



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 788 OF 2013

DICK MAINA GITHAIGA.....PLAINTIFF

VERSUS

THE KENYA NATIONAL CHAMBERS OF COMMERCE AND INDUSTRY...1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

RULING

I have before me a Notice of Motion dated 6th November 2013 brought under **Section 40 Rule 1 and 2 of the Civil Procedure Rules** (should be Order 40) seeking the following remedies:-

1. *Spent*
2. *That a temporary injunction be issued restraining the 1st defendant, its agents, employees and/or people working under it from occupying, leasing, constructing and/or in any other way interfering with the current status of plot*

number Thika Municipality Block 9/1014 pending the hearing of this application inter-partes and thereafter pending the hearing and determination of this case.

3. *That a temporary injunction be issued restraining the 2nd defendant, its agents, employees and/or officials from processing and issuing a lease, a certificate of lease and/or any other ownership documents of plot number Thika Municipality Block 9/1014 in favour of the 1st defendant herein or any other person pending the hearing of this application inter-partes and thereafter pending the hearing and determination of this suit.*
4. *That costs of this application be borne by the defendant/respondent.*

The application is supported by the plaintiff/applicant's affidavit and on the grounds set out therein.

From what I can glean in the supporting affidavit of the

applicant (**DICK MAINA GITHAIGA**), he is the registered lessee of plot No. Thika Municipality Block 9/194 and at the time of acquisition of the said property, it had a front access to the main road and another access to the back road. However, the 1st defendant has purportedly acquired the plot in front of and adjacent to his plot thus cutting across the frontage of several other plots and blocking his access to the main road. That this was done un-procedurally, unlawfully and fraudulently and if a building is put up on the said plot, it will cut off his access to the main road and also devalue his property. That notwithstanding his protest, the 2nd defendant is in the process of issuing ownership documents of the

said plot to the 1st defendant which is designated as Thika Municipality Block 9/1014.

The 1st defendant opposed the application through a replying affidavit sworn by its director **DR. SAMUEL THINGURI WARUATHE** in which he has deponed, inter alia, that the 1st defendant is the bona fide proprietor of a lease from the Government of Kenya of all that property known as Thika Municipality Block 9/1014 a copy of which is annexed thereto and that it is in occupation of the same and has even leased it to 3rd parties and therefore this application is mischievous, ill willed, frivolous and does not disclose any cause of action known in law. That the dispute between the parties started way back in 2012 when the plaintiff/applicant leased his property to persons to whom he represented that his property extended all the way to the main road which caused the 1st defendant/respondent to issue a demand letter to the said tenants. That the plaintiff/applicant has recently recognized the 1st defendant/respondent as the legitimate lessee of the plot and on 16th October 2013 wrote a letter to the 1st defendant/respondent requesting to be given a lease over the said property (annexture **SW 5**). It is deponed further that the 1st defendant/respondent considered granting the plaintiff/applicant a lease over the said property but declined due to his history of trespass, encroachment, interference and/or un-warranted ownership claims over the said property. That the plaintiff/applicant is less than candid and has not come to Court with clean hands as demonstrated by the fact that he has brought the 2nd defendant into this suit without even first seeking redress from it as set out under **Article 67(2) of the Constitution**.

In response, the plaintiff/applicant filed a further affidavit questioning the propriety of the advocate for the 1st defendant/respondent acting in this matter without a special resolution of 1st defendant/respondent. Further, the plaintiff/applicant has deponed that the lease issued to the 1st defendant/respondent is not genuine as it is not executed by the allottee or witnessed and even the relevant Government fees are unpaid and also that his letter dated 16th October 2013 did not deter him from claiming his right of access to the main road.

When counsels for the plaintiff/applicant and the 2nd defendant/respondent appeared before me on 22nd September

2014, it was agreed that the application be canvassed by way of written submissions. However, as at the time of writing this ruling, only the plaintiff/applicant's advocate had filed submissions.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions filed by Mr. Kariuki advocate for the plaintiff/applicant.

