



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.22 OF 2017

(FORMERLY NBI ELC.1595 OF 2016)

PETER NGARUIYA NGOCHI.....PLAINTIFF/APPLICANT

-VERSUS-

GABRIEL GITAU NGOCHI.....DEFENDANT/RESPONDENT

RULING

Coming up for determination is the *Notice of Motion* application dated **19th December 2016** brought by the Plaintiff/Applicant, **Peter Ngaruiya Ngochi**, who has sought for the following orders against the Defendant, **Gabriel Gitau Ngochi** who is his blood brother;-

1) Spent.

2) Spent.

3) That this Honourable Court be pleased to grant a temporary injunction order restraining/stopping the Defendant, the Defendant's agents, servants or any other person acting through the Defendant's instructions from trespassing, encroaching and/or erecting any structures on land parcel No.Githunguri/Riuki/1155, pending the hearing and determination of this suit.

4) That the Officer Commanding Ngemwa Police Post/Administration Police and the area Assistant Chief do oversee the enforcement of these orders in observance of peace and order.

5) 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 **Supporting Affidavit** of **Peter Ngaruiya Ngochi**. These grounds are:-

a) That the Plaintiff is the legal and registered owner of all that parcel of land known as No.Githunguri/Riuki/1155, located at Githunguri within Kiambu County.

b) That the Defendant has trespassed and/or encroached on the Plaintiff's/Applicant's land and is threatening to forcefully evict him from his land.

c) That unless the Defendant is restrained by this Honourable Court's injunction order, the Defendant will continue encroaching, trespassing and erecting illegal structures on the aforesaid parcel of land and the Plaintiff will suffer irreparable loss and damage as a result.

d) That it is in the interest of justice and all fairness that the orders sought herein be granted.

In his ***Supporting Affidavit***, the Applicant alleged that his siblings and himself inherited land parcel ***No.Githunguri/Riuki/121***, in equal shares of 0.276 Hectares each and the same was equally subdivided with each person getting his own independent title deed. He averred that ***Githunguri/Riuki/1154***, was given to the Defendant and ***Githunguri/Riuki/1155***, was given to the Plaintiff/Applicant. Further that the boundaries were well set out and the beacons properly erected on both parcels of land with a common access to the land. He also alleged that on diverse dates in the ***year 2016***, and specifically ***December 2016***, the Defendant trespassed on his parcel of land without colour of right and in particular removed the legal boundary and destroyed the plantation that was in his land. That the Defendant illegal and mean actions are aimed at depriving him of his lawful acquired land. He further alleged that the Defendant has been threatening to evict him from his lawfully acquired land and the Applicant is living in imminent fear of being evicted from his parcel of land and he risks suffering a great loss. Further that the Defendant/Respondent has infringed on his constitutional right to property and unless he is restrained, he will continue to violate the Applicant's rights. He also contended that the Defendant will not suffer any prejudice if the orders sought are granted and it is only fair and in the interest of justice that the instant applicant be allowed.

The Application is contested and ***Gabriel Gitau Ngochi***, the Defendant/Respondent swore his Replying Affidavit on ***28th June 2017*** and admitted that they indeed inherited the said portions of land from their father's parcel of land ***Githunguri/Riuki/121***.

After the subdivisions, the Plaintiff and Respondent were registered accordingly as stated by the Plaintiff/Applicant. He also averred that the Plaintiff's parcel of land is on the upper side and his portion on the lower side. He denied all the other allegations made by the Plaintiff/Applicant and urged the Court to visit the site to establish the truth. He alleged that he is only interested in his right of access which is only 6 meters wide with a length of 108 meters. He urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions which this Court has carefully considered. There is no doubt that the Plaintiff and the Defendant are blood brothers who inherited their respective parcels of land from their father's parcel of land ***Githunguri/Riuki/121***. There is no doubt that the Plaintiff is the registered owner of the suit property ***Githunguri/Riuki/1155*** and the Defendant the registered owner of ***Githunguri/Riuki/1154***. There is also no doubt that the two parcels of land are of equal sizes.

The Plaintiff also alleged that the Defendant has trespassed on his parcel of land and more specifically in ***December 2016***. The Defendant has denied the trespass but has contended that he is only interested in the access road which he is entitled to as of right. The Court has noted that the Plaintiff's title deed was issued in the ***year 2012***. That could probably be the same time that the Defendant's title deed was also issued. If that is the case, the Plaintiff and Defendant have been utilizing their respective parcels of land since then. There is no evidence that there was any dispute over the access road before ***December 2016***. The Defendant has alleged that the dispute is over an access road and has urged the court to visit the site and ascertain for itself the true position. This Court finds that the said site visit can only be done after the calling of evidence in the main trial and the said evidence having laid down the basis for such site visit.

For now, the Court finds that the Defendant has not denied trespassing on the Plaintiff's parcel of land. The Plaintiff is the registered owner of ***Githunguri/Riuki/1155***, as is evident from the certificate of title produced in court PN1. As a registered owner of the said parcel of land, his rights are protected under Section 25(1)(a) of the Land Registration Act which provides as follows:-

25.(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as

provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

a) to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register;

The above rights can only be defeated by application of law or through a court order. That is not the case herein. The court finds that the Plaintiff has established the threshold principles for grant of injunctive orders as laid down in the case of ***Giella Vs Cassman Brown & Company Ltd 1973 (KLR) 358.***

Consequently, the Court finds that the Plaintiff's ***Notice of Motion*** application dated ***19th December 2016***, is merited and it is allowed entirely in terms of prayer No.3 only with costs being in the cause.

Further, the parties to comply with Order 11 of Civil Procedure Rules within the next 45 days from the date hereof and thereafter take a date for Pre-trial Conference before the Deputy Registrar of this Court.

It is so ordered.

Dated, Signed and Delivered at Thika this ***18th*** day of ***December 2017.***

L. GACHERU

JUDGE

In the presence of

Mr. Kaburu for Plaintiff/Applicant

No appearance for Defendant/Respondent

Diana - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of Mr. Kaburu for Plaintiff/Applicant and absence of the Defendant/Respondent.

L. GACHERU

JUDGE

18/12/2017