



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 907 OF 2012

STEPHEN K GACHURU1ST PLAINTIFF

NJERI WANJIRU.....2ND PLAINTIFF

=VERSUS=

DAVID CURURU WANGUNYU (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
LUCY W KURIA CURURU (DECEASED)).....DEFENDANT

RULING

The matter coming up for the determination is the Plaintiffs/Applicants Notice of Motion application dated *28th November 2012*, brought under *Order 40 Rules 1 & 2 of the Civil Procedure Rules and Sections 1A, 3A and 63 of the Civil Procedure Act* and all the other enabling provisions of law.

The application is brought against the Defendant herein *David Cururu Wangunyuu* (sued as the administrator of the Estate of *Lucy Wanjiku Kuria Cururu* , (Deceased) seeking for these Orders:

- i. *That the Court be pleased to grant an injunction to restrain the Defendant/Respondent and/or employee acting under him from entering , interfering with, developing , taking possession and/or in any other manner dealing with the properties registered as Dagoreti/Riruta/351 pending the hearing and determination of the suit herein.*
- ii. *That the Court be pleased to issue an order compelling the Defendant/Respondent to compensate the Plaintiff in monetary terms for loss and damages occasioned by demolition of the Plaintiffs structure in the suit property.*
- iii. *That the Court be pleased to issue an order compelling the Defendant/Respondent to issue the Plaintiff with Title Deeds for their interest in the suit property.*
- iv. *That the Court be pleased to grant any other or such other Order it may deem fit and just to grant.*
- v. *That cost of this application be provided for.*

The application is premised on the grounds set on the face of the application and also on the supporting affidavit of *Stephen Kariuki Gachuru* and *Njeri Wanjiru* . Among these grounds are;

- a. *That the Plaintiffs bought part of the suit property from Lucy Wanjiku Kuria Cururu, now deceased and have been in occupation of the said properties since the year 1987 and 1990 respectively.*
- b. *Further that at the time of Lucy's demise, she had not transferred to the Plaintiff their respective titles deeds but they had taken possession.*
- c. *Again, the Defendant took out letters of Administration to the Estate of Lucy Wanjiku Kuria Cururu under Succession Cause No. 2424 of 1994 and which was confirmed on 6th October, 1995 and a certificate of confirmation of grant was issued to that effect.*
- d. *Further, that the Plaintiffs were listed as beneficiaries to the estate and a share of heirs was indicated in which the Plaintiffs were to get 0.10 acres.*
- e. *Further that the Defendant identified the Beacons of the Plaintiffs plot to the Plaintiffs in the presence of a surveyor and their respective boundaries were pointed out.*
- f. *That the plaintiff have developed their respective plots by putting up rental houses which they have rented out to tenants.*
- g. *However, the Defendant has refused and /or failed to process and issue title deeds to the plaintiffs despite numerous requests to them.*
- h. *Further, the Defendant without the plaintiffs knowledge, authority and/or trespassed into the Plaintiffs premises and started wanton consent destruction therein including demolishing of the Plaintiffs rental houses.*
- i. *Again, the Defendant has threatened to begin development of the encroached suit property by putting up construction notice on the site and was poised to begin excavation work anytime unless stopped by an Order of the Court. It was therefore prudent to seek for injunctive relief.*

In their respective supporting Affidavits the Plaintiffs averred that they purchased part of the suit property from **Lucy Wanjiku Kuria Cururu** (now deceased) and took possession of the same in the years 1987 and 1990 respectively.

However, the said **Lucy Wanjiku Cururu** died before she could have subdivided and transferred to them their respective titles although they had taken possession of the same. Further, that in the succession cause filed by the Defendant, the plaintiffs were listed as beneficiaries to the Estate and were to get **0.10 acres**. However, the Defendant has failed and/or neglected to issue them with the title deeds and he has now trespassed on their premises and demolished their rental houses. Further, that the Defendant has threatened to begin development on the said parcel of land unless stopped by the Court.

