



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC NO. 693 OF 2014**

JOSEPH WAITHAKA KAHARI.....PLAINTIFF

=VERSUS=

EUNICE WAWERU.....1<sup>ST</sup> DEFENDANT

CHARLES MAINA WAWERU.....2<sup>ND</sup> DEFENDANT

EDWIN NJENGA NJOROGE.....3<sup>RD</sup> DEFENDANT

**RULING:**

Coming up for determination is the Plaintiff/Applicant's Notice of Motion dated 3<sup>rd</sup> June 2014, brought under *Article 40(1) and 159(2) (d) of the Constitution of Kenya 2010, Order 40 Rules 1(a) ,4(1) and Order 51 Rule 1 of the Civil Procedure Rules 2010, and Section 1A ,1B,3A and 63(c) & (e) of the Civil Procedure Act Cap 21 Laws of Kenya* and all other enabling provisions of law. The applicant seeks for orders that:-

*a. An order of temporary injunction do issue against the Defendants/ Respondents restraining them, their servants and/or agent from trespass, alienating, constructing a structure or interfering in any other way with the Plaintiff's property known as Plot No.215 Kariobangi South, River Bank Nairobi pending the determination of this suit*

*b. That costs of the application be provided for.*

The application is premised upon the grounds stated on the face of the application and upon the affidavit of *Joseph Waitthaka Kahari* .

These grounds are;

*i. The Plaintiff/Applicant is the owner of that parcel of land known as plot No.215, Kariobangi South, River Bank in Nairobi.*

*ii. That the Defendants /Respondents unlawfully encroached into the suit property and have started disposing building materials namely sand, building stones and ballast in readiness to commence building construction.*

**iii. That the Plaintiff /Applicant is likely to suffer irreparable loss and damage should the Court not grant the orders being sought by the Plaintiff/Applicant.**

On his supporting Affidavit, the applicant averred that vide letter of allotment dated **21<sup>st</sup> February 1992**, he acquired the suit land from Nairobi City Commission. That after the allotment, he made the requisite payments that is **stand premium** and **annual rent**, where he was issued with Nairobi City Commission Receipt payments as per annexure **JKW2**, and was issued with beacon certificate **JKW3**. Further that upon fulfilling all the requirements, he took possession of the suit land and has been making requisite payments to Nairobi City Council as evident from **JWK-1 (a) (b) & (c)**. That on **15<sup>th</sup> May 2014**, he visited the suit land and found people clearing the land in readiness for construction. Upon inquiry from one **Mr Kinyanjui**,

he was informed that he was working under instructions of the Defendants. Further that on **25<sup>th</sup> May 2014**, he found building material already on site. He averred that he will suffer loss and damage if the Defendants are not restrained by this Court from unfair and illegal invasion of his parcel of land. He urged the Court to grant the Orders sought.

The application is opposed. The 3<sup>rd</sup> Respondent **Edwin Njenga** swore a Replying Affidavit and averred that he purchased the suit property from **Consolata Wangui Kigathi -Waweru** (deceased) who is the mother to 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That prior to the purchase, he caused a search and confirmed that the suit land property was owned by the said **Consolata Wangui Kigathi- Waweru**, as evidenced by annexure **ENN1**. He entered into a sale agreement with the said **Consolata Wangui** as per annexure **ENN2** and was handed over other ownership documents **ENN3**. It was his contention that he was not aware of any third party interests and indeed the said **Consolata Wangui Kigathi**, had taken possession of the property, and even erected a building thereon. He also contended that the applicant did not have possession of the suit land and that the 3<sup>rd</sup> Respondent has built up to slabs levels as per annexure **ENN5**.

The 3<sup>rd</sup> Respondent further disputed that the applicant is the owner of the suit property and that the suit property was a repossessed property and therefore the applicant is not entitled to the order of injunction.

**Eunice Waweru**, the 1<sup>st</sup> Defendant also swore a Replying Affidavit and averred that she is a stranger to the averments in the applicant's affidavit. She further averred that her mother the late **Consolata Wangui ,Kigathi -Waweru** was the owner of the suit land –**Kariobangi South, River Bank** –Repossessed **Plot No. 215** ( suit property) . Further that the suit property was sold to the 3<sup>rd</sup> Defendant when her mother fell ill and required money for hospital bill. It was her contention that the applicant is a stranger to her and that her mother had even started a construction on the suit property and she sold it with incomplete building. It was her contention that the suit property belongs to the 3<sup>rd</sup> Defendant who has already started construction on the suit property and has brought down the previously erected building by her late mother.

The applicant filed a further affidavit and contended that he was a stranger to the documents annexed to the Replying Affidavit purportedly allocating the Repossessed **Plot No. 215– Kariobangi South River Bank Nairobi** to one **Consolata Wangui Kigathi** . He also averred that he was aware that the said **Consolata Wangi Kigathi** started to put up a structure on the suit land in the year 2009 and it was brought down by the Nairobi City Council.

Further that the said **Consolata Wangui Kigathi** filed **ELC No.468 of 2008** and used different documents from what are attached to the Replying Affidavit by 3<sup>rd</sup> Defendant . He averred that he is the original bonafide allottee of the suit property, **Plot No.215 Kariobngi South, River Bank** as per the letter of allotment dated **21<sup>st</sup> February 1997**.

