



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 882 OF 2012

**ESTHER WANJIKU KAMAU (Suing on behalf of the Estate of
STEVEN CHOMBA KAMAU Deceased).....PLAINTIFF**

VERSES

PETERSON IRUNGU MAINA 1ST DEFENDANT

NAIROBI CITY COUNCIL2ND DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff seeks the following outstanding orders in his application by way of a Notice of Motion dated 16th November 2012:

1. That an interlocutory injunction be granted prohibiting the Respondents their servants and or agents or any person claiming under them from further developing, wasting or alienating to third parties all that land known as Nairobi/Umoja 83/14/450 and Nairobi/Umoja 83/14/451 (hereinafter referred to as "the suit properties") pending hearing and determination of this suit.
2. That pending the hearing and final determination of this suit, a conservatory Order do issue placing all monetary proceeds received by the 1st Defendant, his principals, servants and or agents or persons claiming tenancy or occupancy under him from the suit properties into an escrow account to be held jointly between the Registrar of this Honourable Court and the Plaintiff and the 1st Defendant.
3. That the escrow account referred to in order 3 above be managed only through orders of this court.

The grounds for the application are elaborated upon in the Plaintiff's supporting affidavit and further affidavit sworn on 16th November 2011 and 5th June 2013 respectively, in which she states that the suit premises all that land known as Nairobi/Umoja 83/14/450 and Nairobi/Umoja 83/14/451 is registered to and forms part of the estate of Steven Chomba Kamau. Further, that she is the Administrator ad litem of the estate of the late Stephen Chomba Kamau having been appointed as such by limited grant of letters issued in Succession Cause 790/2012 on 23rd April, 2012, a copy of which limited grant she attached.

The Plaintiff stated that the deceased Stephen Chomba Kamau was her son, and that the suit properties were initially allocated to herself and her deceased husband, Samuel Kamau Karanu, and were then inherited by and/or assigned to their deceased son. Further, that she was initially allocated plot A112 and her deceased husband was allocated Plot A111, and she annexed copies of the letters of allocation from the 2nd Defendant dated 25th August 1978, the tenant purchase agreements, receipts and the deed of

assignment of her plot to her deceased son.

The Plaintiff further stated that the said properties were registered in the name of her deceased son in the year 1999 and 2000 respectively, and she annexed copies of green card, lease, and the certificate of lease for plot A.111 (Nairobi/Umoja 83/14/450) and for plot A 112 (Nairobi/Umoja 83/14/451). She also stated that her son became ill in 2011 and died on 24th November 2011. That subsequently in February 2012 she came to learn that someone was developing the suit properties and after conducting investigations found out that the said person was the 1st Defendant.

The Plaintiff averred that the documents of title as well as the rates demand from the 2nd Defendant show clearly that the registered proprietor of the suit properties is Steven Chomba Kamau, and that the 2nd Defendant should not have dealt with the 1st Defendant and allowed him to encroach on the suit properties and make major alterations thereon. Further, that the Land Registrar confirmed by way of a certificate of official search that the deceased is still the registered proprietor of Nairobi/Umoja/83/14/450 and Nairobi/Umoja/Block 83/14/451, and she annexed copies of the said certificate of official search issued on 13th May 2013.

The Defendants' Responses

The 1st Defendant opposed the Plaintiff's application in a replying affidavit and further supplementary affidavit sworn on 8th April 2013 and 16th September 2013 respectively. He stated that he is the proprietor of, and purchased the suit properties, being Plots Number A-111 and A-112 Sector II Umoja Innercore from the allotted owners, one Lenis Silla and one Catherine Wairimu. Further, that he purchased the said plots free from any encumbrances for valuable consideration and followed the legally laid out procedures. He also averred that he carried out due diligence and was aware that the said properties were previously owned by one Steven Chomba Kamau, who had been allocated the same by the 2nd Defendant.

However, that on or about 12th July 2002, the 2nd Defendant published an advertisement in the local newspapers, informing the allottees of various properties that if payment for the allotment and development proposals were not received within one month from the said date then the same would be nullified. Further, that the advertisement also categorically stated that payment and development proposals were mandatory conditions contained in the letter of allotment. The 1st Defendant annexed a copy of the said advertisement.

The 1st Defendant further stated that upon expiry of the aforementioned advertisement notice the 2nd Defendant repossessed the said properties and allocated them to allottees, who subsequently sold them to him. Further that all correspondence relating to the said properties from the 2nd Defendant including on rents and rates has since been addressed to him, and that he has diligently been paying the said rents and rates for the properties. He attached copies of the allottees letters of allotment, the sale agreement he entered into with the allottees, the power of attorney registered by the allottees in his favour, and copies of correspondence from the 2nd Respondent and receipts on payment of rent and rates.

The 1st Defendant contended that in compliance with the terms and conditions of the letters of allotment, he obtained approvals for development of the suit properties from the 2nd Defendant and commenced construction, which construction is now complete and the said buildings occupied by tenants. He attached the approved plans, and certificates granted by the 2nd Defendant. He also stated that prior to completion of the said construction, he had applied for, and had been granted a loan facility from Barclays Bank of Kenya on the condition that the proceeds of rent from the said suit properties were to be deposited in a loan account to be opened with the said Bank.

Therefore, that the orders sought herein by the Plaintiff to deposit the rent proceeds into an escrow account are highly prejudicial under the circumstances, and will affect a third party not conversant nor a party to these proceedings and lead to breach of contractual terms with the Bank. Further, that at the time he purchased the suit properties they were bare and there was no development of any nature thereon.

