



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 437 OF 2017**

**JACINTA WAMBUI WAITITU.....PLAINTIFF/APPLICANT**

**VERSUS**

**RUTH WACHUKA IRUNGU.....DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 12<sup>th</sup> May 2017 brought under *Section 3A of the Civil Procedure Act Order 40 Rule 1,2,4,and 51, of the Civil Procedure Rules*, wherein the Applicant has prayed for the following orders;

i. Spent

ii. Spent

iii. That pending the hearing and determination of this suit herein, the honorable court be pleased to issue an injunction order restraining the Defendant by herself, her servants, agents, assignees or any persons claiming through the Defendant or any of them from entering upon, trespassing on, cultivating and/or deriving any benefits therefrom, using developing on or constructing on or in any manner whatsoever dealing or interfering with the Plaintiff's possession of the suit property known as **Marmanet North Rumuruti Block 2/4517 (Ndururumo)**.

iv. The costs of this application be provided for.

2. The Application was premised on the grounds on the face of it as well as on the supporting affidavit sworn on the 12<sup>th</sup> May 2017 by Jacinta Wambui Waititu the Plaintiff/Applicant.

3. The court notes that vide an affidavit of service sworn on the 6<sup>th</sup> June 2017 and filed on the 14<sup>th</sup> February 2018, by Martin Muriu Maina, an Advocate of the High Court of Kenya, that the Defendant /Respondent was served with the Summons to enter appearance as well as the pleadings on the 5<sup>th</sup> June 2017 within the precincts of the Nanyuki Chief Magistrate's court, but did not enter an appearance or file any document's.

4. On the 29<sup>th</sup> January 2018, the mention notice for the 14<sup>th</sup> February 2018 was served upon the defendant/ Respondent at her residence within Likii village(slum) who subsequently raised an alarm to the effect that the process server was a thief thereby necessitating him to flee (after effecting service)

5. On the 14<sup>th</sup> February 2018 the court having satisfied itself that service had been effected, issued interim orders of injunction against the Defendant pending the hearing of the Application inter parte.

6. The matter was scheduled for hearing inter parte on the 19<sup>th</sup> April 2018, and the court once having satisfied itself, vide an affidavit of service filed on the 16<sup>th</sup> April 2018, which the Defendant had been served and had once again had failed to enter appearance, file her response or attend court, proceeded to hear the Plaintiff's application ex parte.

7. The Counsel for the Plaintiff relied on his application as well as the supporting affidavit sworn by the Plaintiff in seeking orders of injunction against the Defendant pending the hearing of the main suit.

8. Even though the application was undefended, the burden still remained upon the Plaintiff/Applicant to prove her case by showing that it met the conditions set out for granting of an interlocutory injunction in the case of **Giella vs, Cassman Brown & Co. Ltd (1973) E.A 358**, namely that she had a *prima facie* case with a probability of success; that she might otherwise suffer irreparable injury, which cannot adequately be compensated by an award of damages unless the injunction is granted; and that the balance of convenience tilted in her favour.

9. Briefly, the Plaintiff's claim is that she is the duly registered proprietor of the suit parcel No. **Marmaret North Rumuruti Block 2/4517 (Ndururumo)** measuring approximately 1.966 hectares by virtue of holding an indefeasible title deed dated the 23<sup>rd</sup> May 2015.

10. That the Plaintiff herein bought the suit of land from one Jane Wanjiru Waweru in the year 1996 for consideration of Ksh 200,000/=

11. That by consent, and in accordance to the Kikuyu customs the land was registered in the name of her husband John Wagura Wangombe (deceased) on the 21<sup>st</sup> November 1996 but upon his demise in the year 23<sup>rd</sup> June 2009, she had applied for reissuance of the title in her name which was done on the 23<sup>rd</sup> May 2012.

12. That sometime in the year 2017, the Defendant and her agents and/ or servants trespassed onto her land and started cultivating on it in thereafter had planted crops thereon.

13. The Plaintiff averred that the Defendant had no legal justification to encroach on her land which she depended on for her livelihood.

14. That if the Defendant was not stopped from her activities, the Plaintiff would suffer irreparably.

15. The plaintiff relied on the following documents;

i. A copy of the title deed dated 23<sup>rd</sup> May 2012

ii. A copy of the title deed dated the 21<sup>st</sup> November 1996

iii. A copy of the death certificate of John Wagura Wangombe

iv. A copy of the letter from the assistant chief of Thinguthu Sub-location indication that the plaintiff and her two children were the heirs of the deceased's properties.

16. In consideration of the application before me and further in consideration of the provisions of section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012, the same clearly outlines the interests and rights of a registered proprietor. I am also aware on the position of a holder of a title deed in respect of land under Section 26(1) of the Land Registration Act.

17. That Having regard to the fact that the application herein was not defended and further that on an balance of convenience, the same tilted in favor of the issuance of the injunction sought, I am guided by the case of **Abel Salim & Others -v- Okongo & Others [1976] KLR 42** where the court of Appeal held:-

“In granting or refusing to grant an interlocutory injunction, a court exercises discretion. I am of the view that the conditions for the grant of an interlocutory injunction are well settled and I can see no reason to depart from them. These are stated in **Giella -v- Cassman Brown & Co. Ltd. [1973] EA 358 at 360**

18. Ultimately therefore, upon considering all the evidence herein, I am satisfied that the Plaintiff's right to property and safe ownership thereof ought to be protected by way of an injunction against the Defendant. The Plaintiff/Applicant has established a prima facie case with a probability of success, as set down in the celebrated case of **Giella -v- Cassman Brown** to entitle her to the orders sought in the Notice of Motion dated 12<sup>th</sup> May 2017.

19. Consequently, I allow her application dated 12<sup>th</sup> May 2017 with costs.

20. It is further directed that, the parties herein do comply with the provisions of *Order 11 Civil Procedure Rules* within the next 21 days upon delivery of this ruling so as to have this matter heard and determined.

21. The case is herein transferred to the Chief Magistrate's court for hearing and determination.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of June 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**