



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

**ENVIRONMENTAL AND LAND 1392 OF 2014**

**JOSEPH WANYOIKE.....APPLICANT**

**VERSUS**

**REGINA NJERI GACHERU.....1<sup>ST</sup> RESPONDENT**

**EUNICE WANJIRU.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application for determination before this court is the Notice of Motion dated **30<sup>th</sup> October 2014**, brought under **Order 51 Rule 1 ,Order 40 Rule Rules 1,2,3 & 4 of the Civil Procedure Rules ,section 1A,1B 3A & 63 (e) of the Civil Procedure Act** seeking for orders that;-

*i. upon hearing this application inter parties this court be and is hereby pleased to issue an order of temporary injunction restraining the Respondents either by themselves ,their agents, servants, employees, proxies and or anyone acting on their behalf from continued trespass, encroachment ,construction ,use, disposal, alienation and or in howsoever manner interfering with the applicant's Residential Plot No X 33 Huruma Infills-Mathare phase 1 pending the hearing and determination of the suit.*

*ii. Further the applicant is seeking an order of eviction against the Respondent and that the Respondent demolishes and removes the temporary iron sheet structures erected by them on the applicant's residential Plot No X33, Huruma Infills-Mathare Phase 1.*

*iii. Costs of the application be provided for.*

This application is premised on the grounds stated on the face of the application and supported by the affidavit of **Joseph Nyoike**, who deponed that he was allocated **Residential Plot X 33, Huruma infills-Mathare Phase 1**, by the then Nairobi City Council on **1<sup>st</sup> November 2000**. He paid the initial ground rent and survey fees and was issued with a plot beacon certificate. He further deponed that his plot had been surveyed in a bid of having him get a certificate of title. He also stated that he wrote to the Director of City Planning Development, requesting to fence his plot but on **4<sup>th</sup> August 2009**, he realized that the defendant has trespassed and erected an illegal temporary structure on the said plot. He wrote to the officer in charge of enforcement seeking for assistance of enforcement notices but the orders were never obeyed. It was his contention that on or about **20<sup>th</sup> May 2008**, the Director of City Planning caused a Public Notice to be issued which required any member of public who had any objections to the part development plan for the proposed residential plots to present their objections within 60 days of the said

notice. He deponed that the respondents actions are without any legal justification and this court ought to protect his proprietary rights over plot no.X 33 as he has made out a prima facie case to warrant the orders of the court.

This application is contested. The 1<sup>st</sup> defendant filed a Replying affidavit wherein she deponed that she was the allottee of **plot No F95 Huruma Infills Kiamaiko**, and has lived in the plot since 1991. She further deponed that the then Minister for Local Government informed them that those who had resided on the plots for a while would be allocated the plots they have been residing in. She stated that after the death of her husband she was being threatened with eviction forcing her to lodge an official complaint to the then City Council of Nairobi now Nairobi City County Government and immediately after she lodged her complaint the council confirmed her allotment and demanded that she pays a total of **Ksh 8,640/=** which she paid. She further stated that she was residing in **plot No F95, Huruma Infills- Kiamaiko** as per the allotment letter and not **Plot No X33, Huruma Infills -Mathare Phase 1** as claimed by the plaintiff. She also stated that the plaintiff was allotted the plot in the year 2002, while she was allotted the plot in the year 2000. That she is a stranger to the building plan and consent as alleged by the plaintiff and further added that the plaintiff was at liberty to trace his plot since she is in a different plot from the one claimed by the plaintiff.

Parties canvassed this application by way of written submissions. The plaintiff stated that he had demonstrated that he had a prima facie case capable of protection by issuance of the orders sought. He stated that he had an approved part development plan and that the enforcement notices required the defendant to remove the illegal structures from the suit property. He relied on the case of **Giella-vs-Cassman Brown Limited [1973] EA** .He further submitted that he will suffer irreparable loss if the orders sought are not granted because he has incurred a tidy sum to obtain the necessary approvals and was ready to commence construction on the said plot.

The defendant on her part submitted that she had resided on her plot for twelve years. She also submitted that what was in contention in this suit are two different plots and the plaintiff should petition the City Council of Nairobi, now Nairobi City County Government to show him the exact location of his plot and in the absence of the Nairobi City County Government this court is not in a position to establish what plot belongs to who.

