



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

**THIKA LAW COURTS**

**ELC.NO.311 OF 2017**

FRANCIS THAIRU.....1<sup>st</sup> PLAINTIFF/RESPONDENT

NICHOLAS WAIYAKI.....2<sup>nd</sup> PLAINTIFF/RESPONDENT

-VERSUS-

KAREN W. THUMBI.....1<sup>st</sup> DEFENDANT/RESPONDENT

MUHATIA PALA T/A NATHAN PALA AUCTIONEERS.....2<sup>nd</sup> DEFENDANT/REPOENDENT

GEORGE MBUTHIA THUMBI.....3<sup>rd</sup> DEFENDANT/APPLICANT

PETER MUGAI THUMBI.....4<sup>th</sup> DEFENDANT/APPLICANT

**RULING**

The matter coming up for determination is the 3<sup>rd</sup> & 4<sup>th</sup> Defendants'/Applicants' application dated **14<sup>th</sup> January 2016** seeking for various orders against the Plaintiffs/Respondents herein. The orders sought are:-

1) Spent.

2) Spent

3) Spent

4) *That upon hearing this application interparties, this Honourable Court be and is hereby pleased to issue an order of a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents whether by themselves, their agents, servants and/or employees from denying and/or limiting the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Applicants access to 2<sup>nd</sup> floor of the suit property, title No.Ruiru Town/70 for purposes of developing and maintaining the same pending the hearing and determination of the suit herein.*

5) *That upon hearing this application inter partes, this Honourable court be and is hereby pleased to issue an order of a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents whether by themselves, their agents, servants and/or employees from illegally occupying and utilizing the 2<sup>nd</sup> floor of the suit property title No.Ruiru Town/70*

*pending the hearing and determination of the suit herein*

*6) That upon hearing this application inter partes, this Honourable Court be and is hereby pleased to issue an order to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents to adjust and reset the 2<sup>nd</sup> floor access staircase situated in the ground floor that is inside their premises to be accessible to the Defendants/Applicants on a 24 hour basis and accessed from outside the Plaintiff/Respondent's rented premises.*

*7) That upon hearing this application inter partes, this Honourable Court be and is hereby pleased to order demolition of the illegal structures put up by the Plaintiffs/Respondents on 2<sup>nd</sup> floor of the suit property title No.Ruiru Town/70 at their own costs.*

*8) Costs of this application be borne by the Plaintiffs/Respondents.*

The application is premised upon the grounds stated on the face of the application and on the **Supporting Affidavit** of **George Mbutia Thumbi**, the 3<sup>rd</sup> Defendant herein. These grounds are:-

*a) The Defendants/Applicants are the registered owners of the suit property title No.Ruiru Town/70.*

*b) The lease subject matter of the instant suit in favour of the Plaintiffs/Respondents was specifically with respect to ground and first floors only of the suit property title No.Ruiru Town/70.*

*c) The injunctive orders in force granted by this court in this matter and in favour of the Plaintiffs/Respondents only relate to and are binding to the ground and 1<sup>st</sup> floors of the suit property title No.Ruiru Town/70.*

*d) The Plaintiffs/Respondents are misinterpreting, misapplying and unnecessarily using the alleged injunctive orders to the detriment of the Defendants/Applicants.*

*e) That the Plaintiffs/Respondents have unlawfully prevented the Defendants/Applicants from developing their legally owned property and completely frustrated them with threats of contempt of court.*

*f) It is in the interests of justice that orders sought herein be granted.*

In his Supporting Affidavit, **George Mbutia Thumbi** averred that together with his other siblings, the 1<sup>st</sup> & 4<sup>th</sup> Defendants, they are the registered owners of the suit property being **Title No. Ruiru/Ruiru/70**. He also averred that the Plaintiffs/Respondents had allegedly leased from their mother the ground and 1<sup>st</sup> Floors of the suit property **No.Ruiru Town/70** and not any other part of the said property as is evident from the lease agreement **annexture 13**. Further, he averred that the Plaintiffs herein filed the instant suit over a rent dispute and termination of tenancy against the Defendants and there are existing injunctive orders already in force which they have respected and obeyed.

