



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO 562 OF 2009

ELIZABETH MUMBI.....PLAINTIFF/RESPONDENT

VERSUS

TIMOTHY KIMANI MUIGAI.....1ST DEFENDANT/RESPONDENT

VIRGINIAH WANJIKU KIMANI.....2ND DEFENDANT/RESPONDENT

NJENGA WAHU-CHAIRMAN

AWENDO COMPANY LIMITED.....3RD DEFENDANT/APPLICANT

RULING

The application for the court's consideration is the 3rd Defendant's Notice of Motion dated **28th January 2013** brought under **Order 40 Rules 1 and 2 of the Civil Procedure Rules and section 3,3A of the Civil Procedure Act** seeking for orders that;-

- i. That the plaintiff ,her servants and or agents be restrained from trespassing on land and selling portions of the disputed land known as LR No 61/37 North of Ruiru Town to the prejudice and interest of the 3rd Defendant before this case is fully heard and determined by the court.***
- ii. That the Plaintiff/Respondent be restrained from selling portions of the disputed land to 3rd parties and receiving money from them and thereafter erecting permanent structures therein to the prejudice and interests of 3rd Defenant before this case is fully heard and determined by this Honourable Court on the disputed portion of land.***
- iii. That the OCS Kimbo Police Station be directed to enforce and ensure compliance of these orders.***

The application is premised on the grounds stated on the face of the application and the supporting affidavit of **Njenga Wahu** the Chairman and Managing Director of Awendo Company Limited. The deponent averred that this matter should be addressed promptly as the Plaintiff and 3rd parties have illegally invaded the suit property for no good reason and eventually call for their eviction. That the plaintiff's presence on the suit property is adverse to 3rd Defendant's their interest and they are causing a lot of destructions and wastages in the said land therefore he is seeking the court's intervention to stop the plaintiff.

The 1st and 2nd Defendants opposed the application by filing their grounds of opposition. They stated that the application is an abuse of the court process, legally defective in law and is unsustainable and is only meant to ridicule the judicial system and the administration of justice as the third defendant has no counterclaim.

The plaintiff filed her grounds of opposition and Replying Affidavit wherein she stated that the application is an abuse of the court process as the present application raises similar issues to the application dated **16th July 2012** which was withdrawn by consent and is an attempt to circumvent the court process. She further stated that the application sought to restrain her from trespassing on the suit land while she has been in occupation of the said land even at the alleged acquisition of the 3rd defendant and that since the inception of this suit the 3rd defendant had never denied her possession and rightful acquisition of her portion of the suit property. She averred that it is therefore curious that the 3rd defendant has now come to court to restrain her from entering the suit property and prays that the suit property be dismissed.

The application was canvassed by way of written submissions. The plaintiff filed her submissions on **5th May 2014** wherein she stated that the 3rd defendant in its submissions did not bring any claim against her and quoted a paragraph in the ruling dated **27th December 2010** where the court held that

“the defence has no counter claim that can form a basis for an injunction sought by the 3rd defendant against the plaintiff. The request for the application is denied” and submitted that the application was an abuse of the court process. Plaintiff further relied on the case of **Kiplel arap Kipkurgat –vs- Elijah Malakwen Lelmengit [2007]e KLR** where Ibrahim J [as he then was] held that ***“where a defendant has a counter claim in respect of a property e.g Specific Performance ,advance possession then in respect of such counterclaim he is a claimant and is in the same position like a plaintiff. In such a situation such a defendant would be entitled to apply for temporary orders of injunction to preserve the suit property. In the present suit the defendant has not set up any counter claim for adverse possession or otherwise. In the premises I do hereby hold that the orders of a temporary injunction are not available to the defendant in this case”***

Further, Plaintiff prayed that the defendant’s application should fail by the fact that his defence does not include a counterclaim.

The 1st and 2nd defendants filed their written submissions on **11th July 2014** wherein they submitted that the plaintiff was the owner of one portion of land which she purchased from the 1st and 2nd defendants therefore the plaintiff’s proprietary rights should be respected and since the deed plan was already registered with the office of the director of survey, the same cannot be altered. They too submitted that without a counterclaim filed by the 3rd defendant the application must fail since there was nothing that the 3rd defendant was claiming against the plaintiff

The 3rd defendant filed its written submissions on **14th May 2014**. It submitted that title is absolute and indefeasible proof of ownership of land and cannot be defeated except on grounds of fraud or misrepresentation. It relied on the case of **Nairobi Permanent Market Society & Others –vs. Salima Enterprises & Others [1995-1998] EA 232**. The 3rd defendant also submitted that the transaction between itself and the and the plaintiff was suspect therefore no land belonging to the 3rd defendant can be given to the plaintiff.

The Court carefully have considered the affidavits and the written submissions of the parties together with their authorities. The issue for this court’s determination is whether the 3rd defendant has made out a case for itself to warrant the relief it sought in its application. The principles for grant of injunction are well settled by decision of **Giella Vs Cassman Brown & Company Limited [1973] E.A. 358**.

Therefore when a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly. The plaintiff must demonstrate a prima facie case with a probability of

success; secondly, he must show that he stands to suffer irreparable harm not compensable in damages; and lastly, if in doubt, the court must weigh the balance of convenience. At the heart of the suit is a dispute over ownership of the suit land. The disputants have laid claim to **LR No./61/37**. The determination of the legal owner is the true subject of the trial court on tested evidence after the parties have been cross examined on their statements and documents. The 3rd defendant is in court seeking to restrain the plaintiff from trespassing and selling the suit property. This Court has considered the 3rd defendant's statement of defence and note that it did not file a counterclaim. Had he filed a counterclaim which meant that he had a claim against the plaintiff, he would be entitled to apply for temporary orders of injunction to preserve the suit property pending the heading and determination of the suit. Since the applicant/3rd Defendant has no counterclaim the orders sought in the application dated **28th January 2013** are not available. Further by the decision of Muchelule J in a ruling delivered on **27th September 2010**, it was stated that since the 3rd defendant's defence had no counterclaim that could form the basis of the injunction sought by the 3rd defendant against the plaintiff that request of the application was declined. The Court in the present application will also decline the 3rd Defendants the prayers its has sought .

Having now considered the instant Notice of Motion, the Court finds it no merited and it is dismissed with costs.

This is a matter that is ready for hearing and as a matter of urgency the parties herein should settle this matter for full hearing as directed by the court on 31st October 2012.

It is so ordered.

Dated, Signed and Delivered this **20th** day of **May, 2015**

L.GACHERU

JUDGE

In the Presence of:-

Plaintiff present in person

None attendance for Defendant though notified.

Court Clerk: Hilda

L.GACHERU

JUDGE

20/5/2015