



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELC CIVIL CASE NO. 271 OF 2012

JAMES NYAMWEYA OENGAPLAINTIFF/ APPLICANT

VERSUS

FELISTUS KEMUNTO MAKORI.....DEFENDANT /RESPONDENT

AND

CLARA SLAGER

BABS HELMATEL

GERDA FLIKKEMA (in their capacity as officials of

Africa Contact Foundation.....INTERESTED PARTIES/ RESPONDENTS

RULING

1. The Applicant, **James Nyamweya Oenga**, filed a Notice of Motion dated 28th March, 2012 seeking the following orders:-

1) spent

2) spent

3) That pending the hearing and determination of the suit herein the Honorable Court be pleased to grant an injunction restraining the Defendant/Respondent and the Interested Parties by themselves, servants, employee and/or agents from trespassing on, wasting, damaging and/or otherwise interfering with the dealings of the suit property Kiambogo /Kiambogo Block 2/8743 or until further orders of this court.

4) That this Honorable court does order the Defendants/ Respondents deposit such security in monetary terms to cover the applicants loss.

5) That pending the hearing and determination of this suit the Honorable Court be pleased to order the Defendant/Respondent and the Interested parties by themselves, servants, employee and/or agents be vacated from the suit property.

6) That costs of and incidental to the application be provided for.

2. The Application is premised on the grounds set out therein and is supported by an affidavit sworn by the Applicant and dated 28th March, 2012. He depones that he is the registered owner of the suit land which he allowed the Defendant to occupy temporarily in 2004. However, the defendant has over time put up a permanent structure on the property without the applicant's consent and despite issuance of a notice to vacate the suit land, the Defendant has failed to comply and continued to put up permanent structures on the land. He further avers that the Defendant has denied him access to the suit land and seeks that the Defendant be ordered to vacate to avoid further damage and wasting away of the suit property.
3. The application is opposed. The defendant, **Felistus Kemunto Makori**, swore a Replying Affidavit on 20th March, 2013. She avers that she was a Catholic nun with Franciscan Sisters of St. Joseph when she met and got into an intimate relationship with the Applicant. Their relationship became suspicious to her seniors and knowing her expulsion from the convent was eminent, she purchased the suit land and had it registered in the name of the Applicant to hold as trustee. The inevitable happened and the Respondent was expelled from the convent. She moved into the suit property where by this time she had put up a house. She further avers that she started an orphans' children home with the funding of the Interested Parties and with the full knowledge of the Applicant. She denies that the Applicant contributed any monies towards the purchase and development of the suit land and is an opportunist. She thus prays that the application be disallowed and the matter proceeds to full trial.
4. The Interested Parties also opposed the application. They filed a Replying Affidavit sworn by **Clara Slager** on 20th March, 2013 in which she avers that she is the chairperson of Africa Contact Foundation based in Netherlands; She deponed that the foundation funded the construction and the running of the Children's home since its inception in 2009; That at all times, the applicant knew of the existence of the home and for a period of time, supplied food stuff to the institution. At all times, the Applicant represented to the officials of the foundation that he held the suit property in trust for the Respondent. They further contend that if the orders sought are granted, they will suffer irreparable injury and the children will be rendered destitute.
5. The parties filed written submissions reiterating their stated positions. The issue that stands for determination is whether on the facts and circumstances of this case, the Applicant is entitled to the orders of injunction sought at this interlocutory stage. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**. The Applicant needs to show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience.
6. On the first limb, the applicant must show that he has a *prima facie* case with probability of success. In so doing, he annexed a copy of the title to the suit land which shows he is the registered owner of the land. However, the respondent has cast doubt as to whether he holds such suit land on his behalf or in trust for the respondent herein. In my view, this is a matter that would require further interrogation of the parties' evidence by way of oral submissions by the parties at the trial so that the parties are subjected to cross examination to test the credibility of the evidence tendered. However, at this stage all the applicant is required to demonstrate is not a case which must succeed but one which may succeed. With the facts and evidence placed before me, I am of the view that a *prima facie* case with a probability of success has been established.
7. Will the applicant stand to suffer irreparable damage if the injunction is not granted? From the material before me, the applicant admits that he allowed the respondent to reside on the property for a period of time. He did not demand any rent from the respondent and fell out after the alleged development on the suit land by the respondent. The Applicant did not however place before me any evidence to show that the respondent is putting up a permanent structure or how the property is been damaged or wasted away by the respondent. I therefore find that applicant has not proved that he suffer irreparable damage.
8. Having found that the plaintiff will not suffer irreparable damage, I wish not to labor on the last principle but I do observe that the respondent and at least ten orphaned children reside on the suit land and this tilts the balance of convenience in their favour. The order for an injunction and

prayer 5 will in effect evict the respondent and the children at an interlocutory stage without the court having sufficiently satisfied itself on the evidence and its credibility. The prayer is therefore unattainable at this stage.

9. For the above reason, I find no merit in the Notice of Motion dated 28th March, 2012 and hereby dismiss it with costs to the respondent.

Dated, signed and delivered on this 14th day of February 2014.

L N WAITHAKA

JUDGE.

PRESENT

Mrs Mbeche holding brief for Mr Gekonga for the plaintiff/Applicant

Mr Osoro for Defendants and I.P/Respondents

Emmanuel Maelo : Court Clerk

L N WAITHAKA

JUDGE