It was his contention that the Plaintiffs herein without any colour of right and/or legal justification have completely denied them entry into 2<sup>nd</sup> floor of the suit property to enable them develop and utilize it since the property is legally owned by them. He contended that lack of maintenance of area around 2<sup>nd</sup> floor has caused the suit premises to lose value and its condition is deteriorating causing other existing tenants to be inconvenienced. He also contended that the Plaintiffs/Respondents have put illegal structures on the 2<sup>nd</sup> floor and are utilizing the same without the consent of the Applicants and thus acting outside the scope of the lease agreement.

The deponent deposed that their request to be given unhindered access to the 2<sup>nd</sup> floor of the suit premises

has constantly been ignored by the Plaintiffs/Respondents herein. He deposed further that the Plaintiffs have misinterpreted, misapplied and are unnecessarily using the existing injunctive orders to frustrate them in accessing and developing the suit premises. Further that they completely have no access to the 2<sup>nd</sup> floor of the suit property which is legally theirs, and cannot make any use of the same. He alleged that the Plaintiffs action amounts to conversion of the suit property and it is in the interest of justice that the orders sought herein be allowed. It was further alleged that the Plaintiffs will not suffer any prejudice in any way if the orders sought are granted. Alternative Dispute Resolution has failed. He urged the Court to allow the instant application.

The 1<sup>st</sup> Defendant, **Karen W. Thumbi**, swore her **Replying Affidavit** on **2<sup>nd</sup> February 2016**, and supported the instant application. She averred that the Plaintiff have fully taken over possession of the whole ground, 1<sup>st</sup> and 2<sup>nd</sup> floors and use them for gain contrary to the disputed lease agreement and the existing Court Order. She also averred that the structures that the Plaintiffs have built on the 2<sup>nd</sup> floor are illegal and should be demolished at their own costs and/or should be made to pay rent for the 2<sup>nd</sup> floor which they are utilizing illegally. Further that since the owners of the suit premises cannot access the building using the illegally constructed staircase, then the same should be re-adjusted and re-positioned for easy accessibility. She urged the Court to allow the application.

The **application is contested** by the Plaintiffs herein. **Francis Thairu**, the 1<sup>st</sup> Plaintiff swore a **Replying Affidavit** on **8<sup>th</sup> February 2016**, and averred that he had been informed by his advocate that the instant application is incompetent, misconceived, fatally defective, unmeritorious and cannot be sustained in law. He further averred that though the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants are the registered owners of the suit property, their title has been challenged under **Succession Cause No.2442 of 2013**. Further that the Defendants have not being appointed the administrators of the estate of **Jonah Thumbi Karimi**, and they are not entitled to deal with the estate. It was his contention that the Plaintiffs indeed occupy ground and 1<sup>st</sup> floors of the suit premises but there is no 2<sup>nd</sup> floor and there are no structures above 1<sup>st</sup> floor to be occupied or inspected.

Further that they run a hotel business and it would be very unhealthy for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to purport to undertake construction when the hotel business is still running. It was his contention that they built the staircase in issue with the authority of the landlord on **18<sup>th</sup> February 2009**, and it is built within their lettable area. Further that there is a common staircase common to all tenants which is outside their lettable area and all tenants and third parties are free to use it. He contended that they will be prejudiced if the orders sought are granted as they will be greatly inconvenienced if any construction is allowed above their hotel business. The Plaintiffs/Respondents urged the court to dismiss the instant application.

The application was canvassed by way of written submissions wherein the **Law Firm of Wangechi Munene & Co. Advocates** for the 3<sup>rd</sup> & 4<sup>th</sup> Defendants/Applicants filed theirs on **10<sup>th</sup> May 2016**, and urged the Court to allow the instant application. The Plaintiffs/Respondents through the **Law Firm of J. Makumi & Co. Advocates** filed their written submissions on **24<sup>th</sup> May 2016**, and urged the Court to disallow the instant application.

