



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.NO.380 OF 2017

SIMON GATUNGO MBUGUA.....PLAINTIFF/APPLICANT

-VERSUS-

MONROSS HARDWARE LIMITED.....DEFENDANT/RESPONDENT

R U L I N G

The matter for determination is the Plaintiff's *Notice of Motion* application dated **9th January 2017**, brought under Order 40 Rules 1,2,3 and 9 of the Civil Procedure Rules, Sections 3A and 63 of the Civil Procedure Act and all enabling provisions of law wherein the Applicant has sought for temporary order of injunction to restrain the Defendant and its servants, agents and/or any one acting under its directions from interfering with the Plaintiff's quiet possession of the property, trespassing or continuing to construct or develop on subject property (which is not described). The application is premised on the grounds stated on the face thereof and on the *Supporting Affidavit* of the Plaintiff/Applicant, **Simon Gatungo Mbugua**.

The Plaintiff's case is that he is the administrator of the *Estate of Joseph Kamau Mbugua*, who was a registered co-owner of all the property known as **LR.No.125/158, Ruiru Township**. Plaintiff/Applicant alleged that the *said Joseph Kamau Mbugua* co-owned the suit property with **James Mbugua Kamau** (Deceased), **David Kamau Kariuki** and **Daniel Muturi Gathegi**(deceased) as tenants in common in equal shares. It is his case that the family of the other co-owners or tenants in common sold the suit property to the Defendant without the Plaintiff's knowledge or involvement. Therefore since the plot has not been sub-divided, the said sale is unlawful and a nullity as the Plaintiff's share in the property cannot be lawfully alienated by his co-tenants in common without his participation and involvement. It was his claim that the Defendant's occupation of the suit property amounts to trespass and the Court should restrain it from breaching the Plaintiff's proprietary interest in the property.

The application is opposed and the Defendant *filed grounds of opposition* and averred that the application is *incurably defective* at law. That the prayers sought are *ambiguous* and the Court cannot issue orders in *vacuo*. Further that the application is *frivolous* and *vexatious*.

Further, **Herman Njuguna Wageche** swore a *Replying Affidavit* dated **18th January 2017**, and averred that indeed the Plaintiff is the *administrator* of the *Estate of Joseph Mbugua Kamau*, and he consented to the sale of the land **LR.No.125/158** situated in **Ruiru Township** vide a *Memorandum of Understanding* dated **30th June 2016**. Further that as tenants in common with equal shares, each co-owner was entitled to sell his share as the same is distinct.

It was the Respondent's allegation that the co-owners only entered into agreement to sell each a $\frac{1}{3}$ of their share and the Applicant is at liberty to sell his $\frac{1}{3}$ share to the Defendant if he so wishes. It was also alleged that the Plaintiff/Applicant has always been aware and had agreed that the property be sold to the Defendant and that is why the co-owners sold their shares to the Defendant herein. It was therefore alleged that the Defendant is not a trespasser as it had purchased $\frac{2}{3}$ shares from the other co-owners. The Court was urged to dismiss the instant application.

The application was canvassed 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 renders itself as follows;

In determining this application, the Court will be guided by the threshold principles set out in the case of **Giella..Vs..Cassman Brown & Co. Ltd (1973) EA 358**. These conditions are:-

- a) ***The Applicant must establish that he has a prima facie case with probability of success.***
- b) ***That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) ***When the Court is in doubt, to decide the case on a balance of convenience.***

The Court will first have to determine whether the Applicant has a *prima facie* case with probability of success. In the case of **Mrao Ltd..Vs...First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, the Court described prima facie case as:-

“----- a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for a explanation on rebuttal from the latter”

The Plaintiff has alleged that he is the **administrator** of the **Estate of Joseph Kamau Mbugua** who co-owned **LR. No.125/158 Ruiru Township** together with two other persons. It is indeed not in doubt that the said **Joseph Mbugua Kamau, David Kariuki Kamau** and **Daniel Muturi Gathegi** were **registered as tenants** in common in equal shares on **1st March 1968** as is evident from the title document attached to the application. There is also attached to the application a **Memorandum of Understanding** dated **30th June 2016**, wherein **Simon Gatungu Mbugua, Amos Nganga Muturi** and **David Kariuki Kamau** had agreed to sell the suit property for **Kshs.50,000,000/=** and the proceeds were to be shared equally. **Simon Gatungu Mbugua** is the Plaintiff herein and it is shown that he **signed** on the said **Memorandum of Understanding**. There is a further **Sale Agreement** dated **9th December 2016**, wherein the **administrators** of the **Estate of Muturi Gathegi** did consent to sell a **$\frac{1}{3}$ share** out of land reference **No.125/158** to the Defendant herein.

The Plaintiff has alleged that the co-owners who are tenants in common sold the suit land without his knowledge. However, the Court has noted that there is a **Memorandum of Understanding** wherein all the parties agreed to sell the suit property. The Plaintiff is therefore not candid when he alleges that the said suit land was sold without his knowledge or consent. The Court finds that the Plaintiff has therefore failed to establish that he has a *prima-facie* case with probability of success.

On the second limb, the suit land herein **LR.No.125/158 Ruiru Township** which was co-owned by three persons, vide a Memorandum of Understanding dated 30th June 2016, to be sold at an amount of **kshs.50,000,000/=**. It is evident that this suit land can be quantified and valued. The Plaintiff's share is $\frac{1}{3}$ of the total value. Therefore the Plaintiff can adequately be compensated with an award of damages. In the case of **Wairimu Mureithi..Vs..City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

Equally, in this case, the Court finds that the suit land can be quantified and damages would be adequate to compensate the Plaintiff in case he emerges the successful party in the main suit.

On the balance of convenience, the Court finds that it is not in doubt and so there is no need to decide on a balance of convenience.

Having now carefully analysed the available evidence, the Court finds that the Plaintiff/Applicant’s ***Notice of Motion*** dated ***9th January 2017***, is ***not merited***. The same is consequently ***dismissed*** entirely with costs being in the cause.

The parties to comply with Order 11 within a period of ***45 days*** from the date of this Ruling and thereafter take a date for Pre-trial Conference before the Deputy Registrar for expeditious disposal of the main suit.

It is so ordered.

Dated, signed and delivered at Thika this 26th day of July 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Tum holding brief for Mr.Kabugu for Plaintiff/Applicant

Mr. Kamau holding brief for Ngige for Defendant/Respondent

Rachael - Court Clerk

Court – Ruling read in open Court in the presence of the above stated advocates.

L. GACHERU

JUDGE

26/7/2017