



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.322 OF 2017

LUCY NGOIRI NDERI.....PLAINTIFF/APPLICANT

-VERSUS-

TERESIA WANJIKU WAINAINA.....DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant herein *Lucy Ngoiri Nderi*, brought his suit against the Defendant *Teresia Wanjiku Wainaina*, and sought various orders. Among the orders sought in the main suit is a declaration that she is the *bonafide* registered owner of land parcels *No.Ruiru/Ruiru East Block 2/405* and *No.Ruiru/Ruiru East Block 2/406*, to the exclusion of anyone else.

Simultaneously, the Plaintiff filed a *Notice of Motion* application dated *10th March 2017*, 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 Nos.Ruiru/Ruiru East Block 2/405 and 406 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 *Affidavit* of *Lucy Ngoiri Nderi*. These grounds are:-

a) That Plaintiff is the registered proprietor of the land parcels Nos.Ruiru/Ruiru East Block 2/405 and 406.

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 averred that she bought shares in **Nyakinyua Investment Ltd**, as is evident from **annexture L1**. Further that she participated in the balloting exercise and she was allocated land parcels **NoS.Ruiru/Ruiru East Block 2/405 and 406**, in **Nyakinyua Investment Ltd**. It was her further averment that upon balloting and paying fees for processing of title deeds, she was issued with clearance certificates for the said land parcels and she annexed the receipt as **exhibit L4(a)** and **L4(b)**. She also averred that in **the year 1993**, she was registered as the proprietor of the two parcels of land and was issued with the **title deed as annexture L5**. She also alleged that she has been in quiet possession of the said land parcels until the **year 2016**, when the Defendant herein started to trespass on the said land parcel claiming ownership thereof. Further that in **January 2017**, the Defendant deposited shipment containers and building materials on the said land parcels which action has denied her access to the said land parcels. It was her contention that the Defendant has started digging foundation and that is to the Plaintiff's detriment. She alleged that the Defendant's title deeds were obtained fraudulently and that the Defendant's actions are unlawful. It was her further contention that this action has deprived her of her constitutional rights over her said parcels of land and that she will suffer irreparable loss if the orders sought are not granted. She urged the Court to allow the instant application.

The application is vehemently opposed by **Teresia Wanjiku Wainaina**, who filed a **Replying Affidavit** on **13th April 2017**. She averred that she is the legally registered owner of the two parcels of land and has been in continuous possession since the **year 1988**, when she was issued with the title deeds in respect of the two parcels of land. She averred that she is a member of **Nyakinyua Investment Company**, wherein on **17th May 1983**, and **10th September 1983**. She was issued with two share certificates for the above parcels of land being **No.04660** and **04622** exhibit **A(a)(b)**. After paying the requisite fees, she was allowed to ballot and thereafter was issued with ballot card **No.334** for the double plots being **exhibit D**. It was her contention that she was issued with the title deeds on **26th august 1988**, which are exhibits **E(a) & (b)**. Further that she took possession of that land and fenced it off and has been growing hay grass since then. It was her contention that the Plaintiff has never been in possession of the two parcels of land and she denied having trespassed on the said suit properties. She also alleged that apart from being in continuous possession, she has placed containers for commercial purposes on the two plots which containers have been in existence for more than two years. She urged the Court to dismiss the instant application.

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

The Applicant herein has sought for injunctive orders which are equitable relief granted at the discretion of the Court. This discretion however must be exercised judicially. See the case of **David Kamau Gakuru...Vs..National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001**, where the Court held that:-

“It is trite that the granting of 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 as the Court determines this application, it will take into account that it is not supposed to determine the disputed facts conclusively or definitively given that the available evidence is affidavits evidence which is not tested through cross-examination. The contested issues would best be dealt with conclusively at the main trial, where evidence would be called and tested through cross-examination. See the case of **Geoffrey Orai Obura...Vs...Housing Finance Co. of Kenya Ltd, Nairobi (Milimani) HCCC No.497 of 2006**, where the Court held that:-

“This being an interlocutory application, the court has to be cautious not to make any conclusive findings of facts on disputed facts that form the subject of the main trial”.

At this stage, the Court is only called upon to determine whether the Applicant is deserving of the orders sought based on the criteria 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.***

First, the Applicant needed to establish that she has a *prima-facie* case with probability of success. *Prima-facie* case was described in the case of **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean;-

“so what is a prima facie case----- 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”

Further in the case of **Habib Bank Attorney General Zurich...Vs...Eugene Marion Yakub, Civil Application No.43 of 192 (1982) LLR 4977 (CAK)**, the Court held that:-

“probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.

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

The Applicant alleged that she became a member of **Nyakinyua Investment Ltd** in the **year 1976**. She attached a receipt of payment dated **1st September 1976**, in the name of **Ngoiri Wanderi** for **Kshs.2100/=**. She also attached other receipts for payment which payments were done in different years. She also attached two title deeds for the two parcels of land which were issued in the **year 1993**, specifically **18th March 1993**. She alleged that the Defendant herein has encroached on her two parcels of land. She produced a letter dated **26th November 2015**, allegedly from **Nyakinyua Investments Ltd**, stating that the two parcels of land belong to the Plaintiff herein. Further, that when she reported the matter to the police, the police carried investigations and found that the Defendant’s documents were not genuine. However, that allegation is denied by the Defendant who produced her documents and it is clear that the Defendant became a member of **Nyakinyua Investment Ltd** in the **year 1983**. She paid the requisite fees and was issued with **share certificates No.04660** and **04622** in the **year 1983**.

Further, the Defendant has two title deeds for the two parcels of land which were issued on **26th August 1988**. Clearly, there are two sets of title deeds over the two parcels of land. One set is held by the **Plaintiff** and was issued in the **year 1993**. The other set is held by the **Defendant** and was issued in **1988**. It is trite that no parcel of land can have two certificates of title over it. One of the set herein must be the one issued regularly and the other set was either irregularly issued or was issued by mistake

through double allocation. However, that is not an issue that can be determined at this stage. The said disputed issues have to be determined after calling evidence.

The Plaintiff/Applicant herein has attached a copy of a letter dated **26th November 2015**, from **Nyakinyua Investment Ltd.** However, this Court finds that it cannot wholly rely on the said letter without the maker of that letter testifying in court. It is prudent for the author of this letter **L4(b)** to be availed in court during the main trial to testify, produce the said letter and the said evidence tested through cross-examination. The only persons who can shed light on who is the genuine allottee of these two parcels of land are the officials of **Nyakinyua Investment Ltd.** Further, the officials from the Ministry of Lands are crucial witnesses herein, as they would shed light on whether the two sets of title deeds were issued by their offices or not and whether the double allocation was through fraud or mistake.

The Plaintiff alleged that when she reported the matter to the police, the police carried investigation and found that the Defendant's document were not genuine. It is evident that the Defendant's title deeds were issued earlier than that of the Plaintiff's herein. How did the police arrive at that conclusion? The said police investigator also need to be availed in Court and shed more light on the genuineness of the Plaintiff's title and untruthfulness of the Defendant's title deeds. It is trite that fraud is an extremely serious allegations which should not be made lightly. In the case of **Dhalla..Vs...Meralli (1995 – 1998) 2EA 84 (SCU)**, the Court held that:-

“Fraud must be pleaded and strictly proved, the burden being heavier than a balance of probabilities generally applied in civil matter”.

Therefore fraud being a serious allegation, it can only be proved at the hearing at the main trial as the same is not capable of proof at the hearing of interlocutory application.

This Court having considered the available evidence and the annexures thereto, finds that there are two sets of competing title deeds and therefore the Court is unable at this stage to hold and find that the Plaintiff's set of title deeds are the genuine ones. For the above reasons, the Court finds that the ***Plaintiff has been unable to establish that she has a prima-facie case with probability of success.***

On the second limb, the Applicant alleged that she got the title deeds in the year **1993** and took possession of the two parcels of land. However she has not told the Court how she has been utilizing the land. The Defendant alleged that she took possession and has been in continuous possession from the **year 1988** wherein she has been planting hay grass. Further that for the last two years, she erected shipment containers for commercial purposes and that she did not erect them in the **year 2016** as alleged by the Plaintiff. The Court has indeed seen the said containers **marked E6**. They are old containers and they look like they have been standing on that site for a while. This Court is also unable to hold that the Plaintiff has been in possession of the suit property and the Defendant's action will occasion irreparable loss on her part which cannot be compensated by an award of damages. The two parcels of land can be quantified and in the event that the Plaintiff/Applicant will emerge the successful litigant, the Defendant herein can compensate her 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 of if the Court is in doubt to decide on a balance of convenience, this Court finds that it is more probable that the Defendant has been utilizing the suit land and had even erected the containers on the suit properties a while ago for commercial purposes. The Court finds that the ***balance of convenience herein tilt in favour of maintaining the status quo.*** See the case of **Esso (K) Ltd..Vs..Mark Makwata Okinya, Civil Appeal No.69 of 1991**, where the Court held that:-

“The purpose of injunction is to maintain the status quo”.

The *status quo* herein is that the ***Defendant is in possession***. That is the *status quo* to be maintained. However since there are competing titles herein, the right of every party should be preserved. 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”.

Similarly, the suit property herein need to be preserved. The *status quo* is to be maintained wherein ***the Defendant is to remain in possession by retaining the said containers for commercial purposes but the Defendant is restrained from further construction, charging, alienating, selling, disposing off, digging foundation and/or engaging in any action that would interfere with the preservation of the suit properties***. The *status quo* order will remain in force ***until the suit is heard and determined***.

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

Plaintiff in person - present

L. GACHERU

JUDGE

10/11/2017