



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.413 OF 2017

MARY MUTHONI KINYANJUI.....PLAINTIFF/APPLICANT

-VERSUS-

NYAKINYUA INVESTMENT LTD.....1ST DEFENDANT/RESPONDENT

JENNIFER WANJIRU KIMANI.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff/Applicant's *Notice of Motion* application dated **3rd April 2017**, brought under Order 40 Rule 2, Order 51 Rule 3 and Section 3A of the Civil Procedure Act. The Applicant has sought for the following orders against the Defendants/Respondents.

a) Spent.

b) Spent.

c) That the 1st Defendant, its servants and agents be temporarily restrained from interfering with Plot No.3975 in Nyakinyua Investment Limited and the 2nd Defendant, her agents, servants be temporarily restrained from interfering with Plot No.3975 Nyakinyua Investment Limited, until the final determination of this case.

d) Costs of this suit.

The application is supported by the annexed affidavit of **Mary Muthoni Kinyanjui**, the Applicant herein and in the following ground:-

1. That the 1st and 2nd Defendants are in conspiracy to take away the suit plot from the Plaintiff.

In her *Supporting Affidavit*, the Applicant has averred that she owns **plot No.3975**, which she inherited from her mother **Wairimu Kanyingi**, who was a member of the 1st Defendant. She further alleged that the 1st Defendant has illegally transferred the said plot to the 2nd Defendant. She urged the Court to restrain the 1st Defendant from transferring the said plot to the 2nd Defendant and that the 2nd Defendant be restrained from interfering in any way with the suit plot. The Applicant urged the Court to allow her application.

The application is **contested** by the **1st Defendant/Respondent** only, who filed its **Replying Affidavit** through **Nduta Ndirangu Chege**, one of the Directors and Chairlady of the Board of Directors and a shareholder of the 1st Defendant. She averred that the Applicant has not annexed any single document to prove her claim to the entitlement of the suit premises. She further averred that the Company's records indicate that the Applicant was the owner of **LR.NO.Ruiru/Mugutha Block 1/3976**, which she transferred to one **Jennifer Muthoni Kimani**, on unknown dates and the Applicant's name was deleted and in lieu thereof replaced with the name of the transferee. Therefore, the Company is not in the process of transferring the property in the name of the 2nd Defendant who is unknown to the 1st Defendant. She further averred that the 1st Defendant cannot be restrained to do what it has no capability of doing as it cannot transfer the property which is owned by a third party and neither is it in anyway interfering with the suit property at all. She urged the Court to dismiss the instant application.

The 2nd Defendant though served with the instant application and the Plaintiff did not enter appearance nor respond to the said application. On **21st June 2017**, the Court directed the parties to canvass the said application by way of written submissions. The **Law Firm of Karuga Wandai & Co. Advocates** for the Plaintiff/Applicant filed their written submissions on **3rd July 2017**, and urged the Court to allow the Plaintiff's application.

However, the 1st Defendant failed to file its written submissions as directed by the Court. The Court reserved the matter for Ruling without the 1st Defendant's written submissions, and to date no such submissions have been filed.

The Court has now considered the instant **Notice of Motion**, the pleadings in general, the annexures thereto and the written submissions as filed by the Plaintiff/Applicant. The Court has also considered the relevant provisions of law and the Court will render itself as follows:-

The Applicant herein has sought for injunctive order which is an equitable relief granted at the discretion of the Court. 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 also take into account that at this stage, the court will not delve into the substantive issues and make final conclusions of the issues in dispute especially based on affidavit evidence. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & 2 Others, Civil Appeal No.213 of 1999**, where the Court held that:-

"In an application for injunction, the court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence".

All that the Court is supposed to determine at this stage, is whether the Applicant is deserving of the injunctive orders sought based on the usual criteria. The criteria to be determined is the one set in the case of **Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358**, which has been repeated in other judicial pronouncements. In the case of **Kibutiri...Vs....**

Kenya Shell, Nairobi HCCC No.3398 of 1980 (1981) KLR 390, the Court held that:-

"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages.

Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.” See also E.A Industries ..Vs..Trufoods (1972) EA 420.

It is therefore clear that the Applicant herein needed to establish the above stated principles or threshold for grant of injunctive orders.

First, the Applicant needed to establish that she has a *prima-facie* case with probability of success. In the case of ***Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR 123***, the Court held that:-

“A prima-facie case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the Applicant’s case at the trial”.

The Plaintiff/Applicant therefore has a duty to establish that there is an infringement of her right and that she has a probability of success of her case at the trial.

The Plaintiff/Applicant alleged that she owns ***plot No.3975***, which she inherited from her mother ***Wairimu Kanyingi***, as is evident from ***MMK A*** and ***MMK E***. The Court has seen the receipts attached to the instant application. These receipts were allegedly issued to ***Wairimu Kanyingi*** on payment of various amount to ***Gatundu Nyakinyua Co. Ltd***. Though the said receipts were issued by ***Nyakinyua Investment Co. Ltd***, on various dates, they do not indicate that the said payments were over payment of ***plot No.3975***. Though receipt ***MMK E*** is for payment of ***Kshs.740***, being payment of title deed fees, the description of the plot number is not given. The Plaintiff did not attach the share certificate for plot ***No.3975***, in the name of the said ***Wairimu Kanyingi*** or the Plaintiff herself. Though the Plaintiff further alleged that the said plot was registered in her name in the register of the 1st Defendant, she did not attach the said register to show that the ***plot No.3975*** is in her name or a title deed in her name. There was also no evidence of transfer of this plot to 2nd Defendant.

Without evidence of ownership of this ***plot No.3975*** by the Plaintiff/Applicant herein, the Court cannot hold with certainty that she indeed owns the same and that by the act of 1st Defendant transferring the said plot to 2nd Defendant, then her right has been infringed. The ***Court therefore finds and holds that the Plaintiff has not established that she has a prima-facie with probability of success at the trial.***

On the ***second limb***, the Court finds that even if the said plot has been transferred to the 2nd Defendant, this plot can be quantified and the Plaintiff/Applicant can therefore be adequately 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***, where 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”.

Having found that damages herein would be an adequate remedy, the ***Court finds that the Plaintiff herein has not satisfied the 2nd condition for grant of injunctive orders.***

On the ***third limb***, the Court finds that it is not in doubt and it will not decide on the balance of convenience.

Having now carefully considered the instant ***Notice of Motion*** application dated ***3rd April 2017***, the ***Court finds it not merited.*** Consequently the said ***application is dismissed entirely with costs being in the cause.***

The parties herein are directed to prepare the suit for hearing 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 **8th** day of ***December*** 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Kyule holding brief for Mr. Wandai for Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court clerk.

Court – Ruling held in open court in the presence of the above advocate and absence of the Defendants.

L. GACHERU

JUDGE

8/12/2017