



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC.NO.298 OF 2017**

**JOSEPH NDIRANGU MUNENE.....PLAINTIFF/APPLICANT**

**AVERSUS-**

**PETER MACHARIA MURIU.....DEFENDANT/RESPONDENT**

**R U L I N G**

The matter for determination is the *Notice of Motion* application dated **27<sup>th</sup> June 2016**, brought under Order 40 Rule 1, 2 & 3 of Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of Law and Regulations. The Plaintiff/Applicant has sought for the following orders:-

**a) Spent.**

**b) THAT this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendant/Respondent by himself, his respective agents, servants, employees and/or any other person in his name from constructing and/or in any other manner whatsoever interfering with Residential Plot No.3128 within Block No.Ruiru West Block 1/Githunguri, Ballot No.G3 and Share Certificate No.B 1417 pending the interparte hearing of this application.**

**c) THAT the OCS Ruiru Police Station to ensure compliance with the Court's Orders.**

**d) THAT costs of this application be borne by the Defendant/Respondent.**

This application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Joseph Ndirangu Munene**, the Plaintiff/Applicant herein. These grounds are:-

**i. THAT the Plaintiff/Applicant is the registered owner of  $\frac{1}{8}$  acre Residential Plot no.3128 within Block No.Ruiru West Block 1/Githunguri, Ballot No.G3 and Share Certificate No.B 1417.**

**ii. THAT the Plaintiff/Applicant has been in possession of the suit land from the 20<sup>th</sup> Day of August 2004.**

**iii. THAT the Defendant has commenced construction on the above mentioned land parcel knowing very well it does not belong to him.**

**iv. THAT the Plaintiff/Applicant has tried to stop the said construction but his efforts has been futile.**

v. **THAT the Defendant is interfering with the Plaintiff's quiet enjoyment of the suit land.**

vi. **THAT the Plaintiff/Applicant stands to suffer an irreparable loss and/or damage unless the Respondent's illegal actions are stopped by this Honourable court.**

vii. **THAT it is in the interest of justice to allow the application herein because the balance of convenience in any event tilts in favour of the Plaintiff/Applicant and in granting the orders sought.**

The Plaintiff/Applicant averred that he is the registered owner of **Plot No.3128** within Block **No.Ruiru West Block 1/Githunguri, Ballot No.G3** and **Share Certificate No.1417** from **Githunguri Constituency Ranching Co. Ltd.**

He further averred that he has been in possession of the suit land since the year **2004** when he was issued with the **Share Certificate** but the Defendant/

Respondent has without justifiable cause entered into the said land and started digging trenches. The Defendant/Respondent has claimed that the land belongs to him but he has not produced any document of ownership of the said plot. It was his contention that unless the illegal actions of the Defendant/Respondent are stopped, he will suffer irreparable loss and damages. It was his contention that it is in the interest of justice that this application be allowed.

The application is **opposed** and **Michael Njehia Kiarie** swore a **Replying Affidavit** and averred that he is the absolute owner of the suit property as per **Share Certificate No.B 309** residential **Plot No.G3** issued on **18<sup>th</sup> April 1998**. It was his allegations that he bought the plot from **Phylis Njeri Wangaruro** sometimes on **19<sup>th</sup> January 2001**, for a valuable consideration of **Kshs.700,000/=** as evidenced by the **Sale Agreement**. He contended that the said seller was the **original shareholder** as she had receipts dated back to **1972**. The Respondent/Defendant alleged that he took possession of the said land and has been following up the issue of **Lease Certificate** but the same has never been surveyed hence no numbers have ever been issued. He contended that the Plaintiff/Applicant's documents are not authentic. It was his further contention that he stands to suffer irreparable damage unless the orders in place are vacated. He also prayed that the Plaintiff/Applicant be ordered to deposit security for costs to the tune of **Kshs.1,000,000/=**.

The Respondent/Defendant filed a **further affidavit** and deponed that his advocate wrote to **Githunguri Constituency Ranching Company** to verify on the authenticity of the documents produced by both parties and the said Company wrote a letter dated **7<sup>th</sup> September 2016**, and confirmed that the Plaintiff/

Applicant's documents are a forgeries and did not emanate from their offices. It was his further allegation that the Plaintiff/Applicant's claim is tainted with illegality, using forged documents to get an order of injunction and the same should be discharged. Defendant/Respondent urged the Court to disallow the Plaintiff/Applicant's application.

