



**REPUBLIC OF KENYA**

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

**ENVIRONMENTAL AND LAND DIVISION**

**ELC CIVIL SUIT NO. 683 OF 2013**

**RAPHAEL KIRAGU KAMAU ..... PLAINTIFF**

**VERSUS**

**SERA NYAMBURA KAMAU ..... DEFENDANT**

**RULING**

The Plaintiff vide a plaint dated 10<sup>th</sup> June 2013 filed on the same date seeks a declaration that plot NOs. **A 25** and **A 26 Umoja III D (Bidii)** were allocated to the Plaintiff and belongs absolutely to the plaintiff. The plaintiff further seeks an injunction against the Defendant restraining her from in any manner interfering and/or dealing with Plot NOs **A25** and **A26 Umoja III(Bidii)** and additionally, prays for damages for trespass against the Defendant.

Simultaneously with the plaint the plaintiff filed a Notice of Motion application under a certificate of urgency seeking an interlocutory injunction against the Defendant restraining any dealings with plot NOs. **A25** and **A26 Umoja III D(Bidii)** pending the hearing and determination of the suit. The application is premised on the grounds set out on the face of the application and on the supporting and further affidavit sworn by **Raphael Kiragu Kamau** on 10<sup>th</sup> June 2013 and 5<sup>th</sup> August 2013 respectively. The Defendant opposes the application and has sworn a replying affidavit dated 19<sup>th</sup> July 2013 in opposition thereto. on the direction of the court the parties have filed written submissions each articulating their respective positions.

The plaintiff's case is that he is a member of **Umoja III Housing Settlement Scheme** and in August 2004 he states he was allocated 2 plots vide ballot number 980 and 918 annexed to and marked as "**RKK1**" in the supporting affidavit and that he was issued with a plot identification certificate number 918. The plaintiff states he has had possession and occupation of the said properties peaceably until on or about 3<sup>rd</sup> August 2011 when the Defendant encroached on the suit property. The plaintiff avers that **Umoja III D (Bidii)** have had the properties resurveyed and that the plots have been renumbered **A25** and **A26** and contends that the Defendant has no valid claim to the said plots as both investigations by the local administration and officials of **Umoja III D (Bidii)** have confirmed the plaintiff to be the rightful owner of the disputed plots. The plaintiff claims that the Defendant defied directions from the officials of the association and the local administration and has embarked on constructing on the suit property without any right to do so.

For her part the Defendant through her replying affidavit avers that on 13<sup>th</sup> July 2010 she and one **Regina Wangui Ndotono** purchased two plots numbered **209/94** and **209/95** located in **Umoja III** from **Charles Njoro Karigo** and **Esther Wanjiku Njoro** at the cost of Kshs.350,000/- per plot and avers that transfer

documents were issued to them by the officials of **Umoja III** settlement Scheme and they were issued with plot identification certificates **NO. 253** and **254** annexed to the replying affidavit and marked “**SKI**” and “**SK2**”. The said **Regina Wangui Ndotono** transferred her plot to the Defendant so that the Defendant now owns both plots. The Defendant avers that she has been in occupation of the two properties and that sometimes in 2012 as she was putting up structures on the premises the plaintiff complained to the Chief that she (the defendant) had encroached onto his property. The Defendant states that when both of them appeared before the chief she produced her ownership documents and the plaintiff also produced what she claimed were her ownership documents and ultimately the chief failed to resolve the dispute amicably. The Defendant contends she is the rightful owner of the suit premises and seeks a dismissal of the applicant’s application for injunction as the plaintiff’s alleged ownership documents are not genuine.

Here is a classic case of both the plaintiff and the Defendant each claiming to be legally entitled to the suit properties and each claims to have ownership documents to the properties obtained from **Umoja III Housing Scheme** also referred to as **Umoja III (Bidii)**. The documents relied upon by the plaintiff include a ballot paper having 2 numbers **980** and **918** issued by **PACEG INVESTMENT** to the plaintiff marked “**RKK2**” for plot **NO. 171**.

