



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU**

**ELC 410 OF 2013**

**WILSON TANUI BARNO .....1ST APPLICANT**

**STANLEY KINGA MWENDIA.....2ND APPLICANT**

**ENOCK KIPRUTO SALBEI .....3RD APPLICANT**

**VERSUS**

**JENIFFER KOSITANY.....RESPONDENT**

**RULING**

***(Application for leave to file defence out of time and for injunction by defendant; there having been an earlier application for injunction by plaintiff which was allowed; previous order of injunction ordered to subsist until the suit is determined; defendant arguing that previous order has lapsed after one year; Order 40 Rule 6 and 7; whether new application by defendant tenable; application for injunction dismissed; application to file defence out of time allowed).***

The application before me is that dated 8 May 2014 filed by the defendant. It is an application said to be brought under the provisions of Section 3A of the Civil Procedure Act, Order 51 and Order 40 Rule 1 of the Civil Procedure Rules, and other enabling provisions of the law. It seeks the following two principal orders which are prayers (c) and (d) in the application, that is :-

*(i) That pending hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the plaintiffs/respondents by themselves, their servants or agents from entering, trespassing, and or interfering with the defendant/applicant's enjoyment, use and possession of the land parcel Ngata Plot LR. No.13287/45.*

*(ii) That this Honourable Court be pleased to allow the defendant/applicant to file her defence and counterclaim out of time.*

I think it is necessary that I first set out a little background before I go to the merits of the application.

This suit was commenced by way of a plaint filed on 19 July 2012. The case of the three plaintiffs is that they are owners of the land parcel L.R No. 13287/45 (I.R No. 50175) measuring 10.47 hectares, having been issued with the Certificate of Title on 8 March 1995. They pleaded that around the year 2006, the defendant trespassed into the property and started occupying the structures therein, grazing cattle, and ploughing the same. It is averred that they attempted to reach an amicable solution with the defendant, who asked to be allowed some time to move out of the land. However, on expiry of this time, the

defendant refused to move out and became hostile. She sent Administration Police Officers (APs) who were guarding her house adjacent to the suit land to harass and forcefully chase away the plaintiffs. It is said that between January 2012 and June 2012, the defendant, with the assistance of APs, brought some strangers into the suit land to dwell and plough it. In the plaint, the plaintiffs have asked for the following orders :-

- (a) *A declaration that they are owners of the suit land.*
- (b) *A temporary injunctive order against the defendant.*
- (c) *A permanent injunction to restrain the defendant from the suit land.*
- (d) *An order of eviction.*
- (e) *Costs and interest.*

Together with the plaint, the plaintiffs filed an application for injunction seeking orders to restrain the defendant from the suit land pending hearing and determination of the case. That application was heard by Ouko J (as he then was) and on 5 February 2013, the ruling on the application was delivered. The application for injunction was allowed and the defendant restrained from the suit land pending determination of the suit. By this time, the defendant, despite being served with summons and the application, had not entered appearance nor filed any defence. It is then that this application was filed on 8 May 2014.

The grounds upon which the application is founded, include the reasons, that the defendant/applicant has been in occupation since the year 2002; that she has extensively developed the land; that she has a triable case and ought to be allowed to ventilate her defence; that the orders of injunction have lapsed and no extension of the same has been sought; that the plaintiffs fraudulently caused themselves to be registered as owners of the suit land; and that she stands to suffer irreparable injury if her application is not allowed. The application is supported by the affidavit of the defendant who has inter alia sworn that she has been in occupation of the land since the year 1992, that the transfer of the property to the plaintiffs happened when the transferor was deceased, that having planted crops on the land she stands to suffer irreparably, and that she should be allowed opportunity to ventilate her defence.

The plaintiffs have filed a Replying Affidavit to oppose the application. They have inter alia stated that they properly purchased the suit land and got registered as proprietors. It is denied that the defendant has been in occupation since the year 1992, and the plaintiffs aver that they were in possession till the year 2006 when they left their work stations in Nakuru. They have averred that the defendant is trying to use her status as daughter of the former President to get away with illegally occupying the land.

Mr. Cheruiyot for the defendant, urged me to allow the application and further stated that pursuant to Order 40 Rule 6, the orders of injunction have lapsed. Mr. Ngamate for the plaintiffs opposed the application and argued that the defendant has not displayed any document to show that she owns the suit land. He was of the view that the applicant is simply wasting the court's time.

I have considered the pleadings, the affidavits in support and in opposition to the motion, the court record and the arguments of counsel. It will be observed that this application is said to be brought pursuant to the provisions of Order 40 Rule 1. That provision states as follows :-

Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

It will be noted that the issue of injunction was already determined by the ruling of Ouko J (as he then was) which was delivered on 5 February 2013. The defendant was ordered to stay away from the land pending hearing of the suit. I cannot therefore entertain another application under Order 40 Rule 1, for if I do so, then there is danger of having two conflicting orders of injunction. Probably the correct avenue that the defendant ought to have taken was to invoke the provisions of Order 40 Rule 7, which gives leeway to a party to apply to discharge, vary or set aside an order of injunction. That provision is drawn as follows :-

Order for injunction may be discharged, varied, or set aside [Order 40, rule 7.]

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

It was argued that the order of injunction issued on 5 February 2013 has lapsed. It may be that counsel for the defendant had in mind the provisions of Order 40 Rule 6 which is drawn as follows :-

*Lapse of injunction [Order 40, rule 6.]*

*Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.*

The above provision in essence requires that a suit, be determined within 1 year, where an order of injunction has been issued, or else the order of injunction lapses, unless the court orders otherwise.

I have my own problems with the practicality of Order 40 Rule 7, and I think it needs to be modified to take into account the reality that we have serious backlog of cases. It is not realistic, that all cases will be determined within one year of the issuance of an injunction. In my view, where the court has issued an order of injunction pending hearing and determination of the suit, then that position should ensue, and if any party is aggrieved by the continued existence of the order of injunction, or wishes to have it set aside, whether on the basis of Order 40 Rule 6 or Rule 7, then such party is at liberty to apply to the court for the order of injunction to be set aside or to be varied. It is not proper for any party to take it upon himself that an order of injunction has lapsed pursuant to the provisions of Order 40 Rule 6 and proceed to disobey it. That can be recipe for anarchy. Litigation should not be seen or taken to be a game of cat and mouse, where one party lies in wait to pounce on the other, by some technicality of law. There needs to be decorum for at the end of the day, what is required of the court is to make a final determination of the rights of the parties in a matter.

Let me stop it at that, and get back to the application before me. I am unable to bring myself to again issue an injunction in favour of the defendant, for there is already an injunction in favour of the plaintiffs. I think the order of Ouko J, provided that the order of injunction should last until the determination of the case. To me, this is sufficient reason, to allow the order of injunction granted in favour of the plaintiff to last until the matter is determined. The defendant has not applied to set aside this order of injunction, but even if I was to deem this application as an application to set aside an order of injunction under Order 40 Rule 7, or even if I would have considered the application itself (as an application for injunction) on merit, I would still have disallowed it, for to me, the applicant has not demonstrated any proprietary interest over the suit land. She holds no title, has no lease, or any other recognizable and enforceable interest over the suit land.

For the avoidance of doubt, in so far as issues of injunction are concerned, the order issued on 5 February 2013 should stand until the conclusion of the matter. The defendant has to keep off the suit land until the final determination of the suit.

There is a second limb to this application which seeks leave to file Defence out of time. It is a cardinal principle of law that everyone deserves an opportunity to be heard. I will therefore allow this aspect of the application and grant leave to the defendant to file defence and counterclaim out of time. I direct that this be done within 7 days from today.

As to costs, the applicant had time to file defence within time, which she did not. She will shoulder the costs of this application.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 22ND DAY OF JANUARY 2015**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**In presence of :-**

Ms Wanjiru for defendant/applicant.

Mr Chege for plaintiffs/respondents.

Emmanuel Maelo : Court Assistant.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**