



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.319 OF 2017

LUCIA NYAGAKI MBURU.....PLAINTIFF/APPLICANT

-VERSUS-

TERESIA WANJIKU WAINAINA.....DEFENDANT/RESPONDENT

RULING

By a ***Plaint*** dated ***10th March 2017***, the Plaintiff/Applicant herein, ***Lucia Nyagaki Mburu*** has sought for various orders against the Defendant/Respondent, ***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 2/5003***, to the exclusion of anyone else.

Contemporaneously, 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 parcel No.Ruiru/Ruiru East Block 2/5003 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 on the ***Supporting Affidavit*** of ***Lucia Nyagaki Mburu***. These grounds in support are:-

a) That Plaintiff is the registered proprietor of the land parcel No.Ruiru/Ruiru East Block 2/5003.

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 parcel.

In her **Supporting Affidavit**, the Applicant alleged that she became a member of **Nyakinyua Investment Ltd** in the year **1976**, upon payment of registration fees. She also averred that in the year **1991**, she was issued with a **share certificate** by the said **Nyakinyua Investment Ltd**, as evident from **annexture L1**. It was her contention that she participated in balloting exercise and was allocated the land parcel **No.Ruiru/Ruiru East Block 2/5003**, in **Nyakinyua Investment Ltd**. She also contended that she was registered as the proprietor of the parcel of land **No.Ruiru/Ruiru East Block 2/5003**, in the year **1992**, and was issued with a **title deed annexture L3**. She further contended that she has been in quiet possession of the suit land parcel until late **2016**, when Defendant started trespassing on the said land parcel claiming ownership.

It was her further allegation that in **January 2017**, the Defendant deposited shipment containers and building materials on the said parcel of land, thus denying the Plaintiff access to the said land. Further that the Defendant started digging foundation on this suit property. Therefore, she contended that the Defendant's unlawful act has deprived her of her constitutional right to property and she urged the Court to allow the application.

The application is **contested** by the Defendant who filed her **Defence** and **Counter-claim** on **13th April 2017**, and a **Replying Affidavit** even dated. In her Counter-claim the Defendant urged the Court to declare that the suit **land No.Ruiru/Ruiru East Block 2/5003** legally belongs to her.

In her **Replying Affidavit**, the Defendant averred that she is the legally registered owner of the suit property having been registered so on **25th August 1988**. She also averred that she has been in continuous possession of the suit property **since 1988**, and has been growing hay grass for her cows. She alleged that she became a member of **Nyakinyua Investment Co. Ltd** in **1983** and was issued with **share certificate no.04650 exhibit A**. That she paid all the requisite fees and balloted for the plots and was allocated the suit property as is evident from **Exhibit D**. It was her contention that the Plaintiff herein has never been in possession and she denied having trespassed on the suit property. She also admitted to have placed several containers for commercial purposes on the suit property which she did so more than two years ago. She urged the Court to dismiss the instant application.

The Plaintiff filed a further affidavit dated **23rd May 2017** and contended that the Defendant unlawfully and fraudulently obtained ballots and certificates which were later **nullified by Nyakinyua Investment Co. Ltd as is evident from LN3**. It was her contention that the Defendant's alleged title deed which had been obtained unlawfully and irregularly **was recalled and cancelled**. Therefore the Defendant's purported title deed was not registered as alleged. It was her contention that by **23rd May 2017**, she was still the registered proprietor of the suit property as is evident from the **official search LN2**.

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, annexures thereto and the relevant provisions of law, and it will render itself as follow;-

The Plaintiff/Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. However, the Court must exercise that discretion judicially. See the case of

CMC Motors Group Ltd & Another...Vs...Evans Kageche Boro, Civil appeal No.295 of 2001, where the Court of Appeal held that:-

“in granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the Learned Judge if it is satisfied that the Learned Judge did not exercise his discretion judicially....”

