



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 123 OF 2017

WILLIAM NGATIA KARIUKI.....PLAINTIFF

- VERSUS -

CHARLES NDIRITU KANJATHI (CHAIRMAN)

ARIMI SELF HELP GROUP.....1ST DEFENDANT

SIMON NDIRITU MURIITHI (SECRETARY)

ARIMI SELF HELP GROUP.....2ND DEFENDANT

1. The application dated **18th July, 2017** is brought by way of Chamber Summons seeking the following orders:

(a) That this Honourable court may be pleased to issue an injunction order restraining the 1st and 2nd respondents, their families, servant, agents and anybody else working under them from entering, interfering, sub-dividing or doing any kind of waste upon the land Parcel No. Plot C26 pending hearing and final determination of this case.

(b) The cost of this application be provided for.

2. The application is premised on the grounds that the applicant is both a member and plot owner of Arimi Self Help Group in Phase I having paid registration and plot fees totaling to Kshs.27,500/-.

3. The application is supported by the affidavits sworn by the applicant on **18th July, 2017** and **24th August, 2017**. He deposes that once he paid Kshs.27,500/- to the self help group, he was shown plot No. C26 in phase I measuring $\frac{1}{2}$ acre and immediately took possession, moved his family thereat and built a semi-permanent house; that he lived peacefully in the aforesaid plot until 2016 when the 1st and 2nd respondents started interfering with his quiet possession. It is his contention that the 1st and 2nd respondents have now moved into the suit property and subdivided it.

4. In support of his case the applicant annexed the following documents to his plaint;

1) A letter from D.C.I.O. Nyeri dated 10th April, 2016.

2) A demand letter from Macharia Advocate dated 14th July, 2006

3) Payment receipts and

4) A sketch map.

5. The application is opposed. In an affidavit sworn by the 1st and 2nd respondents on **15th August 2017**, the respondents acknowledge that the applicant is a member of Arimi Self Help group having paid Kshs.1,000/- registration fee and Kshs.27,500/- as purchase price for a plot in Phase II. They depone that the applicant has failed to pay for survey works and ballot fee amounting to Kshs.10,300/- which is the reason he has not been issued with a ballot and share certificate. They admit that the applicant was allotted plot No. C26 in 1996, but deny he lives therein with his family. They also admit having issued the applicant with a notice to vacate the plot on 1st July, 1996 (CNK-1).

6. It is their contention that this dispute has been arbitrated upon by the Chief, Assistant Chief and Officer Commanding Station (OCS) Naromoru. In that meeting, the applicant agreed to pay Kshs.10,300/- for survey and ballot for plot number C26 and Kshs.500,000/- for the second plot in phase 2 at the current market price. They admit entering Plot No. C26 subdividing the plot into two quarters and taking possession of one quarter of the plot. They contend that they carried out this action after the applicant refused to pay Kshs.10,300 as agreed and after been authorised by the committee

7. In support of their case, the respondents have annexed the following documents;

1. Receipt issued to the applicant by Arimi Self Help Group for Plot No. C26 for Kshs.1000/= being payment of registration fees.

2. Receipts from Arimi Self help group to the applicant for Kshs.15,000/- and Kshs.12,500/- respectively for purchase of a plot in phase 2.

3. A letter dated 12th April, 2016 addressed to the 2nd respondent from District Criminal Investigation Officer (D.C.I.O.).

4. A Notice to vacate dated 1st July, 2006.

5. A letter from the District Officer (D.O) Kieni East asking the applicant to attend a meeting in the D.O's office, Naromoru on 15th May, 2007.

8. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs Cassman Brown** (1973) E.A. 358. The court will consider whether:

(i) The applicant has shown that he has a *prima facie* case with a probability of success;

(ii) Damages will be an adequate remedy and

(iii) on the balance of convenience, should the court be in doubt, it will determine the matter on a balance of convenience.

9. Before I consider application before me on its merits, I wish to point out that the instant application has been brought by way of Chambers Summons instead of Notice of Motion as provided for under **Order 51**. Although the procedure used in bringing this application is wrong, I will exercise my discretion under **Section 3A** of the Civil Procedure Act and proceed to determine the application on its merits as the error does affect the substance of the application and also because courts are implored under **Article 159(4)** of the Constitution and **Section 1A** of the Civil Procedure Act to do justice and disregard procedural technicalities.

10. Turning to the application, I find the issue that stands out for determination to be whether on the facts and circumstances of this case, the applicant is entitled to the orders of injunction sought at this

interlocutory stage.

11. It is common ground that the applicant is a member of Arimi Self Help Group, has paid registration fee and purchase price for one plot, has been in possession of plot number C26 and has erected some structures therein. It is also not in dispute that the applicant has not paid Kshs.10,300/- for ballot and survey fees.

12. The issue in contention is whether the applicant having failed to pay Kshs.10,300 as required of all members of the self help group and both the applicant and the respondents been in agreement that the respondents have already taken possession of a $\frac{1}{4}$ of the suit property, should be granted the orders sought.

13. From the evidence placed before this court, I find the respondents story more consistent than that of the applicant. In his supporting affidavit, the applicant is very economical with the truth. In that affidavit, he failed to disclose to the court that he has not completed payment as required of members of the self help group; that this dispute had been referred to the Chief, Assistant Chief and O.C.S. Naromoru for mediation where certain issues were agreed upon.

14. On the other hand, the respondents have explained the events leading to the repossession of the plot and demonstrated the steps taken in trying to resolve this dispute.

15. Because at this stage, all the applicant is required to demonstrate is not a case which must succeed but one which may succeed, with the facts and evidence placed before me, I find that since the respondents have already repossessed one quarter of the suit property, granting the orders as sought will be an exercise in futility. However, I also hold and find that because a portion of the suit property still remains in the applicant's possession, the respondents should be restrained from interfering with the remaining portion. Consequently, I restrain the respondents from interfering with the remaining portion still in the applicant's possession pending the hearing and determination of the suit. Costs of the application to abide the outcome of the suit.

Orders accordingly.

Dated, signed and delivered at Nyeri this 16th day of November, 2017.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff/applicant

Charles Nderitu Kanjathi – 1st defendant

Simon Nderitu Mureithi – 2nd defendant

Court assistant - Esther