



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL SUIT NO. 9 OF 2014**

**DELAMERE ESTATES LTD.....PLAINTIFF /APPLICANT**

**-VERSUS-**

**MADISURP INVESTMENTS LTD.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The Plaintiff's Notice of Motion was filed on 18/12/2014 under Certificate of Urgency. Prayers 1, 2, 4 and 5 are spent. For purposes of this Ruling, only prayer 3 is outstanding. The prayer is in the following terms:

**The Defendant/Respondent through its agent, employees, assigns, representatives be restrained from entering, remaining on, erecting on, building or depositing building materials on and in any manner be restrained from all their activities on the plaintiff/applicants parcel of land known as Land Reference No. 23404 I.R. 21441/2 (I.R. 96421) Deed Plan Number 219328 until the hearing and determination of the suit.**

2. The Notice of Motion is supported by the affidavit sworn by one Nelson Rotich the Managing Director of the Plaintiff. The gist of the affidavit is that the Plaintiff is the registered owner of the land parcel identified as Land Reference No. 23404 I.R. 21441/2 (I.R. 96421) and has been in occupation since 1907. The Plaintiff's complaint is that on 11<sup>th</sup> December, 2014 the Defendants agent's, workers or employees, without any colour of right, descended on a portion of the suit land after destroying the fence and commenced the deposit of building materials, excavation and construction of structures thereon.
3. Efforts to remove the invaders were violently resisted by them. The plaintiff fears that the actions expose its costly investments in excess of Shs 1 billion. Interim ex parte orders were granted on 18/12/2014 and on 12<sup>th</sup> January 2015 the Defendant entered appearance through the firm of Mongeri & Company Advocates.
4. On 21/1/2015 the Defendants filed a Replying Affidavit in opposition to the application. The same is sworn by one Joseph Nduati Mwangi, a director of the Defendant on behalf of two other directors, with their consent. The deponent asserts the Defendant's title to a parcel of land distinct from the plaintiffs', described as NAIVASHA/MUNICIPALITY BLOCK 2/883 measuring 1.4468 Ha, which parcel was allegedly acquired through purchase from one Philip Kamau Mwangi. It is further deponed that the Defendant is in possession and was putting up an approved structure – a fence round it. There was mention of a co-existing suit before the ELC in Nakuru involving the parties herein.
5. The hearing of the application was adjourned on 16/1/2015 and 22/1/2015 for reasons of non

availability and lack of readiness on the part of counsel for the Defendant. On 18/2/2015 the court rejected an application for consolidation with the alleged ELC suit which was made after Mr. Mongeri failed to show up, after instructing Mr. Obino to hold his brief, claiming that he was on way to court. Mr. Mburu for the plaintiff argued the application principally relying on the grounds thereof as expanded in the Supporting Affidavit.

6. He asserted the Plaintiff's title and emphasized its long undisturbed occupation of the suit property until the onset of the Defendant's activities. Regarding the Replying Affidavit he pointed out that the alleged sale agreement by which the Defendants allegedly acquired title was not annexed. He stated that the plaintiff's title was already in existence at the time the Defendants claim to have acquired title in 2007. Further that no document related to the cited ELC case had been produced. In reply Mr. Obino relied on the Replying Affidavit.
7. I have now considered the Notice of Motion and the affidavits sworn by the rival parties, as well as the oral submissions. This application is brought primarily under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules. The principles for the grant of interim injunctive orders were set out in **Giella –Vs- Cassman Brown & Co. Limited [1973] EA 358**. The successful applicant must demonstrate a *prima facie* case and that he will suffer irreparable damage if the orders sought are denied. If in doubt, the court will consider the balance of convenience.
8. The Plaintiff herein has tendered the title documents accompanied by the Deed Plan No. 219328 of 27<sup>th</sup> July 1998 in respect of the suit property. On the Deed Plan is marked the portion in dispute. The grant was issued in the year 2004, three years before a certificate lease was granted to the Defendants.
9. No survey plan or Deed Plan is attached to the latter document, or other evidence to confirm the statement by the Defendants that their parcel is distinct from the Plaintiff's. Mere payment of rates by the Defendants as demonstrated in annexure **JMM4** and a search document **JMM3** does not establish the distinction. While the Plaintiffs have deponed to long possession and developments on the suit property there is no evidence that the Defendants ever took possession as alleged.
10. However, there is no dispute that the Defendant had commenced some works on the suit land prompting resistance by the plaintiffs and eventually the filing of the present suit. Considering all the foregoing I am satisfied that the plaintiff has established a *prima facie* case as defined in **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The Court stated:-

**“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.....**

**So what is a prima facie case? I would say 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”**

11. The Plaintiff fears that its investment on the suit property will be exposed to risk by the actions of the Defendant thereby occasioning loss to the plaintiff.

The intention of the Defendants in putting up the fence is to cement the alienation and occupation of the suit land as their property as against any other claimant. The Plaintiffs clearly stand to suffer irreparable damage if the construction is allowed to commence while the suit is pending. I do therefore find merit in their application and will allow it in terms of prayer number 3. Costs are awarded to the Plaintiffs.

Delivered and signed at Naivasha this 17<sup>th</sup> day of March, 2015.

In the presence of

For Plaintiff/Applicant

For Defendant/Respondent

Court Assistant Stephen

**C. W. MEOLI**

**JUDGE**