



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 386 OF 2015**

**LEVY VICTOR WAKABA.....1<sup>ST</sup> APPLICANT**

**MARK EDWARD MBUTHIA WAKABA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**FRED MOKUA..... 1<sup>ST</sup> RESPONDENT**

**EMBAKASI RANCHING COMPANY LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 6<sup>th</sup> May 2015 in which the Applicants seek for orders of mandatory injunction directing the 1<sup>st</sup> Respondent to cease the ongoing construction on the suit property and further directing the 1<sup>st</sup> Respondent to forthwith vacate the suit property pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff, Levy Victor Wakaba, sworn on 6<sup>th</sup> May 2015 in which he averred that he was claiming the parcel of land measuring ¼ acre in Kamonde Area of Embakasi being Plot No. P6741 (herein referred to as the “suit property”). He averred that the suit property was previously owned by one Jane Maingi Musau who sold the same to himself, the 2<sup>nd</sup> Plaintiff who is his brother and to their late father Symon Ngunjiri Wakaba. He annexed a copy of a Non-Member Certificate of Plot Ownership dated 29<sup>th</sup> May 2001 issued by the 2<sup>nd</sup> Defendant bearing their three names as evidence of ownership of the suit property. He added that since the demise of his father on 23<sup>rd</sup> May 2007, the suit property became his and the 2<sup>nd</sup> Plaintiff’s. He averred further that the suit property has remained vacant for a long time up until 12<sup>th</sup> April 2015 when upon conducting his routine inspections thereof, he discovered that there was on-going construction thereon. He added that upon enquiry, he came to learn that the 1<sup>st</sup> Defendant was the one carrying on the construction on the suit property. He further added that he and the 2<sup>nd</sup> Plaintiff had not sold the suit property to the 1<sup>st</sup> Defendant or to anyone else and therefore the 1<sup>st</sup> Defendant’s construction on the suit property constituted trespass and was illegal. He further stated that should that construction continue unabated, both he and the 2<sup>nd</sup> Plaintiff would suffer grave loss as the construction of the illegal structures would permanently change the land to their detriment.

The Application is contested. The 1<sup>st</sup> Defendant/Respondent, Fred Mokuu, filed his Grounds of Opposition dated 3<sup>rd</sup> June 2015 in which he stated that the Application is not merited, does not meet the threshold for grant of a mandatory injunction sought, that the orders sought would adversely affect third parties who are not parties and that the suit property had not been described.

The 1<sup>st</sup> Defendant further filed his Replying Affidavit sworn on 2<sup>nd</sup> June 2015 in which he stated that he has erected a structure on his Plot No. V14697 but not on the suit property. He stated that he purchased

his Plot No. V14697 from one Antony Githinji Wanjiru on 23<sup>rd</sup> May 2014 at a consideration of Kshs. 1,400,000/-. He annexed a copy of the Sale Agreement. He further stated that he was given a Non-Member Certificate of Plot Ownership dated 7<sup>th</sup> November 2012 in respect of that plot by the original owner Antony Githinji Wanjiru a copy of which he annexed. He stated further that he visited the site with the Surveyor appointed by the 2<sup>nd</sup> Defendant who confirmed that indeed the Plot No. V14697 belonged to he said Antony Githinji Wanjiru. He further stated that the Surveyor confirmed to him that his Plot No. V14697 appears on Map 2 on the 2<sup>nd</sup> Defendants Map Sheet. He averred that he has not trespassed the Plaintiffs/Applicant's Plot No. P6741 which he stated is totally different from his Plot No. V14697. He asserted that the two plots are different pointing out that the Plaintiffs had not annexed any document to prove that he has trespassed on their Plot No. P6741. He confirmed that he has constructed his house on his Plot No. V14697 but not on Plot No. P6741.

The issue arising herein for determination is whether or not to issue an order of mandatory injunction directing the 1<sup>st</sup> Defendant to cease ongoing construction on the suit property and further to vacate the suit property. Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

***“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”***

With that background laid down, my observation is that the main bone of contention in this matter is the location of the suit property. The Plaintiffs/Applicants are claiming the suit property while the 1<sup>st</sup> Defendant has asserted that he is in occupation of a Plot No. V14697 which he alleges is different from the suit property. The Plaintiffs/Applicants on their part claim that the plot that the 1<sup>st</sup> Defendant is in occupation of is the suit property. Clearly, this is not a matter that can be decided at this interlocutory stage based on contradictory affidavit evidence. The matter must proceed to full trial before the court can authoritatively make a finding on this thorny issue. In the meantime, as we await the full trial of the suit, I direct that the 1<sup>st</sup> Defendant, who is in occupation of the disputed plot after constructing a residential house thereon, shall remain in occupation pending the hearing and determination of this suit. The Application is accordingly dismissed. The costs shall be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup>**

**DAY OF MARCH 2017.**

**MARY M. GITUMBI**

**JUDGE**