The Court has now carefully considered the instant Notice of Motion and the annexures thereto. The Court has also considered the court records, the pleadings in general, the written submissions, cited authorities and the relevant provisions of law and the Court makes the following findings:-

The application herein is anchored under Order 40 Rules 1&2 of the Civil Procedure Rule, and Sections 1A,1B,3A and 63(e) of the Civil Procedure Act. Order 40 Rule 1 provides for instances when injunctive order may be issued by the Court. It provides as follows:-

**Where in any suit it is proved by affidavit or otherwise—**

- a. **that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

b. *that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.*

*the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.*

The Court is also enjoined by Sections 1A & 1B of the Civil Procedure Act to deal with matters before it taking into account the overriding objective therein, which is to facilitate the **just, proportionate, expeditious** and **affordable** resolutions of disputes before it. The Court has a duty to further the above overriding objectives.

The Court is also behoved by Section 3A of the same Act to make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process. Further, by Section 63(e) of the Civil Procedure Act, the Court is called upon to make such other interlocutory orders as may appear to the court to be just and convenient.

Taking into account the above provisions of law and the facts of this case, the Court will determine whether the Applicants herein are entitled to the orders sought.

The orders sought are injunctive orders which are equitable reliefs granted at the discretion of the Court. The Court is alive to the fact that such discretion must be exercised judicially. Further the Court will caution itself that at this stage, it is not supposed to make conclusive and definitive findings of facts and law based on affidavits evidence. Since the orders sought are injunctive orders, the principles to be considered are the ones set out in the case of **Giella...Vs....Cassman Brown & Co. Ltd (1973) EA, 358.** 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.***

***When the Court is in doubt, to decide the case on a balance of convenience.***

Further in prayers No.6 and 7, the Applicants are seeking for mandatory injunctions which are final orders and are granted in very exceptional

circumstances. The principles for grant of mandatory injunction were well enunciated in the case of **Kenya Breweries Ltd & Ano..Vs..Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109,** where

the Court held that:

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948.**

On whether the Applicants are entitled to temporary injunction, the court will first determine whether the Applicants have established a *prima-facie* case with probability of success at the trial. There is no doubt that there is in existence, a lease agreement marked as **annexture 13**, between **Francis Thairu** and **Nicholas Waiyaki**, the Plaintiffs herein and one **Eunice Wanjiku Thumbi (deceased)** the mother to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The leased premises is **Plot No.70 Ruiru**, and the leased area is the ground and 1<sup>st</sup> floors of the stated premises. There is also no doubt that this suit premises was registered in the name of **George Muthia Thumbi, Peter Muigai Thumbi** and **Karen Wanjiku Mureithi**, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively, on **5<sup>th</sup> August 2013**. Being the registered owners, they are deemed to be absolute and indefeasible proprietors of the suit property as prescribed by Section 26(1) of the Land Registration Act 2012 which provides:

**“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-**

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or**
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

As the absolute and indefeasible proprietors, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have their rights protected under Sections 24(a) and 25(1) of the Land Registration Act which provides as follows:-

**24. Subject to this Act:-**

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto:**

**25.(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-**

- a) to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and**
- b) to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.**

The rights enjoyed by such proprietors are such rights like right to access their said property and right to inspect their leased property as provided by

the lease agreement. The Applicants have alleged that the Plaintiffs herein have illegally occupied and

utilized the area which should house 2<sup>nd</sup> floor of the suit property. They have also alleged that the Plaintiffs have denied them access to this area and are not paying for the use of that space. The Plaintiffs have not explicitly denied the use of that area which is supposed to house 2<sup>nd</sup> floor.

The Court has seen the photographs marked “C” which shows a structure on the slab allegedly above the 1<sup>st</sup> floor. The Defendants have alleged that the said structure was put up illegally by the Plaintiffs. That the lease agreement is only in respect of the ground and 1<sup>st</sup> floors. If the Plaintiffs are utilizing the area above the 1<sup>st</sup> floor, then that is not a lettable area and they are utilizing that area without the authority of the Defendants who are the registered proprietors.

