



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS

ELC.436 OF 2017

JOSEPH PETER GICHOYA MBOGO.....PLAINITFF/APPLICANT

- VERSUS-

PAUL KINUTHIA MBOGO.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion dated *5th April 2017* brought by the Plaintiff/Applicant seeking for these orders:-

1) Spent.

2) Spent.

3) *That there be issued an order of injunction restraining the Respondent from in any manner whatsoever interfering with the applicant's occupation and use of the ¼ acre of land parcel number Escarpment/Kinari Block 1/2762 where he has his home, and in particular entering, selling, leasing the same and from evicting the application and members of his family pending the hearing and conclusion of this suit.*

4) *That the costs of this application be in the cause.*

The application is premised on the grounds stated on the face of the

application and on the *Supporting Affidavit* of *Joseph Peter Gichoya Mbogo*. These grounds are:-

i. The Respondent and the Applicant exchanged a ¼ acre of their respective portions of land following which the Applicant build his home on the Respondent's portion.

ii. The Respondent is now threatening to evict the Applicant from the said portion notwithstanding that the Applicant has been in possession of the portion for over 12 years since 2003 and built a home at the cost of Kshs.2,600,000/= on the strength of the exchange and representation from the Respondent.

iii. The Respondent had also taken possession of the exchanged portion in 2003 and has leased it to third parties who are using it even today and in any case subdivision of the land has been done to reflect ownership of the ¼ acre by the Respondent.

iv. Although the Respondent has been reluctant to transfer his ¼ acre to the Applicant, having been in possession of the same for over 12 years, the Applicant has acquired title to the same by adverse possession.

v. The situation now obtaining threatens the very existence of the suit property and it is only fair that the same is preserved until the suit is determined.

vi. It is only fair that at least the status quo be maintained pending the hearing of the suit for decision on the merit.

In his **Supporting Affidavit**, **Joseph Peter Gachoya Mbogo** averred that the Respondent is his younger brother and the last born in the family. Further that the Respondent owns the suit property **Escarpment/Kinari/Block 1/7766**, which is close of their mother's property **Escarpment Kinari/Block 1/1301**. He alleged that he was given **1¼ acres** by their mother in **1998** and the in the year **2002**, he wanted to put up his rural home. However, in the same year, the Respondent suggested to the Applicant that they can exchange **¼ acre** as the Applicant's land was swampy and a wetland and was unsuitable for building whereas the Respondents was on upper ground. The Respondent was to use the Applicant's land upon exchange to plant vegetables for business all the year round as the land was a wetland. The Applicant alleged that he agreed to that idea and they exchanged their respective portions of **¼ acres** each. He alleged that all members of the family were aware of the exchange and in the year **2011**, he started to put up his house. However, by then the Respondent had **deposited** the **title deed** for the **¼ acres** exchanged with the Applicant at **Kijabe Mission Hospital**, due to the **outstanding medical bill of Kshs.47,300/=**, and the hospital was planning to **auction** the land to recover the money. He deposed that he paid the said amount and the title deed was to be released to the area chief.

Further that on **27th March 2012**, the Respondent went to the Applicant's home and threatened his wife and children with eviction. He alleged that the Respondent had even sent a demand Notice dated **21st March 2017**, requesting the Applicant's family to vacate the suit property. He also alleged that the Respondent has been taking strangers to view the property with a view to either sell or mortgage the said property. He therefore urged the Court to restrain the Defendant/Respondent from interfering with the suit property until the suit is hear and determined.

The application is **opposed** and **Paul Kinuthia Mbogo**, the Respondent swore a **Replying Affidavit** on **6th June 2017**, and averred that the application is not brought in good faith, not merited and is an abuse of the court process. He alleged that the Applicant is not coming to court in good faith as the agreement was for the Applicant to build the Respondent the house on the suit land, and the Respondent was to assist the Applicant built his house in Malindi. However, after the house was complete, the Applicant requested for one room to store his goods but he eventually occupied the whole house and refused to move out. He denied that there was any arrangement to exchange the portions of land as alleged by the Applicant. He contended that the suit land is owned by himself as per the attached official search and if there was such an arrangement to exchange their portions of land, they would have applied for Land Control Board Consent which was never obtained herein. He also contended that the Applicant has never lived on the suit land for over 12 years. He urged the Court to dismiss the instant application herein with costs.

The Applicant filed a **Supplementary Affidavit** and denied that there was any agreement to build a house for the Respondent as there would have been no consideration from him for such an onerous and expensive task. He urged the Court to allow the application.

