



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT

ELC.NO.143 OF 2016

JAMES MACHARIA WAWERU.....PLAINTIFF/APPLICANT

-VERSUS-

ERASTUS KARANJA GAKUYA.....DEFENDANT/RESPONDENT

R U L I N G

Before the court for determination is the Plaintiff/Applicant's *Notice of Motion* dated **8th February 2016**, brought under Order 51 Rules 1&4 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and also Section 13(7)(a) of the Environment and Land Court Act 2011.

The Applicant has sought for temporary order of injunction to restrain the Defendant/Respondent either by himself, his agents or persons acting under him from trespassing, occupying or interfering in any way with Plaintiff/Applicant's parcel of land known as **Ruiru Kiu Block 13/962**, pending the hearing and determination of the suit. The Applicant/Plaintiff has also sought for mandatory injunction to be directed to the Defendant/Respondent and/or his servants or agents directing them to immediately vacate and/or cease occupying the suit property by removing timber and building materials stored therein.

Further that the Defendant/Respondent be restrained from extending his building in the suit land and also demolish part of his building that has encroached on the suit land.

This application is brought on the grounds stated on the face of the said application and on the **Supporting Affidavit** of **James Macharia Waweru**, the Plaintiff/Applicant. The Plaintiff/Applicant alleged that he is the lawful owner of **LR. No.Ruiru Kiu Block 13/962** situated in **Mwiki, Kiambu County** as evident from annexure JMW1. It was his case that the Defendant/Respondent is constructing on the adjacent parcel of land known as **Ruiru Kiu Block 13/816**. It was the Plaintiff/Applicant's case that he is also erecting a four storey building as commercial residential apartments on the suit land. Further that both the Plaintiff/Applicant and Defendant/Respondent left a distance from their respective buildings to allow access to sunlight and aeration for both buildings. However, the Defendant/Respondent had proceeded to build a fifth floor and has ignored the space left and has encroached and extended his building attaching it to the Plaintiff/Applicant's building. The Plaintiff/Applicant further alleged that direct sunlight to the building has been blocked and the windows to the ground floor won't open due to house blocking them. That the Defendant/Respondent is still constructing and encroaching and unless he is restrained by the Court, the said construction will interfere with the Plaintiff/Applicant's parcel of land causing loss and irreparable damages to him.

The said application is opposed and **Erastus Karanja Gakuya**, swore his **Replying Affidavit** dated **14th**

October 2016, and averred that he owns the adjacent plot **No.Ruiru Kiu Block 13/816** and he obtained approvals from the relevant bodies to construct on the said plot. He also denied that he has encroached on the Plaintiff's plot. He also averred that he obtained approval to construct on his entire plot without the necessity of leaving an open space. He alleged that he has built a balcony on his plot which allows light and aeration. It was his further allegation that the canopy roof of his building which extends 1 ½ feet is within the extra open space which he had left between his plot and that belonging to the Plaintiff/Applicant. He alleged that it was the Plaintiff who constructed his building with windows opening outwards from the outer walls without having left sufficient or any space for that purpose. He contended that the development on his plot has not flouted any building safety and health regulations and was in accordance with the approved plans. It was his allegation that the orders sought by the Plaintiff/Applicant would result in demolition of his building which is entirely put on his parcel of land without any encroachment. He urged the Court to hear the matter fully before making any determination.

The application was canvassed by way of Written Submissions which this Court has carefully read and considered. The Court has also considered the instant application and the annexures thereto and the entire pleadings.

The Court finds that the Plaintiff has sought for equitable relief which is granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the Ugandan case: **Daniel Mukwaya..Vs..Administrator General Kampala High Court, Civil Suit No.630 of 1993**, where the Court held that:-

“The granting of a temporary injunction is a matter within the discretion of the court which discretion must be exercised judicially”.

As the Court embarks on determination of this application, it will warn itself that it is not supposed to make conclusive findings of facts or law based on affidavit evidence. See the case of **Narendra Chaganlal Solanki..Vs..Neepu Auto Spares Ltd, Kisumu High Court, Civil Case No.90 of 2003**, where the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the gravity of danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise some cautionary steps”.

Therefore this Court is only entitled to determine whether the Applicant is deserving of the orders sought based on the usual criteria set in the case of **Giella..Vs..Cassman Brown & Co. Ltd 1973 EA 358**, where it was held that:

- a) The Applicant must establish that he has a prima facie case with probability of success.***
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) When the Court is in doubt, to decide the case on a balance of convenience.***

In the case of **Mrao Ltd..Vs..First American Bank of Kenya Ltd & 2 Others (2003) eKLR 125**, a prima-facie was described as:-

“A case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call an explanation or rebuttal from the latter”.

The Plaintiff has alleged that the Defendant/Respondent has constructed his residential plot on **LR Ruiru Kiu Block 13/816** and has left no space and therefore the canopy balcony, on his building has encroached on the Plaintiff/Applicant's plot blocking sunlight and aeration to his building. The Defendant/Respondent has denied these allegations. It is evidence that both the Plaintiff and Defendant

have constructed on their respective parcels of land.

I have seen a **letter** dated **6th July 2016**, from **M. M. Abdi**, the **Sub-county Administrator** who alleged that both plots lie within the correct boundaries limit but developer of **plot no.13/816** has laid his foundation on beacon to beacon with an **encroachment of 2ft to plot No.13/962**. However, I have also seen another **letter** dated **6th July 2016**, by **Susan Ndungu**, for **Sub-County Administrator**, bearing the same contents but without the issue of encroachment. The Plaintiff/Applicant alleged that the Defendant/Respondent has encroached on his plot and the Defendant has denied that allegation. That is therefore a disputed issue which cannot be resolved through affidavit evidence but by calling of evidence in the full trial. The Court in the case of **Agip (K) Ltd..Vs..Maheshchandra Himatlal Vora & others, Civil Appeal No.213 of 1999, 2EA 285** held that:

“In an application for injunction, the Court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

The Court in this matter finds that the issue of whether the Defendant/Respondent has encroached on the Plaintiff’s suit land is a disputed one which cannot be resolved at this stage but can only be determined at the full trial after calling of oral evidence. There are two letters from the Sub-County Administrators even dated but having different contents. The makers of the two letters need to be called in court for cross-examination on what is the real situation on the ground.

For the above reasons, the Court finds that the Applicant has not established a prima-facie case with probability of success.

Having found that the Applicant has not established a *prima-facie* case with probability of success, I find no reason to deal with the other limbs in Giella’s case, since they are sequential. See the case of **Kenya Commercial Finance Co. Ltd...Vs...Afraha Education Society & Others, Civil Appeal No.142 of 1999 (2001) 1EA 86**, where the Court held that:-

“The judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title’s dispute and therefore has not demonstrated that it has a *prima facie* case with probability of success, no interlocutory injunction would be available”

Further the Applicant in prayers **no.3** and **4** has sought for mandatory injunction which is only granted in very exceptional circumstances. The principles for grant of mandatory injunctions were set out in the case of **Kenya Breweries Ltd & Another..Vs.. Washington O. Okeyo, Civil Appeal No. 332 of 2000 (2002) 1 EA**, where the court held that:-

“A mandatory injunction will be granted on an interlocutory application as well as at 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 on an interlocutory application. See Volume 24 Halsbury’s Laws of England 4th edition, paragraph 948”.

Having considered the totality of this case and the fact that there are disputed issues, the Court finds that it is not a clear case which ought to be decided at once. No evidence that the Defendant/Respondent is attempting to steal a march against the Plaintiff/Applicant.

For the above reasons, the Court finds that the Plaintiff’s **Notice of Motion** application dated **8th February 2016**, is not merited. Consequently, the said application is dismissed entirely with costs being in the cause. Further the parties to **comply** with **Order 11** within the next **45 days** from the date of this Ruling and thereafter set down the matte for pre-trial before the Deputy Registrar.

It is so ordered.

Dated, signed and delivered at Thika this 25th day of July 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Wanjala holding brief for Mr. Kelly for Plaintiff/Applicant

No appearance for Defendant/Respondent

Rachael – Court clerk

L. GACHERU

JUDGE

Court – Ruling reading open court in the presence of the stated advocates and absence of the Defendant/Respondent.

L. GACHERU

JUDGE

25/7/2017