



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.318 OF 2017

EUNICE WAMBUI NGANGA.....PLAINTIFF/APPLICANT

-VERSUS-

TERESIA WANJIKU WAINAINA.....DEFENDANT/RESPONDENT

RULING

By a *Plaint* dated 10th March 2017, the Plaintiff/Applicant herein, *Eunice Wambui Nganga* sought for various orders against the Defendant/Respondent herein, *Teresia Wanjiku Wainaina*. Among the orders sought is a declaration that the Plaintiff is the *bonafide* registered owner of land parcel *No.Ruiru/Ruiru East Block 2/4996 and Block 2/4999*, to the exclusion of anyone else.

Contemporaneous, the Plaintiff filed a *Notice of Motion* application even dated and sought for these orders:-

1) *Spent.*

2) *Spent.*

3) *That a temporary injunction be and is hereby issued to restrain the Defendant/Respondent, by herself or through her agent, servants, employees, family members, relatives and/or anybody else claiming under her from remaining, occupying, entering into, constructing any structure, transferring, selling allocating, encumbering, dealing and/or any other way interfering with the land parcels No.Ruiru/Ruiru East Block 2/4996 and Block 2/4999, pending hearing and determination of this suit.*

4) *That the Officer Commanding Ruiru Police Station, be served with this order to enforce this order and ensure law and order is maintained.*

5) *That the costs of this application be provided for.*

This application is based on the grounds stated on the face of the application and these are:-

a) *That Plaintiff is the registered proprietor of the land parcel No.Ruiru/Ruiru East Block 2/4996 and 4999.*

b) *That towards the end of the year 2016, the Defendant started trespassing on the said land*

parcel claiming ownership thereof.

c) That the Applicant reported the matter to the police at CID Headquarters whereby the parties were directed to avail ownership documents for verification. Upon representation of ownership documents, the investigating officer concluded that the Defendant's alleged title deed for the said land parcel was not genuine and the Plaintiff were advised to seek courts' remedy.

d) That in January 2017, the Defendant deposited shipment containers and building materials. From 3rd March 2017, the Defendant has been digging foundation trenches on the said land parcels.

Further, the application is supported by the annexed affidavit of the applicant, **Eunice Wambui Nganga**, who averred as follows;- That in the **year 1990**, her husband exchanged his land parcel **No.Kiganjo/Gatei/263** with shares owned by **Wanjiku Githiu** in **Nyakinyua Investment Ltd** as is evident from **annexture E1**. She alleged that she thereafter paid all the requisite fees to **Nyakinyua Investment Ltd** as shown by **annexture E2**. It was her contention that she thereafter participated in the balloting exercise and she was allocated land parcel **No.Ruiru/Ruiru East Block 2/4996** and **Block 2/4999**, in **Nyakinyua Investment Ltd**. She further contended that she was registered as a proprietor of the suit properties in **1992**, and was issued with title deeds for **No.Ruiru/Ruiru East Block 2/496** and **Block 2/4999**, as shown by **annextures E4(a)&(b)**. It was her further contention that she even used one of the title deed as a collateral for a loan from the Bank as can be seen from **annexture E4(c), E4(d)** and **E4(e)**. She further deposed that she has been in quiet possession of the suit land parcels until **late 2016** and **January 2017**, when the Defendant started to trespass on the said parcels of land claiming ownership thereof. It was her further allegation that on **January 2017**, the Defendant started to deposit shipment containers and building materials on the said land parcels and has denied her access to the said land parcels. Further that the Defendant has started to dig foundation as evidenced by the assorted photographs annexed as **E6**. Therefore, she contended that the Defendant's unlawful actions have deprived her of her constitutional right to property and she urged the Court to allow her claim.

The application is vehemently **opposed** by the Defendant herein. She filed her **Defence** and **Counter-claim** and urged the Court to declare that the land parcels **Nos.Ruiru/Ruiru East Block 2/4996** and **Block 2/4999** legally belongs to the Defendant.

