruction? The Court finds the instant application is an **abuse** of the court process and is **frivolous**.

Further the application goes against the spirit of **Sections 1A** and **1B** of the **Civil Procedure Act** which empower the court to facilitate the **expeditious** and **affordable** resolution of civil disputes before the court. The instant application only serves the purpose of delaying the expeditious disposal of the suit herein which was filed in the year **1980**.

The Court after careful consideration of the instant **Notice of Motion** application dated **25<sup>th</sup> September 2017**, **finds it not merited**. The **said application is dismissed entirely with costs to the Defendant**/

**Respondent herein.**

Further, since the court file was ordered to be reconstructed, the Defendant/Respondent is directed to file all the available pleadings within a period of **14 days** from the date hereof. Further the parties should prepare the suit for hearing expeditiously by complying with Order 11 within a period of **30 days** after the filing of the relevant copies of pleadings. Thereafter a date for Pre-trial Conference to be taken before the **Deputy Registrar** of this Court for expeditious disposal of the suit in accordance with **Sections 1A & 1B** of the **Civil Procedure Act**. The above are the necessary orders as provided by **Section 3A** of the **Civil Procedure Act** which would ensure that end of justice if met and which will prevent abuse of the court process.

It is so ordered.

**Dated, Signed and Delivered at Thika this 23<sup>rd</sup> day of November 2018.**

**L. GACHERU**

**JUDGE**

**23/11/2018**

In the presence of

No appearance for Plaintiff/Applicant

M/S Wambui holding brief for Mburu Machua for Defendant/Respondent

Lucy - Court clerk.

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**23/11/2018**