This being an application for injunction, it has to be determined within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

- a. ***The applicant has to establish a prima facie case with a probability of success at the trial.***
- b. ***The applicant should show that he is likely to suffer injury which cannot be adequately compensated by damages if the injunction is not granted and, if in doubt,***
- c. ***The Court will decide the application on a balance of convenience.***

As to what amounts to a prima facie case, the Court of Appeal defined it in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD C.A CIVIL APPEAL NO. 39 OF 2002 (2003 e K.L.R)** in the following terms:-

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is 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 for an explanation or rebuttal from the latter”.

It must also be remembered that a party seeking such a remedy must approach the Court with clean hands if he wants it to exercise its discretion in his favour.

Guided by the above principles and taking into account all the issues raised herein, does the plaintiff/applicant merit the orders sought in his application? He seeks firstly to injunct the 1st defendant/respondent, its agents, employees and/or people working under it from occupying, leasing, constructing and/or in any other way interfering with the current status of plot No. Thika Municipality Block 9/1014 pending the hearing of this suit. The 1st defendant/respondent has however availed a copy of a letter of allotment and copy of a lease in respect of that parcel of land (see annexure **SW 2 A and B**). The 1st defendant/respondent are therefore the bona fide registered proprietors of the said property and are entitled to all the rights and privileges that go with such registration. The plaintiff/applicant has attempted to impugn that lease on the ground that it is not executed or signed by an advocate and neither have the registration fees been paid. Those are matters for trial. The lease itself is issued under the now repealed **Registered Land Act** and is duly signed by the Land Registrar and therefore, under **Section 37 (1) of the repealed Registered Land Act**, this Court is entitled to presume that the lease is a proper document until the contrary is proved. Being the registered proprietors of the property Thika Municipality Block 9/1014, the 1st defendant/respondent cannot be injuncted from using it as sought by the plaintiff/applicant.

Secondly, the plaintiff/applicant has in fact recognized the 1st defendant/respondent's ownership of the said property. In his letter dated 16th October 2013 addressed to the 1st defendant/respondent (annexture SW 5) he stated as follows:-

“THE NATIONAL CHAIRMAN KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY

NAIROBI

Dear Sir

REF: LEASE OF THE CHAMBER PLOT L.R. NO. BLOCK

9/1014 AT THIKA

Reference is made to the above mentioned matter and wish to humbly request your honourable office to kindly consider leasing to me the said plot which is immediately next to my plot”

Having recognized the 1st defendant/respondent as the owner of the said plot and even requested to lease it from them, it is difficult to understand how the plaintiff/applicant can at the same time depone, as he has done in his affidavit, that the same was acquired ***“un-procedurally, unlawfully and fraudulently”***. It is clear from the evidence on record herein that the plaintiff/applicant is himself interested in acquiring the said plot for his own use. In his letter mentioned above, he makes that clear in the following words:-

“Am in the process of putting up a 12 storey commercial building on my plot and I intend to use your plot as an entry bay for building materials and other commercial factors related to electing (sic) the facility and thereafter as a parking”

The plaintiff/applicant also seeks a temporary injunction restraining the 2nd defendant/respondent, its agents, employees and/or officials from processing and issuing a lease, certificate of lease and/or other ownership documents of plot No. Thika Municipality Block 9/1014 in favour of the 1st defendant/respondent or any other person. As is now clear from what I have stated above, the 1st defendant/respondent are already the registered proprietors of the said property and so no injunction can possibly be issued against the 2nd defendant/respondent from issuing document that has already been issued.

It follows from all the above that the applicant has not met the threshold set out in the ***GIELLA*** case (supra) as he has not established a prima facie case with a probability of success. He is attempting to

injunction a party from the use of his property yet he recognizes that party's ownership of the said property. The law does not allow him to do so. Having not met the first hurdle in the **GIELLA** case (supra), I need not consider the other tests and it follows that this application is devoid of merit and must fail.

In the circumstances therefore, the plaintiff/applicant's Notice of Motion dated 6th November 2013 and filed herein on 7th November 2013 is dismissed with costs to the 1st defendant/respondent.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015

27/11/2015

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Mwangi for Mr. Kariuki for Plaintiff – present

No appearance for Defendant

COURT: Ruling delivered, dated and signed this 27th November, 2015 in open Court.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015