



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.321 OF 2017

JACINTA NJERI WANYOIKE.....PLAINTIFF/APPLICANT

-VERSUS-

TERESIA WANJIKU WAINAINA....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **10th March 2017** brought by the Plaintiff/Applicant **Jacinta Njeri Wanyoike**, who has sought for the following 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 parcel Nos.Ruiru/Ruiru East Block 2/5001 and 5004 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 premised upon the grounds stated on the face of the application and the **Supporting Affidavit** of **Jacinta Njeri Wanyoike**. These grounds are:-

a. That Plaintiff is the registered proprietor of the land parcels Nos.Ruiru/Ruiru East Block 2/5001 and 5004.

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 parcels were 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.

In her **Supporting Affidavit**, the Applicant averred that she bought shares in **Nyakinyua Investment Ltd**, in **1976**. It was her further averment that in the year **1991**, she was issued with two share certificates by the said Nyakinyua Investment Ltd as is evident from **annexture J3**. She contended that she participated in the balloting exercise and was allocated Land parcels **No.Ruiru/Ruiru East Block 2/5001 and 5004, Nyakinyua Investment Ltd**. Further, that in the year **1992**, she was registered as the proprietor of the two parcels of land **No.Ruiru/Ruiru East Block 2/5001 and 5004**, and was issued with the **title deeds annexture J5**. It was her further contention that she has been in quiet possession of the said land parcels until recently when the Defendant trespassed on the said land parcels claiming ownership thereof. She alleged that in **January 2017**, the Defendant deposited shipment containers and building materials on the said parcels of land thus denying the Plaintiff access to the said land parcels. Further that the Defendant has started digging foundation on the two parcels of land. She further alleged that the Defendant's unlawful actions have deprived her of her constitutional rights to property. She urged the Court to allow her application.

The application is opposed and **Teresia Wanjiku Wainaina**, the Defendant herein swore her **Replying Affidavit** 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 the title deeds in respect of the two properties. She alleged that as a member of **Nyakinyua Investment Company Ltd**, she was issued with two share certificates on **21st January 1985** and **19th March 1987** over the two parcels of land being **No.0477 and 05919 respectively**. Further that after paying the relevant fees, she was allowed to ballot and was issued with a ballot card for the double plots which is attached as **annexture D**. It was her contention that she was issued with title deeds in respect of the two parcels of land on **26th August 1988**, which were marked as **annexture E(a)&(b)**. She also contended that she took possession, fenced off the land and has been growing hay grass for her cows. It was her further contention that the Plaintiff has never been in possession of the suit properties and she denied ever trespassing on the suit property. She also admitted that having been in possession, she placed several containers on the suit properties for commercial purposes which containers have been in existence for more than 2 years. The Defendant urged the Court to dismiss the instant application.

The Plaintiff filed a further affidavit and averred that the Defendant herein unlawfully and fraudulently obtained the documents attached to her Replying Affidavit. It was her allegation that on **28th august 1991**, the said certificates and title deeds were nullified. It was her further contention that the Defendant's purported title deeds were not registered as alleged and that as at **16th March 2017**, when she carried the official search, she was still the registered proprietor of the suit properties.

This application was canvassed by way of written submissions which this Court has carefully considered. The Court has also considered the pleadings in general, the annexures thereto and the relevant provisions of law. The Court makes the following determination;-

The orders sought herein are equitable remedies which are granted at the discretion of the court. 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”.

Further, the Court will take into account that at this interlocutory stage, the Court is not supposed to delve into substantive issues which are in dispute. The Court is only supposed to determine whether the Applicant is deserving of the injunctive orders sought basing that on the usual criteria. See the case of

Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999, where the Court held that:-

“In an application for injunction, the Court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

With the above caution in mind, the Court finds that the criteria to be used herein is the one set 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.

The Applicant herein needed to first establish that she has a *prima-facie* case with probability of success. In the case of **Mrao Ltd...Vs...First American Bank**, the Court held that:-

“A prima-facie case means more than an arguable case, the evidence must show an infringement of a right and probability of success of the applicant’s case at the trial”.

Therefore, has the Applicant herein established that she has a *prima-facie* case with probability of success?