The payment receipts tendered by the plaintiff issued by **Umoja III Housing Settlement Scheme in 2004** and one dated 13/9/2012 by **Umoja III D (Bidii)** do not indicate any plot in respect of which payment was made. Although the plaintiff deposes that **Umoja III D (Bidii)** have resurveyed the properties and the plaintiff has been granted new plot **NOS A25** and **A26** there is no evidence of this in form of any communication and/or documentation from **Umoja III D (Bidii)** and/or any subdivision scheme map showing the allottees of the various plots. The plaintiff places reliance on the communication from the area chief as per the letters dated 13/8/2012 and 4/9/2012 together with other correspondences marked “**RKK3**” in which the chief indicated the plots belong to the plaintiff. On the basis of this communication the plaintiff asserts that he is the owner of the disputed property and thus has established a prima facie case to entitle him to an order of injunction against the Defendant.

The Defendant on her part contends she is the owner of the suit properties and holds plot identification certificates **NO. 253** and **NO.254** that she has been in possession and in occupation of the two properties since purchasing the same. The Defendant asserts that the plaintiff only surfaced when she started constructing on the plots and that when the matter was referred to the local chief there was no amicable resolution of the matter and the Defendant thereafter continued with her construction but the plaintiff allegedly used hired goons to destroy the Defendants structures prompting the Defendant to report the matter to the police for investigation which investigations were at the commencement of the suit said to have been continuing.

The court has reviewed the evidence and the material placed on record by the parties and the issue for determination is whether the plaintiff has established a prima facie case to entitle the court to issue the order of injunction sought against the Defendant. On the evidence before the court, I am not satisfied the plaintiff has established a prima facie case with any probability of success against the Defendant. The documents relied upon by the plaintiff do not show what specific plots he was allocated. The ballot paper showing **980** and **918** exhibited as “**RKK1**” by the plaintiff from **PACEF INVESTMENT** and so is the share certificate marked “**RKK2**” and no linkage has been established between **PACEG INVESTMENT** and **Umoja III D(Bidii)** the alleged owners of the plots that were allocated to members. Equally there is no evidence as to how plots **A25** and **A26** came to be.

The documents tendered by the Defendant show the plots to be plot **NOS. 209/94** and **209/95** which have plot identification certificates **NOS A 253** and **A 254** issued by **Umoja III Housing Settlement Scheme**. There is no evidence linking plot **NOS. 209/94** and **209/95** to the plots that the plaintiff alleges are **A25** and **A26** which the plaintiff claims to be his. There is evidence the Defendant occupied the plots and has

constructed some permanent and/or semi permanent structures thereon. Although the plaintiff claims to have occupied and taken possession since August 2004 there is no evidence of such possession and/or occupation.

In the premises having held that the plaintiff has not demonstrated he has a prima facie case with any probability of success as against the Defendant, I need not consider the other conditions that an applicant in an application for injunction need to satisfy to be entitled to a grant of an injunction as enuciated in the case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358**. The conditions for the grant of an interlocutory injunction were settled in the **GIELLA** case Supra thus:-

- (i) An applicant has to demonstrate a prima facie case with a probability of success;
- (ii) Should demonstrate they would suffer irreparable damage that cannot be compensated by an award in damages unless the injunction is granted;
- (iii) If the court is in doubt as regards the above 2 conditions the court can determine the matter by considering the balance of convenience.

The conditions are sequential such that if no prima facie case is demonstrated and/or established by the applicant the consideration of the second limb/condition is rendered unnecessary. I have no doubt that the Plaintiff has not demonstrated he has a prima facie case with any probability of success.

I accordingly find the plaintiff's application dated 10<sup>th</sup> June 2013 to be lacking in merit and the same is hereby dismissed with costs to the Defendant. The order for the maintenance of status quo is discharged and vacated.

Ruling dated and delivered this 21st day of February 2014

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

.....**PLAINTIFF**

.....**DEFENDANT**