



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC 111 OF 2017

ANTONY NDUNGU MAINA.....PLAINTIFF/APPLICANT

-VERSUS-

FAITH WANJIKU MAINA.....DEFENDANT/RESPONDENT

RULING

The Plaintiff herein *Antony Ndungu Maina* filed this suit on *15th February 2017*, and sought for the following prayers against the Defendant:-

- a) An eviction order directing the Defendant to demolish her illegal structure, remove the debris thereof, and to vacate all that property known as LR.No.Ruiru Kiu/Block 4/458, Share Certificate No.1512, Mwihoko Housing Company Limited.*
- b) Damages for trespass and mesne profits*
- c) Costs and interest at court rates.*

Simultaneous to the Plaint, the Applicant also filed a *Notice of Motion* application dated *15th February 2017*, and sought for these orders:-

- 1) Spent.*
- 2) Spent.*
- 3) That the Defendant by herself, her servants, agents and/or employees or any person claiming under the Defendant be restrained from building, constructing, developing, farming, occupation and use of all that property known as LR.No.Ruiru Kiu/Block 4/458, Share Certificate No.1512, Mwihoko Housing Company Limited pending the hearing and determination of the suit.*
- 4) That the costs of this application be provided for.*

The application is premised upon the grounds stated on the face of the

application and on the annexed *Affidavit* of *Antony Ndungu Maina*. These grounds are:-

- a) The Plaintiff is the lawful owner of LR.No.Ruiru Kiu/Block 4/458, share certificate No.1512,*

Mwihoko Housing Company Limited having purchased the same from the legal owner thereof.

b) The Defendant has without lawful cause entered the said land and is undertaking massive construction works thereon.

c) The Defendant has no legal right whatsoever to occupy or use the land parcel LR.No.Ruiru Kiu/Block 4/458, share certificate No.1512, Mwihoko Housing Company Limited.

d) That the Plaintiff/Applicant has a good case with high chances of success and will suffer irreparable loss and damage should the Defendant continue to occupy and use the subject land parcel.

In his Supporting Affidavit, the Applicant averred that he purchased the suit property ***LR.No.Ruiru Kiu/Block 4/458, share certificate No.1512, Mwihoko Housing Company Limited*** from ***Suzan Wanjiru Kimani***, vide the ***Sale Agreement*** dated ***16th February 2011*** marked ***ANM1***. He also averred that he is still in the process of obtaining a title deed. It was his contention that the Defendant without any lawful justification has entered into the suit land and has started construction thereon. That the Defendant has failed to heed any demand from the Plaintiff and continues to construct a house therein. He urged the Court to grant the orders sought.

The application is opposed and ***Faith Wanjiku Maina***, the Respondent herein filed her ***Replying Affidavit*** on ***2nd March 2017*** and averred that she is the allottee and legal owner of ***LR.No.Ruiru Kiu/Block 4/458*** having bought the same from ***Joseph Gakahu Githi*** vide ***Sale Agreement*** dated ***4th July 2013***. She also averred that she was subsequently issued with a clearance certificate by ***Mwihoko Housing Co. Limited -FWM2***. It was her contention that the previous owner's name of ***Joseph Gakahu Githi*** was cancelled by ***Mwihoko Housing Co. Ltd*** and she was issued with ***clearance certificate*** marked ***FWM3***. It was her further contention that the Applicant herein has never been issued with a clearance certificate by ***Mwihoko Housing Co. Ltd*** and his name does not exist in the Company's register. It was her allegation that the Applicant fraudulently misrepresented to the Commissioner of Lands and the Municipal Council of Ruiru as the allottee of the suit land and fraudulently caused the Municipal Council of Ruiru to issue him with rates payment receipts. Therefore the application herein is an attempt to perpetuate and complete the said fraud and therefore the Applicant has come to court with dirty hands.

She also contended that the Applicant will not suffer any harm if the orders sought are denied but she will suffer greatly if the orders sought are not granted. She urged the Court to dismiss the instant application.

The Respondent filed a further affidavit and averred that she is in occupation of the suit land having acquired it legally for valuable consideration and she was issued with a ***clearance certificate*** by ***Mwihoko Housing Co. Ltd*** and she is therefore the absolute allottee of the suit land and just awaiting the issuance of a title deed. Further that ***Mwihoko Housing Company Ltd*** vide its letter dated ***28th February 2017***, confirmed that she is the ***bonafide*** owner of the suit property. She also contended that the Applicant has not demonstrated that he has any legal title to the suit land to warrant this Court to issue the injunctive orders sought.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the annexures attached to the pleadings and the Court will render itself as follows;-

The Applicant herein has sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However this discretion must be exercised judicially. See the case of ***Hasmukh Khetshi Shah...Vs...Tinga Tranders Ltd, Civil Appeal NO.326 of 2002***, where the Court held that:-

“It must be stated at the outset 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 juncture, it is not called to decide the disputed issues with finality. The Court is only called to determine whether the 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 to at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The criteria that will guide this Court in determining whether the Applicant is deserving of the orders sought 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.***

Taking into account the above laid down criteria and the available evidence, has the Applicant established that he is deserving of the orders sought?

