



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC.NO.94 OF 2017

ZAKARIA NJOGU KARIUKI.....1ST PLAINTIFF/APPLICANT

SAMUEL KERU WAWERU 2ND PLAINTIFF/APPLICANT

=VERSUS=

MOSES KURIA THAIRU1ST DEFENDANT/RESPONDENT

THE ASSISTANT COUNTY

COMMISSIONER (NGENDA WARD)2ND DEFENDANT/RESPONENT

R U L I N G

The Plaintiffs herein *Zacharia Njogu Kariuki* and *Samuel Keru Waweru* have brought this **Notice of Motion** application dated *13th February 2017*, under Section 3A of the Civil Procedure Rules and all other enabling provisions of the law. The Applicants have sought for the following orders:

- 1. THAT this Honourable Court be pleased to issue orders restricting the Defendants, their agents and or servants from selling, entering, trespassing, further dealings, alienating, registrations and or any other dealings against parcels of land LR No. Kiganjo/Kiamworia/T.118 and Kiganjo/Gachika/766 pending hearing and determination of this application and or suit.***
- 2. THAT this Honourable Court be pleased to issue order allowing the Applicants to continue occupying the suit premises pending hearing and determination of this application and or suit.***
- 3. THAT the above order be enforced by the OCPD, Gatundu Police Station.***

The said application is supported by the Affidavit of the Applicants sworn on *13th February 2017*. They have averred that they are the registered owners of the land parcel *No.Kiganjo/Gachika/766* measuring **0.51 acres** as evident from annexure **ZNK1**. They further alleged that the 1st Defendant has illegally caused entry into the said parcel of land *No.Kiganjo/Gachika/766* wherein he has been cutting trees and banana plants without their consent as is evident from annexure **ZNK2**. Further that the 2nd Defendant/Respondent has colluded with the 1st Defendant/Respondent to lodge a restriction against the suit land parcel *No.Kiganjo/Gachika/766* without giving chance to hear the Plaintiffs/Applicants' Defence against their claim. They also averred that the 1st Defendant has failed to regard the existence of the boundary between his land and that of the Plaintiffs/Applicants and has therefore illegally interfered with the suit land. They urged the Court to allow their application.

The 1st Respondent **Moses Kuria Thairu** filed a Replying Affidavit and averred that he lodged a restriction on the suit land based on the **ELC No.890 of 2012**, which he has filed in **Milimani ELC**. That the administrators of the Estate of the earlier owner sold the suit property to the Applicants herein despite the fact that there is an on-going case on the issue of adverse possession at **Milimani ELC**, in which the said administrators have been attending. Further that the Plaintiffs/Applicants purchased the suit property while aware that there was in existence a case at Milimani ELC over the suit property. The 1st Respondent further denied that he had interfered with the suit property by cutting trees and banana plants on the suit property. It was his allegation that he has been in continuous and peaceful occupation of the aforesaid parcel of land, **LR No.**

Kiganjo/Gachika/766, for a period exceeding **12 years** and this suit property was sold by the Applicants in the **year 2016**. Further that the Land Registrar, Gatundu entered the restriction order to the said parcel of land based on the existing and pending ELC suit in Milimani touching on the right ownership. The 1st Respondent urged the court to dismiss the instant application.

The parties have canvassed this application by way of Written Submissions, which this Court has carefully considered. The court has also considered the Pleadings in general and the annexures thereto and the relevant provisions of law.

The Plaintiffs/applicants have anchored the instant **Notice of Motion** under Section 3A of Civil Procedure Act which gives the court the inherent power to make such orders as may be necessary for the ends of justice and

also to prevent abuse of the process of the court. The court has also noted that the Applicants have sought for restraining orders which is an injunctive relief and is equitable in nature and is only granted at the discretion of the court. However, the said discretion must be executed judicially. See the case of **David Kamau Gakuru ..vs.. National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2011**, where the court held that;

“It is trite that the grants of an interim injunction is an exercise of judicial discretion and on application court will not interfere unless it is shown that the discretion has not been exercised judicially or an injunction being a equitable remedy.....”