Even as the Court exercises its discretion, it will be cautious that at this stage, the Court is not supposed to make conclusive findings that might prejudice the main trial. See the case of Nahendra Chaganlal Solanki...Vs...Neepu Auto Spares Ltd, Kisumu HCCC No.90 of 2003, where 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”.

Taking into account the above observations, the Court is alive to the fact that at this stage, it is only supposed to determine whether the Applicant is deserving of the injunctive orders based on the usual criteria. The Court will therefore 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.**

So has the Applicant herein established that she has a *prima-facie* case with probability of success at the trial? *Prima-facie* case has been held to mean more than an arguable case. It means that the evidence must show an infringement of a right and probability of success of the Applicant's case at the trial (See Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125). The Applicant herein has the task of establishing that indeed her right has been infringed.

The Plaintiff/Applicant has alleged that she is the registered owner of the suit property **No.Ruiru/Ruiru East Block 2/5003** having been registered as such proprietor on **28th May 1996**. She produced a certificate of title to that effect. She has also alleged that after the said registration, she took possession of the suit property and remained in such possession until **late 2016** and **January 2017**, when the Defendant trespassed on the said suit property. She did allege that the Defendant has placed containers on the suit property and has started digging foundation to construct on the said property.

There is no doubt that the Defendant too has a title deed over the said suit property **No.Ruiru/Ruiru East Block 2/5003**, which was allegedly issued to her on **26th August 1988**. It is evident that this suit property has two competing titles. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation. But for the Court to establish which of the title deed herein is genuine, evidence must be called and exhibits produced. Further the Plaintiff has alleged that after the Defendant invaded the suit land and she reported the matter to the police, police CID investigated the matter and found that the Defendant's documents were not genuine. However, the said report is not attached and that remains an allegation which has not been substantiated. There is also a letter dated **25th April 2013**, allegedly from **Nyakinyua Investment Ltd**, which letter allegedly confirms the Plaintiff as the proprietor of the suit property. However, the said letter has been challenged by the Defendant herein. The authenticity of this letter can only be ascertained in the main hearing. Though the Plaintiff alleged that the Defendant forged her title deed, an allegation of fraud is a serious one which cannot be proved through affidavit evidence but by calling of evidence in the

main trial. See the case of *Urmilla W/O Mahendra Shah..Vs...Barclays Bank International Ltd & Another (1979) KLR 76*, 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.”

Though the Plaintiff alleged that she has been in possession of the suit property and that the Defendant just placed the containers in **January 2017**, this Court has seen the photographs of the said containers and they do not look like they were recently erected. The Defendant admitted having placed the said containers, but she contended that they were placed there more than two years ago. Further that she had been growing hay grass on the suit land before. The Plaintiff did not inform the Court what or how she was using the suit property before the alleged invasion by the Defendant.

This Court therefore arrives at a finding that it is more probable that the Defendant is the one in possession and has always been in possession. However, the certainty of this presumption can be ascertained through the calling of 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, the Court has found that it is more probable than not, that the Defendant is the one who has been in possession and has even placed containers on the suit property for commercial purposes. There is 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 finds that it is indeed in doubt as to who is the *bonafide* proprietor of the suit property, given that both the Plaintiff and Defendant have title deeds. The Court will therefore decide on a balance of convenience. The balance of convenience tilts in favour of ***maintaining the status quo***. The *status quo* herein is that the ***Defendant is in possession and that is the status quo that should be maintained***. However, the suit property needs to be preserved so that the right of every party is protected pending the final determination of the matter. 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”.

Since there are disputed facts herein, the Court will issue an order for maintenance of status quo. See the case of *Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987)*

eKLR, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Further, though the Defendant is in possession, she ***is restrained from selling, disposing off, alienating, subdividing, charging, constructing, digging foundation and/or carrying out any act that would interfere with the preservation of the suit property.***

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, the Court directs that *status quo be maintained as stated above.*

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 F. N. Kimani for Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

10/11/2017