

REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 674 OF 2013

JOSEPH GITHORO BORO PLAINTIFF

VERSUS

EMBAKASI RANCHING COMPANY LIMITED..... DEFENDANT

RULING

The Plaintiff has filed an application by way of a Notice of Motion dated 6th June 2013, in which he is seeking an order that the Defendants be restrained from allocating to third parties, transferring, issuing titles, selling and/or interfering with plot number F168 Block 105/1290 Share Certificate Number 4059 (hereinafter referred to as the suit property), pending the inter partes hearing of this suit.

The Plaintiff claims to be the registered owner of the suit property by virtue of a share certificate in respect of the same, issued to him by the Defendant on 26th November 1982. He states that he has developed the property, and that despite the fact that he was the first allottee of the suit property, the Defendant has deliberately refused to process the transfer documents in his favour and ceased the processing of his title deed citing technical failures. Further, that the Defendant has allocated the said property to a third party and commenced the process of transfer to the said third party, who has deposited building materials on the suit property and interfered with the Plaintiff's possession and occupation of the same.

These facts are deponed to in a supporting affidavit sworn by the Plaintiff on 6th June 2013. He attached thereto copies of the letter of allocation and share certificate issued to him by the Defendant; the Defendant's approval to his application to develop the suit property; receipts for the site visit and transfer of lease to the suit property; and the transfer of lease. He stated that after signing the transfer of lease and paying the consideration thereof, the Defendant claimed that the suit plot had a dispute and the transfer of lease has lost. He also attached a copy of the police abstract reporting the loss.

The Defendant did not file any response to the Plaintiff's Notice of Motion, despite being given several opportunities by the court to comply, and the Court consequently directed the Plaintiff to file and serve his submissions. The Plaintiff's counsel in submissions dated 13th January 2014 reiterated the foregoing facts, and argued that the Plaintiff had established a *prima facie* case as he had demonstrated that he was allocated the suit property by the Defendant. Further, that having been allowed to build a house on the plot by the Defendant he will suffer irreparable damage as he risks losing the plot without compensation, and that the balance of convenience thereby tilted in his favour.

I have read and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiffs and Defendants. The issue arising herein is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The requirement for the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has brought evidence to show that he is a shareholder of the Defendant, and that he was allocated plot F168 by the said Defendant on 28th November 1982. He also brought evidence of payments made

with respect to the said plot. He has however not brought any evidence of a survey plan or other evidence, other than an incomplete and unsigned transfer of lease to show that the said plot is also the same as Block 105/1290. He states as follows in his supporting affidavit in this regard:

“That I raised my complain (*sic*) with the defendant who suddenly authorized their surveyor to forge and change the map from F 168 to read V 168 and show as a different plot (DEVELOPED) other than the one allocated to me F 168 Block 105/1290 and shown physically to me during various site visits AND CONFIRMED TO BE MINE BY the respondents and I had in 2009 fenced and planted trees which were illegally uprooted without notice.”

It is evident from the statement that there is a map in existence of the said plot and that the two plots F168 and Block 105/1290 may be different.

In the circumstances I find that the Plaintiff has established a *prima facie* case only in relation to the plot F168 and not to Block 105/1290, and that he is entitled to orders only with respect to the former plot. In any event if the two plots are found to be the same, then the Plaintiff will not suffer any prejudice. I also find that given that he was allocated the said plot in 1982 he will suffer irreparable damages as he may not be able to find an equivalent parcel of land to replace the suit property.

I therefore accordingly allow the Plaintiff’s Notice of Motion dated 6th June 2013 only to the extent of ordering that Defendant, its servants, employees, agents, assigns or any other person claiming under or through it be and is hereby restrained from allocating to third parties, transferring, selling, issuing title with respect to, and/or interfering plot number F168 pending the hearing and determination of this suit or until further orders.

The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____20th____ day of ____March____, 2014.

P. NYAMWEYA

JUDGE