The application was canvassed by way of written submissions which I have carefully read and considered. The Court makes the following findings;-There is no doubt that the applicant has sought for

an order of injunction which is an equitable remedy granted at the discretion of the court. However, such discretion must be exercised judicially. See the case of **CMC Motors Group Ltd and another Vs Evans Kageche Boro Civil Appeal No.295 of 2001**, where the Court held that:-

*“In granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judiciously”.*

Though the orders sought herein are equitable remedies, the applicant must satisfy the threshold for the grant of such orders as enunciated in the **Giella’s case**. The principles therein have been repeated in various other judicial pronouncements. In the case of **East Africa Development Vs Hyundai Motors Kenya Ltd Civil Appeal No. 194 of 2004 (2004) LLR 6121** ; the Court held that:-

*“What was before the learned Judge was an application for equitable remedy of injunction and the conditions are; first an applicant must show a prima facie case with probability of success; secondly an interlocutory 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”. See also Giella Vs Cassman Brown and Company (1973) EA 358; EA Industries Vs Trufoods (1972) EA 420.*

In the instant case, has the applicant established that he is deserving of the orders sought?.

Firstly, the applicant needed to establish that he has a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank Of Kenya Ltd & 2 Others [2003] Klr**, prima-facie case was described as :-

*“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 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”.*

From the above description, prima facie case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the applicant at trial.

In the instant suit, has the applicant established that he has a prima facie case with probability of success?.

There is no doubt that the Plaintiff/applicant was issued with the letter of allotment for **Plot No. 215 Kariobangi River Bank on 21<sup>st</sup> February 1992** . The letter of allotment was subject to certain conditions among them special conditions. The letter of allotment also provided that if acceptance and payment was not received within 30 days from the date of Offer, the same would be considered to have lapsed without further reference to the allottee. From the document attached to the Supporting Affidavit, it is evident that the applicant paid the stand premium of **Kshs.12,141/-on 21<sup>st</sup> February, 1992**, and obtained the Beacon Certificate on the same date. However it is not evident whether the applicant accepted the said letter of offer though he paid the stand premium. It is also evident from the document availed by the 1<sup>st</sup> Defendant that the Nairobi City Council repossessed the suit plot and allotted it to one **Consolata Wangui Kigathi - Waweru**(deceased) . The said **Consolata Wangui** sold the suit plot to the 3<sup>rd</sup> Defendant. The applicant in his supplementary Affidavit admitted that he was aware in the year 2009, that the said **Consolata Wangui** had erected a structure on the suit plot which structure was brought down by the City Council. Further the said **Consolata**

**Wangui**, sued the Nairobi City Council of Nairobi in **ELC No. 486 of 2008** . Even if the applicant was aware of presence of **Consolata Wangui Kigathi** in the said suit land in the year 2009, and suit **ELC No.686 of 2008**, there is no evidence that he attempted to take possession of the same or even sought to

be enjoined as a party in **ELC No. 486 of 2008**. It is evident from **ENN2** that the late **Consolata Wangui Kigathi** sold the suit land to the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant is therefore an innocent purchaser for value without Notice.

From the pleadings, the applicant has not enjoined Nairobi City Council as a Defendant. The said Nairobi City County is the only party that can explain the circumstances that led to the repossession of the suit property and allocation of the same to the late **Consolata Wangui Kigathi**.

The explanation of such circumstances can only be done at the main trial. At this juncture, the Court cannot delve into the same issues that would be dealt at the main trial. See the case of **Edwin Kamau Muniu vs. Barclays Bank of Kenya Ltd, Nairobi (Milimani) High Court, Civil Case No. 1118 of 2002**, where the court held that:

***“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality”.***

The Plaintiff has a letter of allotment issued in the year 1992. However

the late **Consolata Wangui Kigathi** also had a letter of allotment showing that the plot in issue was a repossessed plot and allocated to her. The 3<sup>rd</sup> Defendant purchased the suit plot from the late **Consolata Wangui Kigathi Waweru** in the year 2013. For the truth to be established evidence has to be called and the Court at this juncture cannot hold that the applicant has a prima facie case with probability of success.

On the second principle that the applicant must establish that he will suffer irreparable loss which cannot be compensated by an award of damages, the Court herein finds that the suit property can be valued and quantified and in the event that the applicant succeeds in his trial, then he can be compensated by an award of damages. See the case of **Wairimu Mureithi Vs City Council of Nairobi Civil Appeal No.5 of 1979 E A 33**, where the Court stated that:-

***“However, strong the Plaintiff’s case appear 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”.***

Thirdly on the third principle of if the Court is in doubt to decide on the balance of convenience, the court finds that though the applicant was issued with the letter of allotment in 1992, he has not developed the suit land. There was evidence that in the year 2008, the late **Consolata Wangui Kigathi** had erected a structure on the suit land and the same was brought down by the Nairobi City Council. That demolition culminated in the filing of **ELC 486 of 2008** by the late **Consolata Wangui Kigathi Waweru**. Further the suit plot was later sold to 3<sup>rd</sup> Defendant by the said **Consolata Wangui Kigathi** and the 3<sup>rd</sup> Defendant had laid a foundation. That being the position on the ground, the balance of convenience tilts in favour of the 3<sup>rd</sup> Defendant and not the applicant herein.

Having now carefully considered the instant Notice of Motion, the written submissions and the relevant laws; the Court finds the same is not merited and consequently, the Court dismisses the said Notice of Motion dated **3<sup>rd</sup> June 2014**, with costs to the Defendants/Respondents.

It is so ordered.

**Dated, Signed and Delivered** this **16<sup>th</sup>** day of **November, 2015**.

**L.GACHERU**

**JUDGE**

In the presence of

**Mr Mureithi** holding brief for **Mr Njuguna** for the Plaintiff/Applicant

None attendance for the Defendants/Respondents

Court Clerk : Hilda

**L.GACHERU**

**JUDGE**

**Court:**

Ruling read in chambers in the presence of **Mr Mureithi** holding brief for **Mr Njuguna** for Plaintiff/Applicant and absence of the Defendants/Respondents though notified.

**L.GACHERU**

**JUDGE**