Having sought for injunctive relief, the court will be guided by the

laid down principles for grant of such orders. See the case of **Francis Jumba Enziano & others ..vs.. Bishop Philip Okeyo & 2 Others, Nairobi HCCC No.1178 of 2007**, where the court held that:

“the settled principles for grants of an injunction are; First the Applicant must show a prima-facie case with probability of success at its trial and if the court is in doubt it should decide the application on a balance of convenience, Secondly, an interlocutory injunction will not normally be granted unless the Applicant can show that he will suffer irreparable injury which cannot be adequately compensated by damages”.

Even as the court consider the above settled principles, it will also be cautious that at this stage, it should not venture into making definite findings of fact or law and particularly where the affidavits files are contradicting as the court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case on affidavits”(See **Francis Jumba Enziano Supra**).

The applicants herein first needed to establish that they have a

prima-facie case with probability of success. A **prima-facie** case was described in the case of **Mrao ..vs.. First American Bank of Kenya Ltd & Others (2003) KLR** to mean;-

“A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to

call for an explanation or rebuttal from the latter”.

Has the applicants herein demonstrated that they have a prima-facie case with probability of success?

The applicants have alleged that they are the registered owners of the suit property herein ***Kiganjo/Gachika/766***. They have attached a certificate of official search which shows that the suit property was registered in the name of the Applicant on ***23rd September 2016***. The Applicants indeed purchased this suit property from ***Gathoni Kuria*** and ***Eunice Wangui Kibe*** who were allegedly administrators of the estate of ***Karugu Kuria***. However, it is evidence that at the time, the said administrators sold the suit property to the Applicants, the Respondent herein had filed a suit ***ELC No.890 of 2012*** which is an Originating Summons wherein the Respondent herein was asking the court to find that he had acquired prescriptive rights over the suit property, ***Kiganjo/Gachika/766*** by virtue of adverse possession. The vendors who sold the suit property to the Applicants sold the suit land while knowing that their ownership of the suit property was being challenged vide ***ELC No.890 of 2012***.

The Applicants herein having purchased the suit land from vendors whose ownership was being challenged, could the court hold and find that they acquired good title? That is a question to be answered after the calling of evidence. The court finds that the Applicants have therefore not established that they have a *prima-facie* case with probability of success.

Having found that the Applicants have not established a *prima-facie* case with probability of success, the court finds no reason to deal with the other principles as they are sequential, see the case of ***Kenya Commercial Bank Ltd..vs.. Afraha Education Development Co. Ltd & Others ,Nakuru High Court, Civil Case No.260 of 2004***, where the court held that:

“that judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title’s dispute and therefore has not demonstrated that it has a prima-facie case with probability of success, no interlocutory injunction would be available”

On the ***3rd prayer*** of ordering the Land Registrar to withdraw a restriction lodged by the ***2nd Defendant***, the court has to make such a decision after evidence has been called and tested in cross-examination. Equally, the court cannot issue the ***4th prayer*** of alignment of the boundaries of land parcel ***No.Kiganjo/Gachika/766***, before evidence has been adduced as to whether there is a boundary dispute related to the suit property herein.

Having carefully considered the available evidence, the court finds that indeed there exists an ***ELC Suit No.890 of 2012*** between the persons who sold the suit land to the Plaintiffs/Applicants herein. This being a court of equity, the court finds that ***ELC No.890 of 2012*** needed to be settled first before the suit land could be sold. However, this court is not dealing with the contested issues at this juncture as the available evidence is on affidavits only. Those are issues to be dealt with finality at the main trial.

The upshot of the foregoing therefore is that the Plaintiffs /Applicants ***Notice of Motion*** dated ***13th February 2017***, is not merited. The same is accordingly dismissed entirely with costs being in the cause.

It is so ordered.

Dated, signed and delivered at THIKA this 28th June 2017.

L. GACHERU

JUDGE

28/6/2017

In the presence of

Hon. Gacheru Judge

Court clerk – Rachael

Plaintiffs/Applicants - Zakaria Njugu- Present in person

Defendant/Respondent Moses Kuria – Present in person

L. GACHERU

JUDGE

28/6/2017

Court: Ruling read in Open Court in the presence of the above stated parties.

L. GACHERU

JUDGE

28/6/2017