I have now carefully considered the written submissions of the parties as well as the facts and circumstances of the case. The plaintiff is seeking a temporary injunction against the defendants for trespassing onto **Plot No X 33 Huruma Infills-Mathare phase 1**. **The grant of a temporary injunction is an exercise of judicial discretion and for the purpose of preserving the status quo until the question to be investigated in the suit can be finally disposed of. The principles for the grant of temporary injunction were settled in Giella -vs- Cassman Brown Limited [19730] EA 348 which are summarized as follows:**

- i. That the Applicant must show a prima facie case with a probability of success;*
- ii. That the Applicant must show that if an injunction is not granted he/she might suffer irreparable injury which would adequately be compensated by an award of damages;*
- iii. If the court is in doubt it should decide the application on the balance of convenience.*

A prima facie case in a civil case is one 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 explanation or rebuttal thereof from the latter. Finally in granting the injunction, court exercises discretion. An injunction too is an equitable remedy. So that whoever seeks it must come to court of equity with clean hands and must show utmost good faith. See **Mrao Ltd .v. First American Bank of Kenya Ltd (2003) KLR,125.**

**The plaintiff herein has exhibited an allotment letter issued to him by the City Council of Nairobi in the year 2002.He has gone at great lengths to show how he has paid all the requisite monies towards**

**the acquisition of Plot No X 33, Huruma Infills-Mathare phase 1.** He has also shown his intention of commencing construction on the said property but he laments that the defendants have trespassed onto his plot. The 1<sup>st</sup> defendant on her part has stated that she has been on **plot No F95, Huruma Infills-Kiamaiko** having been allotted an allotment letter in the year 2000 as exhibited by her allotment letter that was issued to her by the then City Council of Nairobi now the County Government of Nairobi. She also claims to have paid the required fees as prescribed in the allotment letter.

Having considered the pleadings and the exhibits, my finding at this interlocutory stage is that the plaintiff is laying claim on a plot that the defendants have denied being in occupation. There are two sets of allotment letters showing two distinctly different plots. The plaintiff has not made any efforts to show that these plots could be one and the same and has not enjoined the institution that allotted them these plots. Therefore this court cannot be in a position to tell whether the said plots are one and the same or two different plots.

On the second principle, the plaintiff claimed that he will suffer irreparable injury which cannot be atoned for by an award of damages. In the case of **Wairimu Mureithi vs City Council of Nairobi, Civil Appeal No. 5 of 1979, KLR 332**, the court held that:

***“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.*** See also **American Cyanamid Co. Lt vs Ethicon Ltd (1975) AC 396**.

Irreparable damage to my mind does not mean that there must not be a physical possibility of repairing injury but it means injury that is substantial or material and which cannot be adequately compensated for in damages. The plaintiff claimed that he had expended large amounts of money towards the plot and that he wanted to commence construction on the suit property. The 1<sup>st</sup> defendant on her part stated that she has resided in her plot with her family comprising of her 10 children and have lived on the property for the past 12 years without interruption, an eviction would result into mental distress and anguish on which cannot be compensated for in damages.

On the balance of convenience the 1<sup>st</sup> defendant contended that she is in the occupancy of the suit property and this fact has been acknowledged by the plaintiff who has called her a trespasser. In the case of **Fellowes and another –vs- Fisher [1975] All ER 829 Browne LJ** held that;-

***“ where other factors seem to be equally balanced, it would be prudent to take such measures as are calculated to preserve the status quo”.***

The extent of disadvantages which will be occasioned to each party and which is incapable of been compensated is a significant factor in assessing where the balance of convenience lies.

In the present application, the plaintiff claims to have been allotted the suit property, and the 1<sup>st</sup> defendant also claims the same property, and states that it was allocated to them by Nairobi City Council. The Court notes that the plot in dispute appears to have two different plot numbers, with the plaintiff stating that it is **Plot No X 33 Huruma Infills-Mathare phase 1**, and the 1<sup>st</sup> defendant claiming **plot No F95, Huruma Infills-Kiamaiko**. The issue of which of the plots is located on the suit is still outstanding. It is therefore necessary to preserve the *status quo* until this issue is clarified.

Having now considered the instant Notice of Motion , the Court finds and holds that Status Quo herein should be preserved so that the plaintiff herein should not interfere with the Defendant’s possession of **Plot No X 33, Huruma Infills-Mathare phase 1**, pending the hearing and determination of the suit.

Costs of the application shall be in the cause.

It is so ordered

Dated, signed, and delivered this **29th** day of **May 2015**.

**L. GACHERU**

**JUDGE**

**COURT:** Ruling read in open court in the absence of the parties and their counsels though aware of the Ruling date.

**L. GACHERU**

**JUDGE**