The application was canvassed by way of **Written Submissions** which this Court has carefully considered. The Court has also considered the instant application together with the annexures thereto and the Court renders itself as follow;

The Plaintiff/Applicant has sought for equitable relief which is granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Giella Vs Cassman Brown & Company Ltd 1973 E.A 358**, where the court held that:

**"The granting of an Interim Injunction is an exercise of Judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially".**

The Court has noted that there are **Interim Orders** issued on **28<sup>th</sup> June 2016**, when the matter came to

court on the first instance.

Since the Applicant is seeking for injunction orders, the Court will be guided by the principles laid down in the case of **Giella..Vs.. Cassman Brown Co. Ltd 1973 EA 359**. These principles 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 Applicant herein therefore had the duty of establishing the above stated principles. Further, the Plaintiff/Applicant needed to establish that he had a *prima-facie* case with probability of success. In that regard, the Plaintiff/Applicant alleged that he owns Plot **No.Ruiru West Block 1/Githunguri, Ballot No.G3** as is evidenced by the **Share Certificate No.B 1417** dated **20<sup>th</sup> August 2004**. He also alleged that he had put up some structures on the said plot but the Plaintiff/Applicant encroached on the said suit land and has started digging trenches on the suit land.

The Defendant/Respondent on the other hand has alleged that he is the owner of the suit property **G3** as is evidenced by **Share Certificate No.309** issued on **19<sup>th</sup> January 2001**. He averred that the Plaintiff/Applicant's documents are a forgery and he urged the Court to **discharge** the **interim orders** in force.

What is not in dispute is that both the Plaintiff/Applicant and Defendant/Respondent have documents of ownership over **Plot G3**. Each party is accusing the other of possessing forged documents. The dispute herein is over the ownership of this suit property. The said ownership can only be resolved by calling of witnesses in the main trial. The disputed facts herein cannot be resolved by affidavits evidence. The Court at this stage is not supposed to determine the very issues which will be determined at the main trial through affidavit evidence. All the Court is entitled to do at this stage is to determine whether the Plaintiff/Applicant is deserving of the sought orders using the usual criteria. See the case of **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

***“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria---“***

However, the Court has noted that each of the party herein possesses documents of ownership of the suit property. At this juncture, the Court cannot hold and find with certainty that the suit property belongs to the Plaintiff. The parties needs to call evidence from **Githunguri Constituency Ranching Company Ltd** to shed light on which set of documents are authentic and who indeed owns the suit property. For now the Court finds that the Plaintiff/Applicant has not established that he has a *prima-facie* case with probability of success.

Indeed, the Court is in doubt and it will therefore deade on balance of convenience. The balance of convenience dictates that the Court do issue maintenance of *status quo* to the effect that no party herein, that is, neither the Plaintiff/Applicant nor the Defendant/Respondent should have any dealing on the suit land of whatever nature or manner until the suit is heard and determined. See the case of **Joash Ougo..Vs..Virginia E. Wambui, Civil Appeal No.3 of 1987 (1987)eKLR**, where the Court held that:-

***“The general principle which has been applied by this Court is that where there are serious conflicts of facts, the trial Court should maintain the status quo until the dispute has been decided on a trial”.***

For the above reasons, the Court finds that the Plaintiff/Applicant has not established the threshold

principles for grant of injunctive orders. The upshot of the foregoing is that the **Interim Orders** issued on **28<sup>th</sup> June 2016**, are **discharged** and **replaced** with the **status quo order** to the effect that:-

*i. None of the parties herein, that is, neither the Plaintiff/Applicant nor the Defendant/Respondent should have any dealing of whatever nature and manner on the suit property, until the suit herein is heard and determined.*

*ii. Further the OCS Ruiru Police Station to ensure that status quo order herein has been maintained and Court Order complied with.*

*iii. Costs of the application shall be in the cause.*

*iv. Further, the parties to comply with Order 11 within the next 30days from the date of this Ruling and thereafter set the matter for pre-trial conference, before the Deputy Registrar.*

It is so ordered.

**Dated, signed and delivered at THIKA this 25<sup>TH</sup> day of July 2017.**

**L. GACHERU**

**JUDGE**

**25/7/2017**

In the presence of

Mr. Wanjala holding brief for Mr. Kamonjo for Plaintiff/Applicant

Mr. Kanyi for Defendant/Respondent

Rachael - Court clerk

**L. GACHERU**

**JUDGE**

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

**L. GACHERU**

**JUDGE**

**25/7/2017**