The application is contested. The Defendant **David Cururu Wangunyu**, swore a Replying Affidavit on **17th December 2012**, and also filed a Notice of preliminary objection. The Notice of preliminary objection was dealt with first and a Ruling was delivered on **1st October, 2013**. He averred that the dispute herein belongs to the administration of the Estate of the deceased. He further averred that the Plaintiffs put up temporary structures and extended them beyond the area identified for their beneficial interest. Further that title **No. Dagoreti/Riruta /351**, no longer exists as one of the beneficiaries, **Wanjiku Wanjohi** had without his knowledge taken the confirmed grant and caused the Lands office to subdivide the land into two, **Dagoreti/Riruta/3892 and 3893**, whereby the first title was registered in her name and the second one retained in the name of the Estates as per annexure **DCWI**. Therefore the above act of intermeddling with the Estate scuttled the process of distribution of the estate and he was forced to go to Court to seek for rectification of the grant so as to give each beneficiary their portion. He thereafter caused a surveyor to evaluate the situation and draw a survey plain as per annexure. **DCW2**. It was the surveyor who discovered that many of the beneficiaries including the applicants had built their structures without regard to any boundaries and therefore, he identified the extent of each parcel of land due to each

beneficiary and he showed it to them. He also averred that on **13th October, 2013**, he called all the beneficiaries to Dagoreti Chiefs office and it was argued that they would move their structure in a week's time. Further that all the beneficiaries have complied as agreed apart from the Plaintiffs herein. Therefore as the other beneficiaries fenced off their identified parcels of land, the alien structures were demolished which structures were within the confines of the identified boundaries. He therefore urged the court not to issue any injunction as the Plaintiffs have no claim against the estate and that the land due to them is still intact. He contended that he is constructing on his own allocated site and the Plaintiffs have no basis of interfering with the same.

The parties herein consented to canvass this Notice of Motion by way of written submissions. I have now considered the pleadings generally, the annexures thereto and the written submissions herein and the annexed authorities and I make the following findings;

The Applicants herein have come to court seeking for injunctive Orders. These are equitable remedies which are granted at the discretion of the Court. However, such discretion must be exercised judiciously. See the case of **CMC Motors Group Ltd & Another Vs Evans Kageche Boru, Civil Appeal No. 295 of 2001** where the Court held that:-

“ In granting the injunctory reliefs , the superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judicially”.

Since the applicants are seeking for equitable reliefs, they ought to satisfy the well settled principles enunciated in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358** for grant of such orders. These principles are:

‘Firstly that there is a prima facie case with a probability of success at the trial; and secondly that the applicant is likely to suffer an injury which cannot be adequately compensated in damages unless the injunction is granted and thirdly, if the Court is in doubt about the existence of prima facie case, it may decide the application on a balance of convenience’. See also **EA Industries Vs Trufoods (1972) EA 420.**

Therefore the applicants herein needed to establish the above stated principles. Have the applicants herein established that they have a prima facie case.

As I consider this issue, I am alive to the fact that a prima facie case is to be adjudged on the evidence adduced and not pleadings or submissions by the counsels. In deciding whether applicants have established or not established that they have a prima facie case, I will be guided by the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.** In the above quoted case the court described prima facie case as:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

From the above description, a prima facie case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicants' case at the trial.

In this case, there are facts that are not disputed. There is no doubt that the Plaintiffs herein bought their parcels of land from a portion of land owned by ***Lucy Wanjiku Kuria Cururu*** and they took possession and occupation of the same. There is also no doubt that the said ***Lucy Wanjiku Kuria Cururu*** is now deceased.

Further there is no doubt that the said ***Lucy Wanjiku Cururu*** died before she could have subdivided the said land to the plaintiffs though they were in occupation. Subsequent to her death, the Defendant herein

David Cururu Wangunyu , applied for letters of administration . The said letters of administration were confirmed on **6th October, 1995** and the Plaintiffs herein were cited as beneficiaries entitled to get **0.10 ha** from the estate of **Lucy Wanjiku Cururu**. There is also no doubt that the Plaintiffs herein had put up rental houses in their respective plots and these rental houses were occupied by some tenants. What is also not in doubt is that the said houses have now been demolished by or with the authority of the defendant. The Defendant admitted that the said structures were demolished after the surveyor aligned the boundaries of the plots owned by the respective beneficiaries. There is doubt as to whether the said demolition was done with the permission or order of the court or consent of all the beneficiaries. What is in dispute is whether the Plaintiffs herein had encroached on the boundaries of other beneficiaries and whether the Defendant was entitled to demolish the said structures put up by the plaintiffs herein.

