



**REPUBLIC OF KENYA**

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

**THIKA ELC CASE NO.721 OF 2017**

**MARTIN MBUGUA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**GLADYS GITHEGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUNGARU ENTERPRISES.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff/Applicant herein **Martin Mbugua** has vide a **Notice of Motion** application dated **24<sup>th</sup> August 2017** sought for the following orders:-

- 1) That this Honourable Court do issue an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents, by themselves, their agents, servants officers and or otherwise from carrying out any operations and/or activities on any part of the ten(10) acres of land LR.No.10531, IR No.19076 measuring 957 acres in Kiambu County, Thika East District, sub-leased to the Applicant as originally demarcated in the presence of the Applicant and Directors of Mungaru Enterprises, when entering into the sub-lease agreement pending the hearing and determination of this suit.**
- 2) That this Honourable Court do issue an order directing the OCS at Ngati Police Station to enforce the restraining orders issued by this Honourable Court pursuant to this application.**
- 3) That this Honourable Court do make such orders as it may deem fit and just in the circumstances.**
- 4) That costs of this application be provided for.**

This application is supported by the grounds set out on the face of the application and on the **Supporting Affidavit** of the Applicant herein. These grounds are:-

- a) The 2<sup>nd</sup> Respondent by virtue of a Tenancy Agreement date 1<sup>st</sup> August 2010 is a lessee of the piece of land LR.No.10531, IR No.19076 957 acres in Kiambu County, Thika East District from the Salvation Army.**
- b) The 2<sup>nd</sup> Respondent then entered to a sub-lease with the Applicant to occupy a ten acres portion of the land LR.No.10531, IR No.19076 957 acres in Kiambu County, Thika East District, for a similar period as prescribed above and for similar mining purposes.**
- c) Upon the Applicant taking possession of the said piece of land and beginning the mining activities, the 2<sup>nd</sup> Respondent leased the adjacent portion of land to the 1<sup>st</sup> Respondent, who is also a relative of the agents/officers of the 2<sup>nd</sup> Respondent.**
- d) The parties had peacefully co-existed until last year, when the 1<sup>st</sup> Respondent began encroaching in the Applicant's portion of land, with the encouragement of the 2<sup>nd</sup> Respondent.**
- e) The Defendants/Respondents have continued to threaten the peaceful occupancy and tenancy of the Plaintiff/Applicant by sending goons to intimidate and scare off any operations at the Plaintiff's legally leased portion.**
- f) Despite intervention from the chief of the area and the administration police to have the Defendants restrained from encroaching, the Defendants have persistently been aggressive and provoking chaos by ignoring any attempts for peaceful resolution.**

**g) In fact the 1<sup>st</sup> Respondent on 23<sup>rd</sup> August 2017 sent a team of goons to supervise the unlawful encroachment into the Applicant's portion of land with encouragement by the 2<sup>nd</sup> Respondent.**

**h) The Applicant has incurred substantial costs restoring the demarcation, which the 1<sup>st</sup> Respondent keep on demolishing and moving the boundary, hence encroaching into the Applicant's portion of land.**

**i) It is therefore in the interest of justice that this application is heard and the orders sought granted.**

In his **Supporting Affidavit**, the Applicant reiterated the contents of the grounds in support of his application. The Defendants/Respondents were served with the **Summons to Enter Appearance** and the instant application through **Substituted Service** as per the **Affidavit of Service** of **Samuel Kairu** filed in court on 14<sup>th</sup> November 2017.

The 1<sup>st</sup> Defendant/Respondent did not enter any appearance nor file any response to the instant application. However, the 2<sup>nd</sup> Respondent filed its **Replying Affidavit** on 18<sup>th</sup> December 2017, through the **Law Firm of Kinuthia Kahindi & Co. Advocates**.

**George Muritu Gathecha T/A Mungaru Enterprises** swore a **Replying Affidavit** and admitted that 1st Respondent has her adjacent portion of property but he was not aware of any alleged encroachment into the Applicant's portion of land by the said 1st Respondent. He also denied having encouraged the 1st Respondent to encroach on the Applicant's portion of land. Further that there are several portions of the suit property allocated to several people to mine stones and there are no disputes and that this is the first dispute which he has been informed of since the other people live in harmony with each other. It was his allegation that the Applicant is trying to involve the 2nd Respondent in a personal dispute with the 1st Respondent which the 2nd Respondent has nothing to do with. It was his contention that the 2nd Respondent continues to support both parties and he urged them to live amicably. The deponent urged the Court to dismiss the instant application against the 2nd Respondent with costs.

The application was canvassed by way of written submissions which this Court has carefully considered, together with the cited authorities. The Court has also considered the whole pleadings and the annexures thereto and renders itself as follows:-

The Applicant herein has sought for injunctive orders against the Respondents which are equitable reliefs granted at the discretion of the court. However that discretion has to be exercised judicially and with reasons. 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, the Court takes cognizance of the fact that at this interlocutory stage, the court is not called upon to determine the disputed issues with finality given that the available evidence now is only affidavit 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”.**

All that the court is called upon to determine is whether the Applicant is deserving of the injunctive orders sought and based on the usual criteria set out in the case of **Giella....Vs...Cassman Brown & Co. 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.**

Therefore this Court will consider the available evidence, juxtapose it with the above states principles and then determine whether the Applicant is deserving of the orders sought.

