



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 140 OF 2016

EUNICE WANJIKU MAINA.....1ST PLAINTIFF/APPLICANT

JANE WANGUI.....2ND PLAINTIFF/APPLICANT

RAPHAEL KARIUKI.....3RD PLAINTIFF/APPLICANT

ERICK KAMAU.....4TH PLAINTIFF/APPLICANT

VERSUS

DOUGLAS MAINA KAMAU.....DEFENDANT/RESPONDENT

RULING

This is in respect to the plaintiffs' Notice of Motion dated 14th September 2016 seeking the substantive order that the defendant be restrained from evicting, alienating or selling the land parcel No. KIINE/KIBINGOTI/NGUGUINE/3286 (hereinafter the suit land) pending the hearing and determination of this suit and that costs of the application be provided for. The application is based on the grounds set out therein and supported by the affidavit of **EUNICE WANJIKU MAINA** the 1st plaintiff herein.

The gravamen of the application is that although the suit land is registered in the names of the defendant, the 1st plaintiff who is his wife and the other plaintiffs who are their children all live thereon. However, on 5th September 2016, the defendant leased the suit land to one **SOPHIA WANJIRU MURIMI** and chased away the plaintiffs yet they have lived on the land for over thirty (30) years and have no other land to go to. The plaintiffs will therefore suffer loss and damage by being rendered destitute if they are evicted from the suit land.

The defendant filed a replying affidavit in which he confirmed that indeed the 1st plaintiff is his wife while the other plaintiffs are their children. He denied that he has any intention of selling or charging the suit land or even evicting the plaintiffs. He however added that he has only leased about half an acre ($\frac{1}{2}$) to enable him clear a loan with **FORTUNE SACCO**. He deponed further that he had previously leased part of the land to one **JACKSON MURIMI** in 2014 to cater for pressing family issues. He annexed copies of those leases though they have not been translated into English. I notice however that in his list of documents, the annexed agreements or leases are indeed in English language.

Submissions have been filed to the said application both by **MS MUTHIKE** advocate for the plaintiffs and by the defendant acting in person.

I have considered the application and the submissions filed.

It is not in dispute that the suit land is registered in the names of the defendant who, together with his wife and the other plaintiffs who are their children, live thereon. The defendant states that he has no intention of selling the suit land. The only reason he has leased part of it is to enable him meet a financial obligation to his creditors. He has previously leased part of the suit land to meet pressing family issues in 2014. The only problem the plaintiffs appear to have from the submissions by the counsel is that whereas the lease in 2014 was with the consultation of 1st plaintiff, this time the lease to **SOPHIA WANJIRU** was without similar consultation. The plaintiffs fear that infact the defendant intends to sell the suit land to the said **SOPHIA WANJIRU** although no evidence has been placed before me to that effect. The agreement or lease with **SOPHIA WANJIRU** was executed on 4th July 2016 almost one year ago and the defendant has already received 50,000. As per the said document, if he breaches the same, he will refund 100% which is Ksh. 100,000 and for a party who already has other financial obligations to meet, that would be a heavy burden. However, he ought to have involved his family more so the 1st plaintiff before doing that.

I am alive of the principles set out in ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358***. The plaintiffs are family to the defendant and live on the suit land and therefore have a beneficial interest therein. If they are evicted, they would be rendered destitute having lived on the suit land for over 30 years. It is not the policy of the Court to allow a party to render others destitute particularly if they have a prima facie case with respect to the land in dispute. It is on record however that the defendant has no intention of evicting the plaintiffs.

It is also common ground that the defendant has leased part of the suit land to **SOPHIA WANJIRU** and although the plaintiffs allege that the defendant has leased the whole of the suit land, the agreement on lease only talks of “**a portion**” of the land. The said agreement or lease, as I have stated above, was executed on 4th July 2016 which means that the said **SOPHIA WANJIRU** has been on a portion of the suit land for close to 9 months now. The law is that an injunction cannot be issued to restrain that which has already taken place – see ***JARIBU HOLDINGS VS KENYA COMMERCIAL BANK LTD C.A CIVIL APPLICATION No. 314 of 2007*** and also ***ESSO KENYA LTD VS MAKWATTA C.A CIVIL APPEAL No. 69 of 1991***. Since the lease with **SOPHIA WANJIRU** is already in force, notwithstanding that it is drawn by lay persons and is not really a lease in the legal sense, it would not be proper to injunct the defendant from leasing it since the event has already occurred and she is in possession. Further, the said **SOPHIA WANJIRU** is not a party to these proceedings and such an order cannot therefore be properly made without giving her an opportunity to be heard. The defendant himself undertakes in his submissions not to lease any other part of the land.

Bearing in mind all the above, I make the following orders in respect to the plaintiffs’ Notice of Motion dated 14th September 2016:

- 1. The defendant is restrained from evicting the plaintiffs, alienating or selling the suit land or any portion thereof until this suit is heard and determined or until further orders of this Court.***
- 2. The lease to SOPHIA WANJIRU may run its course unless terminated by the parties thereto if they so wish.***
- 3. There shall be no further leasing of the suit land or any part thereof to any other party until this case is heard and determined.***
- 4. The parties to comply with pre-trial directions so that this case is heard and determined within the next twelve (12) months.***
- 5. Each party to meet their own costs.***

B. N. OLAO

JUDGE

19TH MAY, 2017

Ruling dated, delivered and signed in open Court this 19th day of May 2017

Mr. Muchira for Ms Muthike for the Applicants present

Respondent present in person.

B. N. OLAO

JUDGE

19TH MAY, 2017