As I decided on the disputed facts, I will warn myself of the gravity or damage of making conclusive findings that may prejudice the interest of parties at the hearing of the suit herein and I will as far as possible exercise some caution. See the case of **Narendra Chaganlal Solanki Vs Neepu Auto Spaces Ltd , Kisumu High Court Civil Case No. 90 of 2003.**

As I had earlier observed, there is no doubt that Plaintiffs are part of beneficiaries of the estate of **Lucy Wanjiku Cururu** (deceased). There is no doubt that they are in occupation of the suit plots and have put up rental hose. The said rental houses were demolished by and with the authority of the Defendant who is the administrator of the Estate of deceased, **Lucy Wanjiku Cururu**. The grant was confirmed in the year 1995 but since then, the administrator (Defendant) has not subdivided the said parcels of land and given each beneficiary his/her respective title deed.

Though the Defendant alleged that a surveyor surveyed the suit plot and noted that the Plaintiffs had encroached on the boundaries of the other beneficiaries, there is evidence that by then the Plaintiffs had put up their structures. No evidence that the Defendant obtained the consent of the Plaintiffs while demolishing their rental houses or obtained a Court Order. The Defendant herein took the law into himself and applied the law of the jungle. That cannot be the allowed to happen by the Court. See the case of **Suleiman Vs Amboseli Resort ltd (2004) 2 KLR** where the Court held that;

“ A Court of Law cannot allow such a state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession, the landlord has to obtain an order of competent court or statutory tribunal(as appropriate) to obtain possession”.

The above scenario applies herein since the Plaintiffs were in occupation and had developed the suit plots. Unless they had consented to demolition of the structures thereon, the Defendant ought not to have demolished them without the Order of the Court.

The Court therefore finds that the applicants herein have established that they have a ***prima –facie case with probability of success at the trial.*** The Plaintiffs having been in occupation of the suit plots since they bought the same from the deceased, the balance of convenience tilts in their favour.

The Court has noted that the applicants have sought for compensation in monetary terms for the loss and damages occasioned by the demolition of their structures. I have noted that the said prayer is mandatory one which is also sought in the main suit. The said loss needs to be proved by calling evidence and production of exhibits in support of such loss. Furthermore if the court grants such an order, then the effect would be to bring an end the order sought in the Plaint which needs to be specifically proved. See the case of **Trinity Prime Investment Ltd Vs Savings and Loans and another, Civil Appeal No. 90 of 1998** where the court held that;

“where the court has granted an interlocutory injunction prayed for ,it should not grant a mandatory injunction whose effect would be to bring the litigation to an end at that stage”.

Being guided by the above provisions, I decline to allow the prayer sought for monetary compensation of the loss incurred.

The applicants have also sought for another mandatory Order to compel the Defendant to issue them with the title deeds for their respective parcels of land. There is no doubt that the Plaintiffs are beneficiaries of the estate of the deceased, **Lucy Wanjiku Cururu** . The grant was confirmed in the year 1995 and acreage of the Plaintiffs stated in the said confirmed grant. There is no doubt that the Defendant has not subdivided this land and facilitated every beneficiary to obtain their respective title deeds especially the Plaintiffs herein. There is no dispute that the Plaintiffs are entitled to their respective portions of land as per the confirmed grant. This is therefore a plain and obvious issue which can be resolved at once. The Court is alive to the fact that mandatory injunctions at an interlocutory stage are granted in a very special circumstances only. See the case of **Kenya Breweries Ltd and another Vs Washington O.Okeyo , Civil Appeal No. 332 of 2000**, where the court held that:-

“A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the Plaintiff, a Mandatory Injunction will be granted in an interlocutory application . (See Volume 24 Halsbury Laws of England 4th Edition paragraph 948.)

I find that the issue of whether the Plaintiffs should obtain title deeds is a plain and obvious one. That issue is clear and the fact that a grant was confirmed showing that Plaintiff are beneficiaries of the estate of the deceased herein presents special circumstances. The Court consequently finds that the Plaintiffs are entitled to that order of compelling the Defendant to issue them with title deeds for their interest in the suit property.

Having now considered the Plaintiffs/Applicants Notice of Motion dated **28th November 2012**, the Court finds that the same is merited in terms of **prayers No.3 and 5**. Consequently, the Court allows the said application in terms of **prayers No.3 and 5 respectively**. The Plaintiffs /Applicants are also entitled to costs of this application to be borne by the Defendant /Respondent.

It is so ordered.

Dated, Signed and delivered this **10th day of March 015**

L. GACHERU

JUDGE

In the Presence of:-

..... for Plaintiffs/Applicants

..... for Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE