



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI - MILIMANI**

**ELC CASE NO. E336 OF 2021**

**NICHOLAS NJERU MUTURI.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**THOME DYNAMICS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AUSTIN GITAU KIIO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

***(In respect of the Notice of Motion Application dated 27<sup>th</sup> July 2021)***

**Background.**

1. The Application under consideration is the Plaintiff's Notice of Motion application dated the 27<sup>th</sup> July 2021, brought under the provisions of Order 40 Rule 1(a), & (b), & 2(1) of the Civil Procedure Rules, 2010 and Sections 3A, and 63(e) of the Civil Procedure Act. The Plaintiff prays for orders that the Defendant/Respondents herein be restrained by an order of injunction from entering, constructing, or dealing with the applicants Plot No. 113 or L.R No. 209/11391 pending the hearing and determination of the main suit. The Plaintiff also prays that the costs be provided for.
2. The application is based on the 4 grounds on the face of it and the supporting affidavit sworn by the Plaintiff/Applicant, Nicholas Njeru Muturi.
3. The Plaintiff's claim is that he is the lawful owner of the plot No.113, a subplot on L.R No. 209/11391 (hereinafter known as '**the suit property**') and has been in possession of the same since the year 2001. He alleges that the Defendants/Respondents have without his consent unlawfully entered into the said plot and demolished a foundation that he had erected therein. He further states that the Defendants have erected another foundation on the suit property with the intention of building what he suspects to be shops/offices or other businesses on the suit property thereby denying him use of his property. The Plaintiff claims that he stands to suffer irreparable loss.
4. In his supporting affidavit, the Plaintiff depones that he was allocated the suit property by 'Bahati Development Company'. He has exhibited what he refers to as the allotment letter and an ownership certificate issued by the said Bahati Development Company, issued to him on 5<sup>th</sup> November 2001. This ownership certificate refers to a 'plot 113 of L.P.N 11391 with vacant possession'. The letter of allotment is illegible. The name, the date, the plot number and date of issue are not clear.
5. The Plaintiff further depones that Bahati Development Company was the initial owner of the bigger property, L.R No. 209/11391 having been allocated the same by the then City Council of Nairobi. The Company thereafter proceeded to subdivide the bigger property into subplots and allocated them to its members. The Plaintiff was one such member who was allocated the plot number 113. The Plaintiff has exhibited a copy of the alleged letter of allotment from the City Council of Nairobi as 'NNM2'.
6. The allotment from the City Council of Nairobi is addressed to M/s Bahati Development Welfare Association, of P.O Box 61062 – NAIROBI and is dated 16<sup>th</sup> February 1992. It is in reference to L.R No. 209/11391 along Kangundo Road – Nairobi. The land measures approximately 1.200 hectares. The annual rent payable is Kshs. 15,000/=, whereas the standard premium is Kshs. 50,000/=.
7. The Plaintiff states that though he has all along enjoyed quiet and peaceful possession of his plot, he was unable to develop it due to financial constraints. He was merely able to build a foundation on the suit property.
8. The Plaintiff claims that on 15<sup>th</sup> July 2021, he discovered that the Defendants had trespassed into the suit property – plot No. 113, and

demolished his foundation and in its place put up a new one. He suspects that the intention of the Defendants is to convert his property and construct on it without his authority. This, the Plaintiff says, will definitely deny him use of his property and cause him irreparable loss. He seeks an order to restrain the Defendants. He also seeks a mandatory injunction to compel the Defendants to remove the constructions they have erected on his property.

9. The plaintiff's application is opposed by the 1<sup>st</sup> Defendant by way of a replying affidavit sworn by one, John Irungu Huma, a Director of the 1<sup>st</sup> Defendant Company, Thome Dynamics Ltd.

10. The 1<sup>st</sup> Defendant denies that the L.R No. 209/11391 was at any one time owned by Bahati Development Company. The 1<sup>st</sup> Defendant avers that it bought the parcel of land known as L.R No. 209/11391 in 1999 from the Kenya Association of manufacturers (KAM). KAM was then the registered owner of the land with a grant issued to them under the Registration of Titles Act (RTA) – now repealed.