The application was canvassed by way of written submissions wherein **Omagwa Angima & CO. Advocates** for the Applicant filed the submissions on **13th July 2017**, and urged the Court to allow the instant application. The Respondent filed his submissions on **4th August 2017**, and submitted that he is the registered owner of the suit property and he urged the Court to dismiss the instant application.

The Court has carefully considered the pleadings, the annexures therein and the rival submissions and the Court renders itself as follows;-

The Applicant has filed an **Originating Summons** claiming that he is entitled to be registered as the proprietor of the suit property **Escarpment Kinari Block 1/2762**, by virtue of adverse possession. He alleged that he has lived on the suit property from the **year 2003** which is a period of **over 12 years**. Further that he has built a home on the said suit property at a cost of **Kshs.2,600,000/=** on the strength of the exchange and representation made by the Respondent herein. He has further alleged that the Respondent has been taking strangers to view the suit property and has fears that he might dispose it off before the suit is heard and determined.

The application herein is for injunctive orders which are equitable reliefs granted at the discretion of the Court. Further the Court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the Applicant is deserving of injunctive orders. The Court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. See the case of **Noormohammed Janmohammed...Vs...Kassam Ali Virji Madham (1953) 20 LRK 8**, where the Court held that:-

“Temporary injunctions are granted where there is evidence of immediate danger to property by sale or other disposition. The purpose of temporary injunction is to preserve the status quo”

Further in the case of **Nahendra Chaganlal Solanki...Vs...Neepu Auto**

Spares Ltd, Kisumu HCCC No.90 of 2003, the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise cautionary steps”.

It is further evident that a party seeks for injunctive relief when he/she feels that his/her right has been infringed. The Court will be guided by the principles 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.***
- c) ***When the Court is in doubt, to decide the case on a balance of convenience.***

Has the Applicant herein established that he has a *prima-facie* case with probability of success?

The Applicant has alleged that he entered into the suit property in the **year 2003**, with the consent of the Respondent after they both exchanged their **¼ acres**. He alleged that he thereafter put up a permanent house in the year **2011** where he lives with his family. He alleged that now the Respondent intends to evict him as per the demand letter dated **21st March 2017**. However the Respondent has alleged that the suit land is owned by himself and there was an agreement between him and the Applicant to build a house for him first on the suit land and later build a house for the Applicant in Malindi. Later the Applicant asked the Respondent to allow him use one room to store his goods. However, the Applicant occupied the whole house and refused to move out and thus the demand letter dated **21st March 2017**.

The Applicant has filed an Originating Summons for orders that he is entitled to the suit property by virtue of adverse possession. Those are issues that cannot be decided in this interlocutory application. They are disputed issues which have to await the calling of evidence. However, it is evident that there is a house on the suit property and Respondent has given the Applicant's family notice to vacate. The Court should await for the evidence to determine whether there was indeed an exchange of the parcel of land. It is not in doubt that the suit land is still in the name of the Respondent. There are allegations that the Respondent is showing the suit land to strangers with a view to either selling or mortgaging it. That is before the issue of adverse possession has been settled. The Court finds that the Applicant has

established a *prima-facie* case with probability of success.

Further, on the second limb, it is evident that the Applicant's family is living in the house put up on the suit land. The Respondent has given the Applicant's family notice to vacate vide a demand letter dated **21st March 2017**. There are also allegations that the Respondent wishes to dispose of the suit property and that is why he is inviting strangers to view the suit property. If the Applicant's family is evicted or the suit property is sold before the issue of adverse possession is settled, then the Applicant will suffer irreparable loss which cannot be compensated by an award of damages.

On the balance of convenience, the Court finds that it is not in doubt that Applicant is in occupation of the suit property. However, if the Court is to decide on the balance of convenience, it will tilt the same in favour of maintaining *status quo*. The *status quo* herein **is that the Applicant is in possession and that should be the status quo to be preserved and maintained.**

Having now carefully considered the instant **Notice of Motion** dated **5th April 2017**, the **Court finds it merited and it is allowed entirely in terms of prayer no.3 with cost being in the cause.**

It is so ordered.

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

L. GACHERU

JUDGE

27/10/2017

27/10/17

Before: HON. L. GACHERU, ELC J.

Court Assistant - Lucy

Plaintiff/Applicant in person - present

Defendant/Respondent present in person

Plaintiff/Applicant – My advocate is on the way.

Court – Ruling read in open court in the presence of the Plaintiff and Defendant respectively

L. GACHERU

JUDGE