



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. NO. 908 OF 2013**

**JOSPHAT NJOROGE MWANGI .....1<sup>ST</sup> PLAINTIFF**

**STEPHEN NJUGUNA MWANGI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**DAVID OMONGE .....1<sup>ST</sup> DEFENDANT**

**JOHN CHEGE MWANGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming before me for determination is the Notice of Motion dated 25<sup>th</sup> July 2013 in which the Plaintiffs/Applicants seek for orders of injunction to issue restraining the Defendants/Respondents from trespassing or in any other way interfering with the parcel of land known as L.R. No. 36/130/V11 original 65/5 (hereinafter referred to as the "Suit Property") pending the hearing and final determination of this Application and suit. The Plaintiffs/Applicants also seek for an eviction order to be issued to remove the Defendants/Respondents from the Suit Property to be supervised by the Officer Commanding Shauri Moyo Police Division. They also seek for the costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Josphat Njoroge Mwangi, sworn on 25<sup>th</sup> July 2013 wherein he averred that both he and the 2<sup>nd</sup> Plaintiff, who is his brother, are the registered proprietors of the Suit Property. He produced a copy of the Certificate of title. He further averred that the Suit Property was initially owned by their late father, Mwangi Mbothu, who had purchased it in 1965. He further averred that they have been in continuous uninterrupted possession and occupation of the Suit Property since then and that part of the same is developed while the other is not. He further averred that recently, on 15<sup>th</sup> June 2013, he noticed that the Defendants had started illegally to encroach and trespass on the vacant part of the Suit Property and have constructed temporary structures thereon with the result that they can no longer use the same.

The Application is contested. The 1<sup>st</sup> Defendant filed his Replying Affidavit sworn on 21<sup>st</sup> November 2013 in which he averred that he has lived in the Suit Property openly, notoriously and uninterrupted for the last 35 years contrary to the Applicant's assertion that he is a trespasser who came to the Suit Property

in the year 2013. He averred that at the time of his birth, his parents were already staying at the Suit Property. He averred further that while he attended primary school, secondary school and college, he was living on the Suit Property. He further indicated that even when he engaged in gainful employment, he was still resident on the Suit Property and further that he married and got a child while still dwelling thereon. He stated further that throughout his lifetime, he has never seen the Plaintiffs/Applicants on the Suit Property and is not aware of their connection with it. He further stated that he had conducted due diligence at the Lands Office and had failed to locate any files relating to the Suit Property. Further, he denied that one Mwangi Mbothu purchased part of the Suit Property and challenged the Plaintiffs/Applicants to back their claim with sufficient evidence. He further stated that his mother used to pay rent to one Mr. Harban Singh who left the country in the mid-eighties never to return back to Kenya. He further stated that his mother had constructed some structures on the Suit Property from where she used to collect rent and that after she passed on, he took up the responsibility of collecting rent. He challenged the Plaintiffs/Applicants to produce any receipts in court to prove that they have been collecting rent from either his mother or him. He further stated that he has instructed his lawyers to file suit for adverse possession. Further he denied the authenticity of the documents produced by the Plaintiffs/Applicants.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”***

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“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.”***

Looking at the facts of this case, the Plaintiffs/Applicants have produced to the court the Certificate of title for the Suit Property which indicates that the Suit Property was transferred to Soham Singh Dhiller and Harbans Singh as tenants in common in equal shares sometime ago. However, all the right, title and interest of the said Soham Singh Dhiller was transferred to Mr. Mwangi Mbothu in 1965. It is apparent on the Certificate of Title that Harbans Singh passed on and his interest in the Suit Property was subsequently transferred to the 1<sup>st</sup> Plaintiff in 2001. The Certificate of title for the Suit Property indicated that the Suit Property currently belongs to the estate of Mwangi Mbothu and to the 1<sup>st</sup> Plaintiff in equal shares. Section 26 (1) of the Land Registration Act states as follows:

***“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –***

***a. On the ground of fraud or misrepresentation to which the person is proved to be a party;  
or***

***b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

Further, **section 24(a)** of the Land Registration Act provides as follows:

***“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

These legal provisions require the court to determine that the holder of a certificate of title to land to be held as having produced prima facie evidence of their ownership. I therefore hold that the Plaintiffs/Applicants have indeed established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiffs? Land is unique and no one parcel can be equated in value to another. The value of the Suit Property can be ascertained. However, it would not be right to say that the Plaintiffs can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiffs have established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

The third condition that must be satisfied is that when in doubt, a court is directed to determine in whose favour the balance of convenience tilts. This is one of the rare cases in which though the first two conditions for the grant of an interlocutory injunction are satisfied, the court finds that it harbors doubt as to whether to grant the sought after orders. The Defendant has ably submitted to this court of the long period of time he has resided at the Suit Property. Though the Plaintiffs/Applicants have also asserted that they are in occupation, I have not been convinced by their assertion. To the contrary, I am convinced with the assertions of the Defendant that he was born and bred on the Suit Property. I also noted that the Defendant further asserted that his mother used to pay rent for the premises to one Mr. Harbans Singh. That information tallies well with the evidence produced by the Plaintiffs that indeed Mr. Harbans Singh was a part owner of the Suit Property. To that extent therefore, I hold the view that granting the Plaintiffs/Applicants the orders they seek would amount to eviction of the Defendant and his family from the Suit Property before this suit goes for full trial. To that extent therefore, I am unwilling to make such an order at this stage. I therefore find that the balance of convenience lies in favour of the Defendant and the Plaintiffs/Applicants have not satisfied all the conditions for the grant of an interlocutory injunction.

Arising from all of the above reasons, I find that the Plaintiffs/Applicants have failed to reach the threshold for grant of an interlocutory injunction. I therefore dismiss the Application. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>st</sup> \_\_\_ DAY OF March 2014**

**MARY M. GITUMBI**

**JUDGE**