11. The 1<sup>st</sup> Defendant has exhibited copies of documents in support of its case being the grant in favour of KAM, the sale agreement and copies of correspondences between them and KAM. The grant is I.R 76726, L.R No. 209/11391. The land measures 1.3 hectares. The annual rent payable is Kshs. 60,000./= and the tenure is a leasehold for 99 years from 1<sup>st</sup> May 1990.

12. The land L.R No. 209/11391 was transferred to the 1<sup>st</sup> Defendant on 27<sup>th</sup> December, 2000 as entry number 2 in the certificate of lease document exhibited. On 23.3.2021 the land was again transferred to John Irungu Huma as entry number 3. So, the current registered owner of the land is one John Irungu Huma.

13. The 1<sup>st</sup> Defendant terms the Plaintiff's application as scandalous, vexatious and an abuse of the process of Court.

14. I note from the record that the 1<sup>st</sup> Defendant on 16<sup>th</sup> December 2021 filed a supplementary affidavit sworn on 15<sup>th</sup> December 2021 through the e-filing platform. This supplementary affidavit was filed without leave of the court and long after the Plaintiff had filed his submissions. I will address the issue at a later stage in this ruling.

#### **Court's Directions**

15. On 16<sup>th</sup> November 2021, the Court directed that the application dated 27<sup>th</sup> July 2021 be canvassed by way of written submissions. Both parties have complied and filed their submissions.

#### **Submissions by the Parties.**

#### **Plaintiff/Applicants Submissions**

16. The Plaintiff in his submissions reiterates the averments in his application and the supporting affidavit. The Plaintiff cites the case of **Giella Vs Cassman Brown & Co Ltd (1973) E.A 358**. He submits that he has met the conditions for the grant of an interim injunction.

17. The Plaintiff avers that he was allocated the plot by Bahati Development Company who were the owners of the land. He has been in occupation of his plot until July 2021, when hell broke loose and the Defendants came to the scene forcefully taking over his property. The Plaintiff submits that land is sentimental and that a property and its location are very dear to a person. Losing such a property cannot be compensated by way of damages to his satisfaction. Hence if he were to lose the suit property he would suffer irreparable loss. The plaintiff finally submits that the balance of convenience tilts in his favour considering that he has been in occupation. He therefore urges the Court to grant him the orders sought.

#### **1<sup>st</sup> Defendant/Respondent's submissions.**

18. On its part, the 1<sup>st</sup> Defendant submits that it is the absolute legal proprietor of all that parcel of land known as L.R No.209/11391 having purchased the same from KAM. The parcel of land is registered under the RTA (now repealed).

19. The 1<sup>st</sup> Defendant submits that the Plaintiff is at best a trespasser into its land and has therefore not established a prima facie case as defined in the case of **MRAO VS 1<sup>ST</sup> AMERICAN BANK OF KENYA LTD & 2 OTHERS (2013) KLR 123**. As a trespasser the Plaintiff has no valid claim over its land.

20. The 1<sup>st</sup> Defendant further submits that the Plaintiff has not demonstrated the irreparable loss he is likely to suffer if the order of an interim injunction is not granted. The 1<sup>st</sup> Defendant therefore submits that the Plaintiff's application should not be allowed.

21. The 1<sup>st</sup> Defendant cites the case of **JOHN KHAMASI BEGISEN VS JOSEPH MUROTE WANJIKU (ELC case No. 63 of 2014) & SHOWIND INDUSTRIES VS GUARDIAN BANK LTD & ANOTHER (2002)1 EA 284** in support of its submissions.

22. On the issue of irreparable loss, the 1<sup>st</sup> Defendant relied on **NGURUMAN LTD VS JAN BONDE NIELSEN 7 2 OTHERS (2014) eKLR** where the Court of appeal held that, 'speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the Applicant'. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury - injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or injury or harm is of such a nature that monetary amount will never be adequate remedy."

## ISSUES FOR DETERMINATION

23. The only issue for determination in this matter is whether the Plaintiff has made the case for an award on an interlocutory injunction. However, there is also the incidental issue of the supplementary affidavit filed by the 1<sup>st</sup> Defendant without leave of the Court.