The Applicant has to establish whether he has a *prima-facie* case with probability of success at the trial.

There is no doubt that the Applicant is a sub-lessee of the 2<sup>nd</sup> Defendant/Respondent herein. The 2<sup>nd</sup> Respondent is the main lessee of the suit property **LR.No.10531 IR No.19076** measuring **957 Acres** from **Salvation Army, Kenya East Territory**. The said **Tenancy Agreement** is marked **MM-1** and was entered on **1<sup>st</sup> August 2010**, and the lessee (2<sup>nd</sup> Respondent) was to use the land for mining of stones. There is no

doubt that the 2<sup>nd</sup> Respondent leased **10 Acres out of 957 Acres** to the Plaintiff herein vide a **sub-lease** dated **26<sup>th</sup> November 2013**. The Applicant was to use and mine on the said **10 Acres** for a similar term held by the main lessee.

It is also not in doubt that the main lessee/2<sup>nd</sup> Respondent has leased several other portions of land to several other persons, the 1<sup>st</sup> Defendant/Respondent being one of them. The Plaintiff and 2<sup>nd</sup> Respondent are in agreement that the 1<sup>st</sup> Defendant/Respondent's portion of land is adjacent to the Plaintiff's portion. The Plaintiff has alleged that the 1<sup>st</sup> Respondent with the encouragement of the 2<sup>nd</sup> Respondent has encroached on his portion of land. The 2<sup>nd</sup> Respondent has denied such knowledge of encroachment and even encouragement of 1<sup>st</sup> Respondent to encroach on the Applicant's portion of land. The 1<sup>st</sup> Respondent has not filed any response to deny the Applicant's allegations.

Though the 2<sup>nd</sup> Respondent denied the Applicant's allegation, it verily admitted that there is a dispute between the Plaintiff/Applicant and the 1<sup>st</sup> Respondent. The said dispute is over the boundaries of the two parties' portion of land. Since the 1<sup>st</sup> Respondent did not dispute the Applicant's allegations, the Court will have **no reasons to doubt the Applicant's allegation against the 1st Respondent**.

However, there is no sufficient evidence availed by the Applicant to confirm that the 2<sup>nd</sup> Respondent has encouraged the 1<sup>st</sup> Defendant/Respondent to encroach on the Applicant's portion of land.

For the above reasons, the Court finds that the Applicant has established a *prima-facie* case against the 1<sup>st</sup> Respondent but not the 2<sup>nd</sup> Respondent herein.

On the second limb, it is evident that since the Applicant is a lessee and expects to rip benefits from the sub-lease, if the 1<sup>st</sup> Respondent continues with the said encroachment, then the Applicant will suffer irreparable loss and since the said encroachment infringes on the Applicant's right, the Court cannot find and hold that damages would be sufficient to compensate the Applicant. See the case **of Panari Enterprises Ltd...Vs..Lijoodi & 2 Others (2014) eKLR**, where the Court held that:-

***“Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages aren't always a suitable remedy where the Plaintiff has established a clear legal right or breach”.***

It is evident that if the 1<sup>st</sup> Respondent is not stopped, the Applicant will continue to suffer loss which might cause irreparable harm as the 1<sup>st</sup> Respondent would be interfering with the Applicant's right to mine peacefully on the suit property as per the term of his sub-lease.

Further, the balance of convenience herein would tilt in favour of maintaining the *status quo* and the *status quo* herein is what existed before the encroachment or the wrongful act of the 1<sup>st</sup> Respondent. 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”.***

Having now carefully considered the instant **Notice of Motion** application dated **24<sup>th</sup> August 2017**, the **Court finds it merited in terms of prayers No.4 and 5** against the 1<sup>st</sup> Defendant/Respondent herein only. There is no evidence availed to warrant this Court to issue orders against the 2<sup>nd</sup> Respondent/Defendant herein who is the sub-lessee.

Further, cost **of this application shall be in the cause**. However, the Applicant herein is directed to prepare the main suit for hearing expeditiously so that the issues in dispute can be resolved at once.

Further, the Court finds that the claim herein falls within the **pecuniary jurisdiction** of the **Chief Magistrate's Court**. For the above reasons, this suit will be **transferred** immediately to **Thika Chief Magistrate's Court** for hearing and determination in accordance with **Section 18(1) of the Civil Procedure Act**.

It is so ordered.

**Dated, Signed and Delivered at Thika this 16<sup>th</sup> day of November 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Githui holding brief Mr. Kairu for Plaintiff/Applicant

No appearance for 1<sup>st</sup> Defendant/Respondent

M/S Kahindi for 2<sup>nd</sup> Defendant/Respondent

Lucy - Court clerk.

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

**L. GACHERU**

**JUDGE**

**16/11/2018**