REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 188 OF 2013

SOLOMON MWOBOBIA NKURAARU.....PLAINTIFF/APPLICANT

VERSUS

JACOB MWITI.....DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated **2nd April, 2014** the applicant seeks the following orders:-

i) An order of mandatory injunction to compel the defendant/respondent (Jacob Mwiti), his family, agents and/or anybody claiming under him to give vacant possession of the property known as Title Number Nanyuki Marura Block 8/1950 (Nturukuma) and in default the defendant/respondent be evicted forcefully;

ii) That in default the OCS Nanyuki Police Station to supervise the eviction exercise.

iii) That the cost of the application be provided for.

2. The application is premised on the grounds that the plaintiff (applicant) is the registered owner of the suit property; that the defendant has trespassed into the suit property and hived off a portion thereof and erected temporary structures thereon; that the respondent has maintained status quo forcefully and that there is no acquiescence on the part of the applicant.

3. It is explained that the defendant failed to enter appearance and/or file defence within the time stipulated in law. Consequently, interlocutory judgment was entered against him. It is the applicant's case that owing to the respondent's actions, he has suffered and continues to suffer irreparable loss and damage.

4. The application is supported by the affidavit of the applicant wherein the grounds on the face of the application are reiterated. Besides reiterating the grounds on the face of the application, the applicant has deposed that granting the orders sought at the interlocutory stage will save judicial time.

5. In support of the averments contained in the supporting affidavit, the applicant has annexed to the affidavit a certificate of title in respect of the suit property, marked **SMN-1**; an affidavit of service sworn by his advocate, marked **SMN2**; and a notice of entry of judgment marked **SMN 3**.

6. Counsel for the applicant also filed written submissions which I have read and considered. In the submissions, it is pointed out that the defendant who has not defended the suit, has continued to utilize a

portion thereof forcefully and riotously and submitted that by so doing, the respondent is trying to steal a march on the applicant. It is contended that the defendant is a trespasser (has no title) and submitted that he should give way pending the determination of the dispute.

7. On whether there exists special circumstances warranting issuance of the orders sought, it is submitted that the applicant has title and that the respondent has failed to defend the application. It is reiterated that granting the orders sought, would save judicial time.

8. In support of the applicant's case, reference is made to the case of **Shariff Abdi Hassan v. Nadhif Jama Adan; Nairobi Civil Appeal No.121 of 2005** where the Court of Appeal stated:-

> **"The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.**
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> **That position could be taken by the courts in such cases as those of alleged trespass on to the property. In the case of *Jaj Super Power Cash and Carry Ltd vs. Nairobi City Council and two others* (supra) this court stated:-**
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> **"*This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.*"**
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> **In the superior court, it was established on a prima facie basis that the suit property No. Garissa/Township/105 was registered in the name of the respondent and he held certificate of lease to it, a copy of which he annexed to his application..."**

Analysis and determination:-

Entry of interlocutory judgment:

9. As pointed out herein above, after the defendant allegedly failed to enter appearance within the time stipulated in law, the plaintiff applied for and obtained interlocutory judgment against the defendant. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only. In this regard see **Order 10 Rule 2** of the Civil Procedure Rules which provides as follows:-

> **"Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs."**

10. Liquidated demand was explained in the case of **Serraco Limited v. Attorney General (2009) eKLR** thus:-

> **"JOWITT'S Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found definition for a liquidated demand which is defined as:-**
>
> **"Liquidated demand where an action is brought for a debt or liquidated demand only, the**

writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendants pays the amount claimed to the plaintiff, his solicitor or agent or into court.

Liquidated on the other hand is defined as: "a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages." Whereas liquidated damages is defined as:- " The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty."

11. The plaintiff's case being for recovery of land, does not fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under **Order 10 Rule 2**.

12. The plaintiff ought to have proceeded under **Order 10 Rule 9** which provides as follows:-

"Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing."

13. In my view it is in the proceedings contemplated under **Order 10 Rule 9** where the plaintiff would prove service of summons and failure to enter appearance as contemplated in law, if the trial court is satisfied that service was effected as by law required, it would proceed and hear the plaintiff's case for purposes of determining whether the plaintiff has made up a case of being granted the orders sought.

14. In this case, for unspecified reasons, the applicant decided not to list the suit for hearing but instead brought an application seeking orders which if granted, would determine the suit without the hearing contemplated in **Order 10 Rule 9** (*supra*).

15. Being of the view that no interlocutory judgment could issue in the circumstances of this case, I set aside the interlocutory judgment entered in this matter.

16. With regard to the application by the applicant, from the evidence on record, apart from the averment that the respondent has entered the suit property and put up temporary structures thereon, there is no evidence of that fact or of when the alleged unlawful action was done.

17. In my view, it is not enough to allege that the respondent has trespassed into the applicant's land, the applicant needed to provide evidence of that fact by, say, producing a report of a surveyor indicating that fact or even photographs of the alleged temporary structures constructed on the sui property. This is so because in his own statement, he has pointed out that the respondent is the owner of the adjacent land. In my view, taking into account the applicant's own statement that the respondent owns a parcel of land adjacent to the suit property can easily turn out to be a boundary dispute which this court is prohibited from entertaining unless the boundaries have been determined in accordance with the provisions of **Section 18** of the Land Registration Act, 2012. In this regard see **Section 18(2)** of the Land Registration Act, 2012 which provides as follows:-

"18. (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section."

18. In view of the foregoing and despite there being evidence that the applicant is *prima facie* the owner of the suit property, I decline to issue the orders sought for want of evidence of the allegations made against the respondent and direct that the suit be fixed for hearing as contemplated under **Order 10 Rule 10** of the Civil Procedure Rules.

Dated, signed and delivered at Nyeri this 4th day of June, 2015

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Court assistant - Lydia