## ANALYSIS AND DETERMINATION.

24. When directions were given in this matter, the 1<sup>st</sup> Defendant did not inform the Court that he intended to file a supplementary affidavit. Admitting the affidavit that was filed after the Plaintiff/Applicant had already filed his submissions would mean that the Plaintiff will not have an opportunity to counter or respond to the issues raised in this new affidavit. It is not only highly un-procedural but also unfair to the Plaintiff/Applicant. The Court will therefore ignore it and will not consider the contents of this supplementary affidavit in this ruling.

25. The principles to be considered in determining an application for an order of temporary injunction are well settled since the case of **Giella Vs Cassman Brown & Co. Ltd (Supra)**.

26. An Applicant who seeks an order of temporary injunction must first, establish a prima facie case with a probability of success. Secondly, a temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages unless the order sought is granted. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

27. The court of appeal in **NGURUMAN LTD VS JAN BONDE NIELSEN & 2 OTHERS (2014) (Supra)** while upholding the 3 conditions pronounced in the Giella case stated *that the 3 conditions and stages are to be applied as separate distinct and logical hurdles which an applicant is expected to surmount sequentially*. The import of this holding is that if a prima facie case is not established, the Court need not go farther to consider if the Applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.

28. The meaning of a prima facie case was expounded in details in the case of **Mrao Vs First American Bank of Kenya & 2 others (supra)** to mean, “...in civil cases, it is a case in 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 for an explanation or rebuttal from the latter.’

29. I have considered the application by the Plaintiff and the response by the 1<sup>st</sup> Defendant. I have made a number of observations.

30. The Plaintiff claims that he was allocated the plot number 113 by a Company known as Bahati Development Company. The Plaintiff alleges that this Company was the lawful owner of the bigger parcel known as L.R No. 209/11391 having been allocated the same by the then City Council of Nairobi. In support of his allegations, the Plaintiff exhibited a copy of a letter of allotment purportedly allocating the bigger parcel of land to the said Company.

31. I have already observed that this so called allotment was in favour of M/s Bahati Development Welfare Association. The Plaintiff has not explained or demonstrated that Bahati Development Welfare Association and Bahati Development Company refer to one and the same entity.

32. Secondly, the 1<sup>st</sup> Defendant has demonstrated in the replying affidavit that it actually acquired the title to the parcel of land L.R No. 209/11391 from the original grantee, Kenya Association of Manufacturers. The 1<sup>st</sup> Defendant purchased the land for value and has attached not only the agreement for sale but also a copy of the title that was transferred to it after the execution of the agreement for sale of the land.

33. The title to the parcel of land L.R No. 209/11391 is issued under the repealed RTA. The parcel of land measures 1.300 hectares. It is a leasehold interest for a term of 99 years beginning 1<sup>st</sup> May 1990. The annual rent payable is Kshs. 60,000/=.

34. On the other hand, the letter of allotment exhibited by the Plaintiff refers to a parcel measuring approximately 1.20 hectares and whose annual payable rent is Kshs. 15,000/=.

35. At this stage of these proceedings, the Court must caution itself that it is not to adjudicate issues as if it were determining the main suit. All that the Court is called upon to do is gauge the strength of the Plaintiff’s case as presented in the application.

36. Under the provisions of section 26 of the land Registration Act, a certificate of title issued by the Registrar is prima facie evidence of proprietorship; that the person named therein is the absolute and indefeasible holder of the title. That was the holding in the case of **Embakasi Properties Ltd & another Vs Commissioner of Lands & Another (2019) eKLR**.

37. The parcel of land in dispute in this case has a title issued under the repealed RTA. This is, under the provisions of section 26 of the Land Registration Act prima facie evidence as to the proprietorship of the land.

38. The Court’s considered opinion is that the Plaintiff has not established a prima facie case, as defined in the Mrao Case (supra).

39. Guided by the holding in the *Nguruman Case (Supra)*, I need not to go farther than this having already found that the Plaintiff has not established a prima facie case.

40. The upshot is that the Plaintiffs application dated 27<sup>th</sup> July 2021 is hereby dismissed with costs.

*It is so ordered.*

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2022.**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

No Appearance for the Plaintiff/Applicant

No Appearance for the 1<sup>st</sup> Defendant/Respondent

No Appearance for the 2<sup>nd</sup> Defendant/Respondent

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**