



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.320 OF 2017

NYAMBURA KAMAU.....PLAINTIFF/APPLICANT

-VERSUS-

TERESIA WANJIKU WAINAINA.....DEFENDANT/RESPONDENT

RULING

By a **Plaint** dated **10th March 2017**, the Plaintiff/Applicant, **Nyambura Kamau** has sought for various prayers against the Defendant/Respondent, **Teresia Wanjiku Wainaina**. Among the prayers sought is a declaration that the Plaintiff is the bonafide registered owner of land parcels **Nos.Ruiru/Ruiru East Block 2/5000** and **5002** to the exclusion of anyone else.

Simultaneous to the **Plaint**, the Applicant 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 Nos.Ruiru/Ruiru East Block 2/5000 and 5002 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 on the **Supporting** and **further Affidavit** of **Nyambura Kamau**. These grounds are:-

a) That Plaintiff is the registered proprietor of the land parcels Nos.Ruiru/Ruiru East Block 2/5000 and 5002.

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 deeds 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 **Nyambura Kamau** averred that in the year 1976, she bought shares in **Nyakinyua Investment Ltd**, as is evident from **annexture N1**. Subsequently in the year 1991, she was issued with two share certificates by the said **Nyakinyua Investment Ltd**, **annexture N3**. Further that she participated in balloting exercise and she was allocated the two parcels of land **Nos. Ruiru/Ruiru East Block 2/5000 and 5002**, and she thereafter paid the relevant fees. She contended that in the year 1992, she was registered as the proprietor of the two suit properties and was issued with **two title deeds annexture N5**. It was her further contention that she remained in quiet possession of the suit land until end of 2016 and **January 2017**, when Defendant trespassed on the said parcels of land and denied her access. That Defendant deposited shipment containers and building materials on the said parcels of land, and has even started digging foundation thereon. She alleged that the Defendant's unlawful actions have denied her constitutional right to property and she stands to suffer irreparable loss. She urged the Court to allow her application.

The application is **contested** and the Defendant/Respondent, **Teresia Wanjiku Wainaina**, swore a **Replying Affidavit** on **12th April 2017**, and averred that she is the legally registered owner of the two parcels of land having been registered on **26th August 1988**, as evident from **exhibit A(a) & (b)**. It was her contention that she became a member of Nyakinyua Investment Ltd after paying fees and later survey fees on **5th May 1983**. Thereafter, she was allowed to ballot and she was issued with ballot card for **LR.Nos. Ruiru/Ruiru East Block 2/5000 and 5002**. She was thereafter issued with title deeds on **26th August 1988, exhibit E(a) & (b)**. It was her contention that she took possession of the suit land wherein she fenced it off and started growing hay grass for her cows. She contended that the Plaintiff has never been in possession of the suit properties and she denied allegations of trespass. She also admitted to have placed the containers for commercial purposes on the suit properties but he averred that they have been in existence for more than two years. She urged the Court to dismiss the instant application.

In her further affidavit, the Plaintiff/Applicant averred that the Defendant unlawfully and irregularly obtained ballots and certificates which she **failed to surrender** to **Nyakinyua Investment Co. Ltd** and were **nullified on 28th August 1991**. Further, that the **Defendant's title deeds** which were unlawfully and irregularly obtained **were recalled and cancelled**. She reiterated that she is the registered owner of the suit properties and urged the Court to allow her application.

The application was canvassed by way of written submissions which this Court has carefully considered. The Court has also considered the annexed exhibits and the relevant provisions of law. The Court will render itself as follow;-

The orders sought herein are equitable remedies which are granted at the discretion of the Court. However, the said discretion 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, the Court will take into account that at this interlocutory stage, the Court is not supposed to make conclusive findings of facts and law based on affidavit evidence. The Court is only supposed to determine whether Applicant is deserving of the 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 will guide the Court in determining whether to grant the orders sought or not, is the one laid down 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.***

As the court delves into the available evidence, it will first pose this question;- Has the Applicant established 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”

From the above description, it is clear that *prima-facie* case means more than arguable case. The available evidence must point to infringement of the applicant’s right and probability of success of the applicant’s case at the trial.

The Applicant herein has alleged that she is the registered owner of the suit properties being **Nos.Ruiru/Ruiru East Block 5000 and 5002** having been registered so on **8th May 1992**. She attached the **two title deeds as annexure N5 and N6**. She also attached some receipts to show that she paid some money or fees to **Gatundu Nyakinyua Co. Ltd** and/or **Nyakinyua Investment Ltd**. It is not clear whether the two are one and the same. The Applicant has also alleged that the Defendant did encroach on her suit property and erected some shipment containers thereon, where they are used for commercial purposes. The Defendant has admitted having placed the said containers on the suit properties. It is also evident that the Defendant herein is also in possession of another set of title deeds issued on **26th August 1988**, over the suit properties. This was before the Plaintiff’s title deeds were issued. The Defendant alleged that she acquired the suit properties after paying the requisite fees and balloting for the same, and later on she was issued with share Certificates and later title deeds. She also alleged that she has been in continuous occupation since the **year 1988**, wherein she has been growing hay grass on the suit properties and later erected the stated containers for commercial purposes. She denied that she is a trespasser and asked the Court to disallow the Plaintiff’s application.

It is therefore evident that there are two sets of title deeds. The first set is held by the Plaintiff/Applicant and the second by the Defendant. Both of them are claiming to be the *bonafide* proprietors. However, a property can only have one registration document and cannot be held by different persons having separate or different registration documents, unless they are joint owners. The Plaintiff and Defendant herein are not joint owners. Therefore, it is evident that only one set of title deeds is genuine. However, it is not possible at this juncture to determine which of the two is the genuine one without further evidence.

The Plaintiff attached a letter dated **26th November 2015**, stating that the Plaintiff is the genuine proprietor of the suit properties. This letter is however contested by the Defendant and the Court finds that it cannot at this stage authenticate the said letter. The said letter can only be authenticated in the main trial wherein the maker of the same may be called as a witness and his evidence tested through cross-examination. Further the Plaintiff alleged that after investigations, the police found and held that the Defendant documents were not genuine. There is no police report attached to that effect. That allegation can also be tested through the main hearing by calling the said police investigator as a witness.

Though the Plaintiff alleged that she has been in possession of the suit land since **1992**, she had no tangible evidence to prove such possession. However, the Defendant alleged that she has been growing hay grass on the suit property and two years ago, she erected shipment containers which she has been using for commercial purposes. Indeed the Court has seen the said containers through the attached photographs, and they do not look like they were placed on the said site recently.

The Court finds that the issue of which is the genuine set of title deeds herein, can only be determined after calling evidence. The Court needs to determine whether the issuance of the two sets of title deeds was through fraud or mistake which led to double allocation. This can only be done through calling of evidence in the main trial. 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 has alleged fraud which is a very serious allegation and it can only be proved through calling of evidence but not through affidavit evidence. 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.”

Having now carefully considered the available evidence, the Court finds that there are two sets of competing title deeds. At this juncture, the Court cannot hold and find that the Plaintiff's/Applicant's title deeds are the genuine ones. Therefore the Court finds that the ***Plaintiff has not established that she has a prima-facie case with probability of success.***

On the second limb, though the Plaintiff alleged that she has been in possession, it is evident that the Defendant did place containers on the suit properties a while ago. It is not very clear whether the Plaintiff has been using the suit properties. In the event that the main suit is decided in favour of the Plaintiff/Applicant herein, then the Defendant can be ordered to 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**, the Court finds that it is more probable that the Defendant is the one who has been in possession and use of the suit properties. Her title deeds were the first to be registered. As the court awaits to determine the real owner of the suit properties, the Court finds that the balance of convenience tilts in favour of ***maintaining the status quo***. The *status quo* to be maintained herein is the one where the ***Defendant/Respondent will remain in possession and the placed containers for commercial purposes, will also remain intact. However the Defendant is restrained from selling, alienating, subdividing, disposing off, charging, constructing, digging foundation and/or doing any act which would interfere with the preservation of the suit properties or tilt the existing 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”.

Having now carefully considered the available evidence, the Court finds that the Plaintiff’s ***Notice of Motion*** application dated ***10th March 2017***, ***is not merited and consequently the same is dismissed entirely with costs being in the cause.***

However, ***status quo to be maintained*** wherein the ***Defendant/ Respondent will remain in possession and occupation but restrained as stated above.***

It is so ordered.

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

L. GACHERU

JUDGE

10/12/2017

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