



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 622 OF 2015

JOHN MAINA MBURU.....PLAINTIFF

VERSUS

BETH WANJIKU.....1ST DEFENDANT

EVANS KAGECHE BORO.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 16th March 2015 in which the Plaintiff/Applicant seeks for the following orders:

1. That this honourable court be pleased to issue an order in favour of the Plaintiff and against the Defendants for eviction from and vacant possession of the parcel of land known as L.R. No. 398/18 Original Number 398/10/3 Naivasha (hereinafter referred to as the “suit property”);
2. That judgment for the Plaintiff against the Defendants for mesne profits from 1st January 2015 to date of vacation of the suit property;
3. That the Plaintiff be at liberty to forcefully evict the Defendants from the suit property and the OCS Naivasha Police Station to supervise such eviction to ensure peace and order is maintained;
4. That the Defendants be perpetually restrained from trespassing upon, occupying, residing upon, dealing with or in any manner whatsoever interfering with the Plaintiff’s quiet possession and enjoyment of the suit property; and,
5. That costs of this Application and suit with interest at court rates from the date of filing this suit until payment in full be awarded to the Plaintiff.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, John Maina Mburu, sworn on 16th March 2015 in which he averred that he is the registered proprietor of the suit property having purchased it in the year 2013 from Mary Woki Kaburu, John Mungai Kaburu, David Munyui Kaburu, Peter Kinyanjui Kaburu and Paul Kinuthia Kaburu. He averred further that prior to purchasing the suit property, he conducted due diligence by conducting an official search where he verified the ownership details and also confirmed that there were no

encumbrances registered against the title. He further averred that he took financing to the tune of Kshs. 50 Million from Equity Bank to purchase the suit property and further that he incurred expenses amounting to Kshs. 3.2 Million to fence the suit property. He further stated that the Defendants who are a couple have continued to reside in the suit property without his consent yet the lease granted by the previous owner had expired. He stated that the Defendants are in occupation of the suit property illegally and have not complied to the notice to vacate he served upon them.

The Application is contested. The 2nd Defendant/Respondent, Evans Kageche Boro, filed his Replying Affidavit sworn on 30th April 2015 in which he averred that the suit property is L.R. No. 398/18 yet he has resided in L.R. No. 398/10 since 1980 from which the suit property was allegedly hived out of. He further averred that he leased L.R. No. 398/10 from Njoroge Mugo, Mugacha Thara, Penina Wambui and Alexander Kaburu with an irrevocable option to purchase the entire parcel for Kshs. 2 Million. He averred that the sum of Kshs. 2 Million was shared equally among those persons. He averred that he proceeded to invest heavily in the suit property to the tune of Kshs. 12,264,000/- with the knowledge of the previous owners of the said parcel of land. He further averred that Mary Woki Kaburu, John Mungai Kaburu, David Munyui Kaburu, Peter Kinyanjui Kaburu and Paul Kinuthia Kaburu sold the suit property without consulting him yet they knew that he was in possession and occupation of the suit property. He added that he is not aware of any notice to vacate the suit property. On those grounds, he averred that the Plaintiff is not entitled to the orders sought in this Application.

Both the Plaintiff and the Defendants filed their submissions.

The main issues to determine in this Application is whether or not to issue an eviction order to the Plaintiff, enter judgment against the Defendants for mesne profits and issue a permanent injunction restraining the Defendants from trespassing or occupying the suit property. This suit was filed on 26th January 2015 by the Plaintiff by way of a Plaint in which he sought for judgment to be entered against the Defendant for:

- a. A permanent injunction restraining the Defendant from occupying the suit property;
- b. An eviction order against the Defendant
- c. Mesne profits
- d. Costs of this suit.

As is clear, the Plaintiff has sought in this Application the very same prayers sought in the Plaint. It is also clear that the orders sought in this Application are also final in nature. The main point is that the prayers that the Plaintiff/Applicant seeks in this Application are not prayers that can be granted in an interlocutory application such as this one. They are final in nature and would preempt the main trial of the suit. They cannot be granted at this interlocutory stage. Instead of filing this Application and pursuing it all this time, the Plaintiff should have simply set this suit down for hearing. For now, this Application is hereby dismissed. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF DECEMBER 2016.

MARY M. GITUMBI

JUDGE