First, the Applicant needed to establish that he has a *prima-facie* with probability of success. In the case of ***Mrao...Vs...First American Bank of Kenya Ltd & Others (2003)KLR***, the Court described ***prima-facie*** case to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

The Applicant had a duty of establishing a *prima-facie* case which means more than an arguable case. It also means that the Applicant has to prove an infringement of his right and a probability of success of his case at the trial.

The Plaintiff/Applicant alleged that he bought the suit property from one ***Suzan Wanjiru Kimani*** vide a ***Sale Agreement*** dated ***16th February 2011 - AN1***, but he did not aver whether he took possession of the said suit land or not. Apart from the said sale agreement, the Plaintiff has no other document to show any connection between himself and ***Mwihoko Housing Co. Ltd*** such as a share certificate or any receipts of payment to the said Housing Company.

The Plaintiff only attached a letter dated ***2nd December 2016***, allegedly from ***Mwihoko Housing Co. Ltd*** to ***National Police Service***, but the said letter is not signed. At this juncture the Court cannot ascertain whether this letter is authentic or not. The officials of ***Mwihoko Housing Company Ltd*** needs to be availed as witnesses in the main trial to confirm the authenticity of this letter and further elaborate on the said letter.

However, the Defendant has alleged that she purchased the suit land from ***Joseph Gakahu Githi*** and she has attached a sale agreement dated ***4th July 2013*** between herself and the said ***Joseph Gakahu Githi***. Further the Respondent has attached a cancelled share certificate for ***Joseph Gakahu Githi***, cancelled on ***4th July 2013***, with an indication that it was transferred by the owner. It is also evident vide ***FWM2***, that the Respondent has attached a share certificate in her name from ***Mwihoko Housing Company Ltd*** dated ***5th July 2013***, and a receipt of ***Kshs.30,000/=*** being payment for transfer. Therefore, it is evident that the

Respondent has attached evidence to show her connection with **Mwihoko Housing Company Limited** and the history of how she came to be registered as the holder of **plot No.1512 Mwihoko Housing Co. Ltd.**

The Applicant had alleged that the Respondent without lawful cause entered into the suit property. However it is evident that with the said purchase of the suit property from **Joseph Gakahu Githi** and the transfer of the said property to the Respondent by the said **Joseph Gakahu Githi**, then she had lawful cause to enter into the said property and undertake the alleged construction. As the Court observed earlier, there was no evidence adduced by the Applicant that after the alleged purchase of the said land from **Suzan Wanjiru Kimani**, that he was given vacant possession and that he entered into the said suit property.

The Applicant alleged that the Respondent had no legal right to occupy and use the suit property. However, as the Court has observed, it is the Respondent who has documents showing some connection with the suit property but not the Applicant herein. Further there is a letter from **Mwihoko Housing Company Ltd** dated **28th February 2017**, wherein the said Company vide its Chairman has allegedly confirmed that the suit property **Plot No.1512** belongs to the Respondent **Faith Wanjiku Maina**. If the Applicant has any different confirmation on who is the actual owner of the suit property, then the same can only be availed in the main trial. But prima-faciely there is available evidence to link the Respondent herein with the ownership of the suit property.

The Applicant also alleged that he has a good case with high chances of success. However, it is apparent that it is the Respondent who has availed some evidence to link her with suit property but not the Applicant. The Applicant at this juncture cannot claim that he has high chances of success. Further, failure to aver that he had taken possession of the suit property also means that the Applicant cannot claim that he will suffer irreparable loss which cannot be compensated by an award of damages.

Having now carefully considered the available evidence, the Court finds that the Applicant has not established that he has a prima-facie case with probability of success. Further no evidence was availed that the Applicant will suffer irreparable loss which cannot be compensated by an award of damages. The Court also finds that it is not in doubt and there is no need of dealing with the third limb of deciding the application on a balance of convenience.

The upshot of the foregoing is that the Applicant has failed to establish any of the principles laid down in the case of **Giella....Vs...Cassman Brown & Co. Ltd (supra)** on grant of injunctive orders.

For the above reasons, the Court finds that the Plaintiff's/Applicant's **Notice of Motion** dated **15th February 2017** is **not merited and the same is dismissed entirely with costs being in the cause.**

Further, the parties are directed to prepare the matter for hearing expeditiously by complying with Order 11 of the Civil Procedure Rules within the next 30 days from the date hereof and thereafter fix the matter for Pre-trial Conference before the Deputy Registrar of this Court. The matter to be fixed for hearing of the main suit expeditiously so that the issues in dispute can be determined at once.

It is so ordered.

Dated, Signed and Delivered at Thika this **20th** day of **December 2017**.

L. GACHERU

JUDGE

In the presence of

M/S Gathua holding brief for Mr. Machua for the Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in the presence of M/S Gathua holding brief for Mr. Machua for Plaintiff/Applicant and absence of the Defendant.

L. GACHERU

JUDGE

20/12/2017