The Defendant further filed a **Replying Affidavit** sworn on **12th April 2017**, and averred that she is the legally registered owner of the two parcels of land and has been in continuous possession of the same since the year **1988**, when she was issued with title deeds in respect of the two parcels of land. It was also her contention that she was and is still a member of **Nyakinyua Investment Co. Ltd**, wherein on **30th July 1984**, she was issued with two share certificates for the two parcels of land being **No.4761** and **4763**. She also contended that after paying the requisite charges, she was allowed to ballot and was issued with **ballot card No.11** for double plots as is evident from **exhibit D**. The Respondent deposed that on **26th August 1988**, she was issued with title deeds in respect of the two parcels of land **exhibit E(a)&(b)** and has been in possession since then. That she fenced off the said land and has been growing hay grass for her cows thereon. She denied that the Plaintiff has ever been in possession of the two parcels of land and also denied that she has trespassed on the said suit properties. She contended that she has been in continuous possession of the two plots and also admitted that she placed the containers on the said suit properties for commercial purposes, and they have been in existence for more than two years now. She urged the Court to disallow the instant application.

The Plaintiff/Applicant filed a further affidavit and averred that the Defendant unlawfully and fraudulently obtained ballots and certificates which she failed to surrender to **Nyakinyua Investment Co. Ltd**, and pursuant to **minutes of 28th August 1991**, the ballots and **certificates** and **title deeds were nullified**. Further that the Defendants alleged title deeds which were unlawfully and irregularly obtained were **recalled and cancelled**. It was her further contention that the Defendants purported title deeds were not registered and as at **22nd May 2017**, she was the registered proprietor as is evident from the **official search** and **receipt** marked as **annexture EW2**. She urged the Court to allow her application.

This application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. Further, the Court has considered the relevant provisions of law and case law and makes the following determinations:-

The orders sought herein are injunctive reliefs which are equitable remedies granted at the discretion of the Court. However, this discretion must be exercised judicially. See the case of *Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554*, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

Further, the Court takes into account that at this stage, it is not called to decide the disputed issues with finality especially based on contradictory affidavits. All that the Court is called upon is to decide whether the Applicant is deserving of the injunctive orders sought based on the usual criteria. See the case of *Edwin Kamau Muniu..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....”

The criteria that the Court will base its determination on is the one set out in the case of *Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358*. These criterias 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.***

Therefore the Applicant herein has the utmost duty of establishing the three stated conditions.

Firstly, the Applicant has to establish that she 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*, *prima-facie* case was described as:-

“In civil cases, it is a case which on the material presented to the Court or 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 or rebuttal from the latter”

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

The Plaintiff/Applicant has alleged that she is the registered owner of the two suit properties herein *No.Ruiru/Ruiru East Block 2/4996* and *4999*, having been registered so on ***8th May 1992***. She produced ***title deeds*** as ***annextures E4(a)&(b)*** accordingly. She further stated that she took possession of these two parcels of land after registration but the Defendant started encroaching on the same in ***late 2016*** and ***January 2017***. She attached photographs of some containers which she alleged were erected on the suit properties by the Defendant herein. However the Defendant has alleged that these suit properties are hers and they were registered in her name on ***26th August 1988***, and she produced copies of her ***title deeds annexture E(a)***. It is therefore evident that these two parcels of land have two sets of title deeds held by two different persons. The first set of title deeds are held by the Plaintiff/Applicant herein and the second set by the Defendant. Of course ordinarily, there would be no parcel of land with more than one title deed and the said title deed held by different people. However, we have such a scenerio in this matter and it is

probable that only one set of title deeds is legally held and the other set could either have been issued irregularly, illegally or by mistake. The Court needs to determine which of the two sets of title deeds is genuine. However, it cannot determine that through affidavits evidence at this interlocutory stage. That determination would await the calling of evidence in the main trial.