There is no doubt that the dispute herein is over the two parcels of land being **No.Ruiru/Ruiru East Block 2/5001 and 5004**, wherein the Plaintiff alleges that she is the *bonafide* registered owner having been registered so on **15th June 1993**, as is evident from her title deeds **annexture J5**. On the other hand, the Defendant has alleged that she is the *bonafide* owner of these two parcels of land having been registered as such proprietor on **26th August 1988**. Indeed there are two competing titles.

The Applicant has alleged that she has been in possession of the two parcels of land until **late 2016 and January 2017**, when the Defendant trespassed upon the said parcel of land and even placed shipment containers and had even began digging construction foundation. However, the Defendant disputed that allegation and averred that she has been in possession from **1988** and has been growing hay grass for her cows. She also admitted having placed the said containers for commercial purposes but she contended that she placed them on the suit land two years ago. All these are disputed facts and the Court cannot ascertain with certainty who between the two is the rightful owner of the two parcels of land without further evidence from either **the officials of Nyakinyua Investment Ltd**, or the **Lands office**.

It is evident that there are two sets of title deeds over the two parcels of land. A parcel of land cannot have separate titles held by different persons. One of the set herein must have been issued either unlawfully or through mistake. However, that aspect cannot be ascertained now without further evidence, which evidence would need to be tested through cross-examination.

The Plaintiff alleged that the police carried out investigations and found that the Defendant’s title deeds were not genuine. That report is not attached to the application. The Court would like to have the benefit of that evidence which might assist in unraveling the dispute herein. That evidence would only be availed through oral hearing.

Further, though the Plaintiff attached a letter dated **26th November 2015** from **Nyakinyua Investment Ltd**, confirming that the Plaintiff herein is the legal owner of the parcels of land, that letter has been challenged by the Defendant and the Court cannot at this juncture confirm whether it is authentic or not. The authenticity of this letter would only be done through calling of officials from **Nyakinyua Investment Ltd** through the oral hearing.

The Court finds that all the allegations made by the Plaintiff/Applicant cannot be ascertained at this stage without having the benefit of oral evidence. There are two competing sets of title deeds and their genuineness or not cannot be ascertained through affidavit evidence. The Plaintiff has alleged that Defendant obtained her set of title deeds through forgery or fraud. However, that cannot be ascertained at this interlocutory stage based on affidavits evidence. This is because fraud is an extremely serious allegation which should not be made lightly but has to be strictly proved. 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”.

From the above analysis of facts, 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, the Applicant alleged that she has been in possession of the two parcels of land since **1993**, when she obtained the title deeds. However, the Defendant also alleged that she has been in possession from **1988** and has been growing hay grass. Further that with her possession, she placed the containers on the two parcels of land over two years ago. The Court has considered the photographs attached to the application. Indeed the containers do not look like they were recently placed or erected at the site. The containers look like they have been on site for a while. It is more probable that the Defendant is the one who has been in possession. In the event that the suit herein would be decided in favour of the Plaintiff/Applicant, then whatever loss she would have incurred would 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”.

The Court finds that the ***Applicant has not established*** that she will suffer ***irreparable loss*** which cannot be compensated by an award of damages.

On the third limb, the ***Court finds that the balance of convenience herein would tilt in favour of maintaining the status quo.*** The status quo herein is that the Defendant is in possession and she placed metal containers on the two parcels of land. The purpose of status quo is to preserve the suit property and protects the rights of the parties before the matter is determined. The suit property herein would be preserved by restraining the Defendant from carrying out any act that would defeat the preservation of the suit property. See the case of **Exclusive Estates Ltd...Vs...Kenya Posts and Telecommunications Corporation & Ano. Civil Appl. No.62 of 2004**, where the Court held that:-

“A temporary injunction is issued in a suit to preserve the property in dispute in the suit or the rights of parties under determination in a suit pending the disposal of the suit.... to preserve the subject matter”.

Therefore the ***Court finds that the best option herein is to maintain the status quo*** wherein the ***Defendant would remain in possession but she is restrained from carrying out any of these acts;- selling, disposing off, subdividing, charging, alienating, constructing or carrying any other act that would interfere with preservation of the suit properties being No.Ruiru/Ruiru East Block2/5001 and 5004.***

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

However, the suit properties should be preserved by maintaining the status quo as above stated by the

Court.

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 (but Plaintiff in person present)

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

Lucy - Court clerk.

L. GACHERU

JUDGE

10/11/2017