



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

**AT NAIROBI**

**ELC CASE NO. 786 OF 2015**

**LUCY WANJIKU KYAMBUTHI.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN KABAA KIAMBUTHI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RICHARD NJOROGE KIAMBUTHIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PETER NGUGI KIAMBUTHI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant is a sister to the first, second and third respondents. The interested party is the mother to the applicant and the respondents. The interested party is the registered owner of **LR No. Dagoretti/Kinoo/2828**. The applicant filed a notice of motion dated 10<sup>th</sup> August 2015 in which she sought the following reliefs:

**(a)Spent**

**(b)Spent**

**(c)That the defendants be restrained from being abusive towards the plaintiff either orally, physically or mentally or in any manner whatsoever pending the hearing and determination of this suit.**

**(d)Spent**

**(e)That the defendants be permanently restrained, restricted, prevented and refrained from trespassing, entering invading and or encroaching into the Plaintiff's land parcel known as Portion B in Dagoretti/Kinoo/2828 or putting up structures, fences or buildings thereon or removing fences or structures which had been put up by the plaintiff pending the hearing and determination of this suit**

**(c)Costs of this application.**

2. By a consent dated 10<sup>th</sup> May 2016 and filed in court on 12<sup>th</sup> May 2016, the second Defendant/Respondent was removed from this suit and the affidavits which he had sworn in opposition to the applicant's application were expunged from the record. The consent was adopted as the order of the

court on the 12<sup>th</sup> May 2016.

3. The applicant contends that the interested party had given her a portion marked “B” comprised in **Dagoretti/Kinoo/2828** in the year 2009. That she stays with the interested party in a house lying on portion “A”. The applicant further contends that the respondents have been threatening to evict her from the house in which she lives with the interested party and have physically assaulted her and that some of the respondents have verbally threatened to harm her. That there is a time the third respondent attempted to run over her using his vehicle. She has been reporting the threats and assaults to the police who have not done anything about her complaints.

4. The first and third respondents and the interested party have opposed the applicant’s application through separate affidavits all sworn on 27<sup>th</sup> August 2015 as well as further affidavits sworn subsequently. The respondents and the interested party contend that the applicant has no claim to a property which is registered in the name of the interested party. That the applicant was gifted portion “B” by the interested party which gift she declined to take and as a result thereof the same was gifted to the first respondent. That the applicant was given a studio house where she was to carry on her business but that she has declined to take it up. That though the applicant stays in the same house with the interested party, the applicant does not take care of her as her mother and that she does not even cook for her. The interested party has filed a counter-claim in which she wants the applicant evicted from her house.

5. I have carefully gone through the voluminous affidavits sworn by both the applicant and the respondents as well as the interested party. I must say that this is a sad case of family members who are fighting over property which was acquired by the family Patriarch who died testate. The family Patriarch had implored upon his family not to take each other to court over property he left behind but sadly, the opposite of his wishes is what is being seen in this case. However be that as it may, I have to decide what is before me in accordance with the law.

6. A lot has been said about the house on Portion “A” property known as **LR No. Dagoretti/Kinoo/2828** appears to have been sub-divided into five portions identified as Portions “A” “B” “C” “D” “E” and “F”. Though the centre of the rivalry between the applicant and the respondents as well as the interested party is on Portion “A”, the applicant has come to court seeking injunction orders in respect of Portion “B”. The applicant is also seeking a restraining order barring the first and third respondents from abusing her either, orally, physically or mentally. Portion “A” seems to be the centre of the rivalry because that is where the house of the interested party lies. The third respondent says that he is the one who constructed it for his mother whereas the applicant claims that it is her money which was used to put up the house and that her father in his will stated that she should live with her mother in the same house.

7. The applicant has come to court seeking injunctive orders against the first and third respondent. As I mentioned hereinabove, the case against the second respondent was removed in a consent filed in court on 12<sup>th</sup> May 2016. The applicant deponed in her affidavit that it is the second respondent who has since been removed from these proceedings who physically assaulted her. She annexed a confidential medical report from Dr. Kimani Gicheru dated 27<sup>th</sup> July 2015 showing that she had problems which resulted from physical assault. Apart from this evidence, the allegations against the first and third respondents are not supported by any documentary or credible evidence. The case against the second respondent having been removed, I do not find any basis upon which I can make a finding that indeed there have been threats of harm against the applicant by the first and third respondents.

8. The applicant is seeking an injunction against the first and third respondent from interfering with a portion identified as “B” The interested party has deponed in her affidavit that she gifted that portion to the applicant who declined to take it up. She later gifted it to the first respondent. The applicant contends that the interested party had no power to take it away and gift it to another person and that the first respondent had no power to accept the gift without consent from her.

9. The registered owner of **LR No. Dagoretti/Kinoo/2828** where Portion “B” is comprised is still alive. She is at liberty to share out her property as she wishes. She has said that it is the first respondent who has been given the portion which is the subject of the dispute herein. Portion “A” is subject of a counter-

claim filed by the interested party which is a separate claim. Considering the material placed before me, I find that the applicant has not demonstrated that she has a *prima facie* case with probability of success. In the case of **American Cynamid –Vs- Ethicon Limited [1975] AC 396, Lord Diplock** stated as follows:-

**“If there is no *prima facie* case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”**

10. I have demonstrated hereinabove that the applicant has no basis of complaining in as far as Portion “B” is concerned as well as her complaints of abuse be it verbal or mental against the first and third respondent. The third respondent clearly said that he has no interest in Portion “B” The applicant has concentrated her energy on Portion “A” which does not form the basis of her claim. I therefore find that the applicant’s application lacks merit. The same is hereby dismissed with costs to the first and third respondents as well as the interested party. The injunction orders which had been given before and subsequently extended are hereby discharged.

It is so ordered.  
Dated, Signed and delivered at Nairobi this 26<sup>th</sup> day of June 2017.

**E.O. OBAGA**

**JUDGE**

In presence of:-

Mr Ndirangu for Mr Gichohi for Plaintiff

M/s Nakato for Mr Ibrahim for 1<sup>st</sup> and 3<sup>rd</sup> defendants and the interested party.

Court Assistant : Hilda

**E.O. OBAGA**

**JUDGE**