



**REPUBLIC OF KENYA**  
**IN THE ELC COURT OF KENYA AT EMBU**

**ELC CASE NO. 2 OF 2017**

**FAITH KARIMI MUCHANGI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**BRIAN BIKO MURITHI MUCHANGI...<sup>2ND</sup> PLAINTIFF/APPLICANT**

**CECIL MUTURI MUCHANGI.....<sup>3RD</sup> PLAINTIFF/APPLICANT**

***VERSUS***

**PETER NJERU MVUNGU.....DEFENDANT/RESPONDENT**

**RULING**

1) By a Plaint dated and filed on 13<sup>th</sup> January 2017, the Plaintiffs sued the Defendant for possession of Title Nos. **NTHAWA/GITIBURI/2698** and **2699** on the basis that they had acquired ownership thereof through succession. The said properties were initially owned by the late Mick Muchangi Muvungu who was the Defendants brother and the father of the 1st and 2<sup>nd</sup> Plaintiffs. The 3<sup>rd</sup> Plaintiff is the widow of the deceased.

2) The Plaintiffs, therefore, sought the following reliefs in the Plaint;

- a) A permanent injunction against the Defendant restraining him from carrying on any activities on the two parcels of land.
- b) A permanent injunction against the Defendant evicting him from the two parcels of land
- c) An order compelling the OCS Siakago Police Station to aid in the Defendant's eviction.
- d) An order of injunction stopping the Defendant from harassing the Plaintiffs.
- e) Mesne profits
- f) Costs of the suit.

3) Simultaneously with the filing of the suit the Plaintiffs also filed, under certificate of urgency, an a Notice of Motion dated 13<sup>th</sup> January 2017 seeking the following orders against the Defendant;

- a) A temporary injunction restraining the Defendant from carrying on any activities on the two parcels of land pending inter-parties hearing.
- b) A temporary injunction evicting him from the two parcels pending inter parties hearing.

c) An order directing the OCS Siakago to aid in the Defendant's eviction.

d) An order of injunction restraining the Defendant from carrying on any activities on the suit properties pending the hearing and determination of the suit.

e) A temporary injunction evicting the Defendant from the two parcels pending the hearing and determination of the suit.

f) Costs of the application.

4) The Plaintiffs set out 9 grounds in their Notice of Motion which was supported by the supporting affidavit of Brian Biko Murithi Muchangi sworn on 13<sup>th</sup> January 2017 and his supplementary affidavit sworn on 1<sup>st</sup> February 2017.

5) It was stated in the application that the Plaintiffs were the owners and proprietors of the said two properties by virtue of succession proceedings which resulted in a certificate of confirmation of grant issued on 9<sup>th</sup> January 2014. It was further stated that the Defendant had nonetheless continued to benefit from a bar, butchery and the rental houses on the suit properties to the financial detriment of the Plaintiffs.

6) It was further stated that the Plaintiffs had commenced the sale of the said properties to third parties but were unable to deliver vacant possession thereof. He annexed copies of the title deeds and certificate of confirmation of grant to the supporting affidavit while he annexed a copy of the sale agreement for parcel No. 2698 to his supplementary affidavit.

7) The Defendant filed a replying affidavit on 7<sup>th</sup> February 2017 and a further replying affidavit on 6<sup>th</sup> March 2017 in opposition to the Plaintiffs said application. The Defendant stated in his replying affidavit that he had purchased parcel No. 2699 from his late brother in 2012 for a sum of Kshs. 250,000/-. He annexed a handwritten note of acknowledgment of receipt Ksh. 200,000/- by his late brother. He also attached an Mpesa statement from Safaricom showing some further payment purportedly on account of the purchase price. He also denied harassing or threatening any of the Plaintiffs.

8) In his further replying affidavit, the Defendant stated that the alleged sale of his late brother's property was undertaken secretly and that he intends to apply for revocation of the grant which he states was illegally obtained.

9) A scrutiny of the Plaint and the application reveals that the Plaintiffs are seeking eventually the same reliefs in both. The only difference is that whereas the orders in the suit are sought on a permanent basis, the ones in the application are sought on a temporary basis pending the hearing and determination of the suit. The danger of granting such orders as sought in the application is that they may essentially dispose of the entire suit at the interlocutory stage.

10) The main relief the Plaintiffs are seeking is the eviction of the Defendants and possession of the suit properties for the purpose of selling them. In those circumstances, the Plaintiffs would have succeeded in obtaining a quick trial of the suit through an interlocutory application. That is not permissible in law. Even where a Plaintiff has title documents issued in his name a trial of the action may still be necessary for the purpose of conclusively determining the rights of the parties. For that reason, the court is not inclined to grant the prayers sought in the application or any one of them.

11) The second reason why the court is not inclined to grant the application is that the court is not satisfied that this is a suitable case for the grant of an order of eviction at the interlocutory stage. An order of eviction can only be issued in the clearest of cases and where it has been demonstrated that the actions of the Defendant are plainly unlawful. There is no allegation in the Plaint or application that the initial entry by the Defendant was forcible or unlawful. On the contrary, the defendant claimed to have purchased one of the suit properties (i.e parcel No. 2698) from his late brother. Therefore, there is no

basis for issuance of an eviction order at this interlocutory stage without a hearing of the suit on the merits.

12) In the result, the court finds no merit in the Plaintiffs' application. The Notice of Motion dated 13<sup>th</sup> January 2017 is consequently dismissed. There shall no order as to costs since the parties herein are close family members.

Orders accordingly.

**Dated, signed and delivered in open court at Embu this 10<sup>th</sup> day of May, 2017.**

**ANGIMA Y M**

**ELC JUDGE**