Further, the Plaintiff alleged that her husband exchanged land parcel **No.Kiganjo/Gatei/263**, with the shares that were owned by **Wanjiku Githiu** in **Nyakinyua Investment Ltd**. However, the Court has seen the **transfer document** dated **31st July 1990**, and though the transfer is for title **No.Kiganjo/Gatei/263**, to **Hannah Wanjiku Githiu** in consideration of exchange for other land, those other lands are not described. Are they the suit properties herein? Further, it is evident that the Plaintiff herein was issued with the title deeds on **8th May 1992** and she alleged that she took possession immediately. However, she did not inform the Court what and how she was using the suit properties. The Defendant has alleged that she took possession of the suit land in **1988**, and has been growing hay grass for her cows and two years ago, she placed containers on the suit properties for commercial purposes. For the Court to ascertain who indeed has been using the suit land, evidence needs to be called and tested in cross-examination. This can only be done in the main trial.

Since we have two sets of title deeds, the Court needs to hear evidence from the officials from the Ministry of Lands or the Land Registry that issued the said title deeds to confirm which among the two sets of title deeds are genuine, and the circumstances that led to issuance of two sets of title deeds. The Plaintiff/Applicant has alleged that the police officers carried investigations and held that the Defendant's titles were not genuine. That report is not attached as an annexure. Further, the said police investigator should be availed as a witness in the main trial.

The Plaintiff/Applicant further relied on the letter dated **26th November 2015**, from **Nyakinyua Investment Ltd** which confirmed that the suit properties belong to the Plaintiff. However, this letter is challenged by the Defendant and the authenticity of this letter can only be achieved by calling the maker or officials from the said **Nyakinyua Investment Ltd**. At this interlocutory stage, the Court cannot ascertain the authenticity or correctness of the said letter. See the case of **Ramji Jethabhai...Vs...Mrs CE Fisher, Civil Appeal No.5 of 1980**, where the Court held that:-

“Where weighty issues are raised, it is better to subject them to the salutary test of cross-examination”.

The Plaintiff/Applicant has alleged that the Defendant's title deeds were obtained unlawfully or through forgery. That amounts to fraud and fraud is a very serious allegation which cannot be made lightly. See the case of **Ratlal Gordhanbhai Patel...Vs...Lalji Makonji, Civil App.No.70 of 1956**, where the Court held that:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required”.

Having now carefully considered the available evidence, the Court finds that there are two sets of competing title deeds. The disputed facts of which set is the genuine one and which one is not, cannot be resolved through affidavit evidence at this stage, but by calling evidence in the main trial. For the above reasons, the **Court finds that the Plaintiff/Applicant has not established that she has a prima-facie case with probability of success.**

On the **second limb**, it is evident that there are containers on the disputed parcels of land. The Defendant admitted to having placed them but she contended that she did so more than two years ago. The Court has seen the photographs of the said containers and they do not look like they were placed there recently. It is more probable that the Plaintiff/Applicant has not been using the suit properties because if she was, the said containers would not have been placed. Therefore, there is **no evidence** that the **Plaintiff/Applicant** herein **will suffer irreparable loss** which cannot be compensated by an award of damages. See 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”.

On the ***third limb***, the Court is indeed in doubt and will therefore decide this application on the balance of convenience. Taking into account that both the Plaintiff and Defendant are claiming ownership of these parcels of land, the ***balance of convenience would tilt in favour of preserving the suit properties***. The preservation of the suit properties would ensure that the rights of each party herein is protected pending the determination of the dispute. This ***Court finds that the preservation of the suit properties would be achieved by maintaining the status quo***. The status quo herein is ***that the Defendant is in possession and has placed containers on the suit properties for commercial purposes***. However, even if the Defendant is in possession, ***she is restrained from selling, alienating, disposing off, charging, subdividing, constructing, digging foundation and/or carrying out any act that would interfere with the preservation of the suit properties***.

Having now carefully considered the instant ***Notice of Motion*** application dated ***10th March 2017***, the ***Court finds it not merited and it is disallowed entirely with costs being in the cause***. However, ***status***

quo to be maintained as above stated.

It is so ordered.

Dated, Signed and Delivered at Thika this ***10th*** day of ***November 2017***.

L. GACHERU

JUDGE

10/11/2017

In the presence of

No appearance for Plaintiff/Applicant

Mr. Maweu holding brief for Mr. F. N. Kimani for Defendant/Respondent

Lucy- Court clerk.

Plaintiff in person - present

L. GACHERU

JUDGE

10/11/2017