Further the Court has seen the injunctive orders issued by the Court on **4<sup>th</sup> December 2012**, which was **to restrain the 1<sup>st</sup> Defendant whether by herself, her servants or her agents, the 2<sup>nd</sup> Defendant and/or any other agents from attaching, carrying away advertising, and/or selling the items proclaimed by the 2<sup>nd</sup> Defendant on 18<sup>th</sup> June 2012, or in any other way interfering with the Plaintiffs tenancy on title No.Ruiru Town/70 pending the hearing and determination of the suit.**

However, the above restraining order did not give the Plaintiffs’ authority to utilize areas that were not leased. By utilizing and occupying

the area above the 1<sup>st</sup> floor, the Plaintiffs have gone beyond the scope of their lease agreement and therefore the Court finds that the 3<sup>rd</sup> & 4<sup>th</sup> Defendants/Applicants have established a *prima-facie* case and they deserve restraining orders.

The Plaintiffs should also allow the Defendants access to the 2<sup>nd</sup> floor of their suit property for the purposes of developing and maintaining the same pending the hearing and determination of the suit. Further, the Plaintiffs are restrained from illegally occupying and utilizing the 2<sup>nd</sup> floor of the suit property.

On prayers no.6 and 7, the Applicants have sought for an order that the Plaintiffs be ordered to adjust and reset the 2<sup>nd</sup> floor access staircase situated in the ground floor and that the same should be accessed from outside the premises so that the Defendants can access it. The Plaintiffs/Respondents in their paragraph 19 of the Replying Affidavit averred that there is a common staircase common to all tenants which is outside their lettable area and within the concrete structure of the building common to all tenants and can be used by the Defendants. The Plaintiffs attached photographs **FT2** to emphasize their averments. If there is indeed a common staircase outside the lettable area, this Court finds no reason why the Defendants would wish to use the staircase which is inside the ground floor to access the 2<sup>nd</sup> floor. The Court finds that the Plaintiffs should allow the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants access to the 2<sup>nd</sup> floor but via the common staircase which is outside the lettable area of the Plaintiffs herein. This Court finds no reason to order for re-adjustment of the steel staircase allegedly inside the lettable area of the Plaintiffs/Respondents.

On an order of demolition, the court finds that this is a mandatory injunction which is granted in very exceptional circumstances. The Court has seen a structure on the area which is above the 1<sup>st</sup> floor. It was alleged by the Applicants that this structure was put up by the Plaintiffs herein. The structure is outside the lettable area of the Plaintiffs herein. The structure is therefore illegally erected and this present an exceptional circumstance. The erection of an illegal structure is also a clear and simple case of the Plaintiffs going beyond the terms of their lease agreement. The Court finds that the Applicants are deserving of the orders sought in prayer no.7.

Having now carefully considered the instant **Notice of Motion** dated **14<sup>th</sup> January 2016**, filed by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Applicants, the **Court finds it merited and it is allowed entirely in terms of prayers no.4, 5, 6 and 7.**

However, on *prayer no.6*, the *Applicants are to gain access to the 2<sup>nd</sup> floor using the common stair case which is outside the lettable area of the Plaintiffs within the concrete structural structure of the building.*

Further, the parties should prepare the suit for full hearing expeditiously by complying with Order 11 within the *next 30 days* from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Thika this *27<sup>th</sup>* day of *October 2017*.

**L. GACHERU**

**JUDGE**

In the presence of

M/S Ndungu holding brief for Mr. Makumi for Plaintiff/Respondent

Mr. Makori for 1<sup>st</sup> Defendant/Respondent

No appearance for 2<sup>nd</sup> Defendant

No appearance for 3<sup>rd</sup> & 4<sup>th</sup> Defendant/Applicant

George Thumbi – 3<sup>rd</sup> Defendant present in person

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**