

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1179 OF 2014

EUNICE NDUTA WANYOIKE.....PLAINTIFF

VERSUS

NYAKINYUA INVESTMENTS LIMITED.....1ST DEFENDANT

SIMON MUTHARA.....2ND DEFENDANT

RULING

The Plaintiff brought this suit against the Defendants on 2nd September 2014 seeking among others, an order of injunction restraining the 2nd Defendant from interfering with, entering and/or evicting the Plaintiff from all that parcel of land known as Plot No. 11303 (“the suit property”). In her plaint, the Plaintiff averred that she purchased the suit property from one, Rebecca Ngubia Njoroge on or about 7th March 2011, took possession thereof and constructed a house and a brick perimeter wall around it.

The Plaintiff averred that on a date not mentioned in the plaint, she borrowed some money from the 2nd defendant herein and as a security for the payment thereof, she gave the 2nd defendant the original title documents in respect of the suit property. The Plaintiff averred that as at that time, the suit property had not been transferred to her name by the said Rebecca Ngubia Njoroge who had passed on in November 2013. The Plaintiff averred that while the said title documents were in possession of the 2nd Defendant, the 2nd defendant fraudulently caused the suit property to be transferred to his name and/or the name of his proxy. The Plaintiff averred that following this transfer, the 2nd Defendant had threatened to evict her from the suit property.

The 2nd Defendant filed a statement of defence and counter-claim against the Plaintiff. In his defence, the 2nd defendant contended that he had entered into an agreement with the Plaintiff that if the Plaintiff failed to pay the sum of Kshs.3,500,000/= that he had given her as a loan, the 2nd defendant would be at liberty to have the property transferred to his name. The 2nd defendant averred that the Plaintiff failed to repay the loan that was given to her by the 2nd defendant as a result of which the suit property was transferred to the 2nd defendant. The 2nd defendant denied that he acquired the suit property fraudulently as claimed by the Plaintiff and sought by way of a counter claim; a declaration that he is the lawful owner of the suit property, a permanent injunction restraining the Plaintiff from interfering with the enjoyment and possession of the suit property and in the alternative payment of a sum of Kshs.3,500,000/= together with interest.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 2nd September 2014 seeking an order of injunction to restrain the 2nd Defendant from in any way interfering with the Plaintiff’s quiet user of the suit property pending the hearing and determination of the suit herein. The Plaintiff’s application which was brought under certificate of urgency was brought on the ground that the 2nd defendant was interfering with the Plaintiff’s quiet possession of the suit property by threatening to evict her therefrom. The Plaintiff’s application was opposed by the 2nd defendant and the same was heard by Onguto J. In a ruling that was delivered on 13th November 2014, Onguto J. dismissed the Plaintiff’s application for injunction with costs to the 2nd Defendant. The judge found that the Plaintiff had failed to establish a prima facie case against the 2nd Defendant. The court found further that the loss

if any was to be occasioned to the Plaintiff by the 2nd Defendant's acts which were complained of, the same could be compensated by an award of damages.

There is no evidence before me that the Plaintiff appealed against the said decision by Onguto J. The Plaintiff has now come back to court with yet another application, this time round seeking an order that she be reinstated on the suit property and a temporary injunction restraining the 2nd defendant from interfering with or evicting her from the suit property pending the hearing and determination of the suit. The Plaintiff's application has brought on the ground that on 22nd March 2016, the defendants illegally evicted her from the suit property. The application was opposed by the 2nd defendant through a replying affidavit sworn on 11th April 2016 in which he stated that the Plaintiff has never resided on the suit property and as such could not have been forcefully evicted therefrom. The 2nd defendant stated further that he is not in possession of the suit property and as such he could not be compelled to reinstate the Plaintiff thereon. The 2nd defendant denied that he had evicted the Plaintiff from the suit property and argued that the Plaintiff's contention to that effect was not supported by any evidence.

The Plaintiff's application was argued before me on 12th April, 2016 when Mr. Okatch appeared for the Plaintiff while Mr. Opundo appeared for the 2nd defendant. I have considered the Plaintiff's application together with the replying affidavit that was filed by the 2nd Defendant in opposition thereto. I have also considered the submissions by counsels and the authorities that were cited before me by the Plaintiff. As I have stated at the begging of this ruling, the Plaintiff had filed an earlier application for injunction to restrain the 2nd defendant from evicting her from the suit property. The court considered the application on merit and dismissed the same on 13th November 2014. The court made a finding that the Plaintiff had failed to establish a prima facie case against the 2nd defendant and that she would not suffer irreparable harm if the injunction sought was not granted. On the basis of those findings, the court declined to stop the 2nd defendant from evicting the plaintiff from the suit property. The Plaintiff did not appeal against the said decision. The Plaintiff has not amended her pleadings to introduce any further cause of action. The Plaintiff has now contended that following the said ruling by Onguto J. the 2nd defendant proceeded to evict her from the suit property. The Plaintiff has without amending her pleadings moved the court for reinstatement onto the suit property and an injunction to restrain her eviction pending the hearing of the suit. What the Plaintiff has sought is a mandatory and prohibitory injunction against the defendants. The principles upon which this court exercises its discretion on application for mandatory and prohibitory injunctions are well settled. For the court to grant a mandatory injunction, the applicant must establish a clear case with overwhelming chances of success. The conditions for granting a mandatory injunction are stringent than those which apply to prohibitory injunctions. As I have stated above, the Plaintiff has not brought a new case before me. The current application is based on the pleadings which were filed on 2nd September 2014 together with the earlier application for injunction. As I have mentioned above, Onguto J. had already made a finding that the Plaintiff has no prima facie case against the 2nd defendant. The judge had also observed that if any loss was to be incurred by the Plaintiff the same can be compensated by an award of damages. It is contested that the Plaintiff was evicted from the suit property by the 2nd defendant. The Plaintiff has placed some evidence before the court that she was indeed evicted from the suit property. There is however no evidence as to who evicted her and who is now in possession of the suit property. Those are issues which will have to await the trial of the suit. Assuming that it is indeed the 2nd defendant who evicted the plaintiff from the suit, can the court grant the prayers sought by the Plaintiff? I don't think so. As I have stated above, before she was evicted from the suit property, the plaintiff had ran to court to stop her eviction. The court considered her case and dismissed her injunction application, essentially refusing to stop her eviction. The Plaintiff did not appeal the decision.

In the absence of any new material or case placed before me, there is no basis upon which I can depart from the findings of Onguto J. that the Plaintiff has no prima facie case against the 2nd defendant. I do not think that having refused to stop the eviction of the Plaintiff, the court can be called upon after the eviction has taken place to reinstate the Plaintiff without amendments to the plaint to lay a proper basis for such relief. I am of the view that the order sought by the Plaintiff in the present application if granted would be inconsistent with the findings of Onguto J. in his ruling of 13th November 2014.