The 2nd Defendant filed Grounds of Opposition dated 24th April 2013 wherein it stated that the Plaintiff's application did not raise any reasonable cause of action against it, and that the prayers sought cannot be properly issued against it. Further that the Plaintiff had failed to establish a *prima facie* case against the 2nd Defendant to entitle her to the orders sought.

The Submissions

The Court issued directions that the parties do file and exchange submissions, which were complied with. The Plaintiff's counsel filed two sets of submissions, dated 23rd May 2013 and 16th October 2013. He relied on sections 27, 28 and 37 of the repealed Registered Land Act in his submissions on the rights of a registered proprietor of land, and the effects of entries on a register of land.

It was his contention that in law a letter of allotment given by the 2nd Defendant to the 1st Defendant cannot be used to extinguish the Plaintiff's registered title over the suit properties, and relied on the decision in **Shiva Mombasa Limited vs Kenya Revenue Authority (2005) e KLR** in this respect. Further, that the Plaintiff had provided copies of the register and his certificates of title, and had therefore shown a *prima facie* case with high chances of success in line with the test in **Giella vs Cassman Brown**, and as held in **David Mburu Wakiamba vs The Chief Land Registrar and 3 Others (2012) e KLR**

The Plaintiff's counsel further argued that as a result the Plaintiff was entitled to damages for trespass by the Defendants, and restitution of the suit property to the state it was before the wasting by the 1st Defendant. He relied on the decisions in **Gitwany Investment Limited vs Tajmal Limited and 3 Others (2006) e KLR** to this effect. He also argued that the act of repossession of the suit property was *ultra vires* the powers of the 2nd Defendant, for the reasons that as at the date of repossession by the said Defendant according to the minutes it produced in evidence on 6th November 2001, title to the suit properties had been issued to the Plaintiff. Further, that it is trite law that only a court of law can cancel a title once it is issued as held in **Kuria Greens Limited vs Registrar of Titles and Another (2011) e KLR** and **Republic vs Registrar of Titles Mombasa & 2 Others ex parte Emfil Limited (2012) e KLR**.

The Plaintiff's counsel contended that there is no evidence of any security created over the suit property in favour of Barclays Bank of Kenya, and it therefore has no equitable or legal interest in the suit property and cannot be a party to this suit. Further, that the 1st Defendant was aware of the dispute over the suit property at the time he accepted the loan facility from the said Bank, and that he is not an innocent buyer without notice as he did not undertake due diligence, whereupon he would have discovered that the property was vested in the Deceased.

Lastly, it was argued for the Plaintiff that the proposition that an injunction cannot issue against government is no longer tenable in view of the provisions of the Constitution of 2010 under which judicial power is derived from the people and the government should not be given preferential treatment at the expense of the ordinary citizen. Reliance was placed on the Ugandan case of **Dr James Rwanyarare & Others vs The Attorney General, Constitutional Appl. No. 6 of 2002**, and the decision of the Kenyan High Court (Majanja J.) in **Kenya Bus Services Ltd & Another vs Minister for Transport & 2 Others (2012) e KLR** in this regard.

The 1st Defendant's counsel filed submissions dated 16th September 2013, wherein he reiterated the facts of his case and submitted that the criteria set out in **Giella vs Cassman Brown** for the grant of a temporary injunction had not been met by the Plaintiff, for the reasons that both the Plaintiff and 1st Defendant are laying claim to the suit property. Further, that the 1st Defendant is likely to suffer greater loss as he has been in possession of the suit properties since 2008 and has built thereon two apartment complexes which are occupied by tenants. It was submitted in this regard that the Plaintiff had not demonstrated what loss she would suffer that cannot be adequately compensated in damages. The counsel relied on the decision in **Suleiman vs Amboseli Resort Limited (2004) 2 KLR 589** in this respect.

On the balance of convenience, the 1st Defendant's counsel submitted that the 1st Defendant having

purchase the suit properties for value without notice, it would be unconstitutional for the court to make the orders sought by the Plaintiff, and that a third party being Barclays Bank of Kenya would also be affected and be condemned unheard contrary to section 50(1) of the Constitution. Lastly, on the Plaintiff's claim for mesne profits and rental income, the 1st Defendant's counsel argued that the Plaintiff had not brought any evidence of the contributions she had made to the investments on the suit properties, and that this is an issue to be determined after full hearing of the suit.

The 2nd Defendant's counsel filed submissions dated 18th September 2013, wherein he contended that the prayers sought by the Plaintiff cannot issue against the 2nd Defendant without violating laid down mandatory statutory provisions. Further, that the proper avenue available to the Plaintiff would be proceedings in the nature of judicial review and not by civil action. The counsel relied on the provisions of section 16 (1) (i) of the Government Proceedings Act that prohibits the granting of injunction orders against the government, of which the counsel submitted the 2nd Defendant is part. He also relied on the decisions to this effect in **Ali and 3 Others vs City Council of Nairobi, HCCC No, 820 of 2003**, and **Meru County Hotel Travellers Ltd vs City Council of Nairobi, (2008) e KLR**.

The counsel further submitted that the Plaintiff had failed to establish that the 2nd Defendant was complicit in the alleged trespass on the suit properties, and had not placed before the court any evidence of revocation of title. Lastly, that the Plaintiff had thereby failed to establish a *prima facie* case, and does not stand to suffer any irreparable harm as she can be adequately compensated in damages.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary and mandatory orders of injunction. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and also to determine if the Plaintiff has in addition shown any special circumstances to entitle her to the mandatory injunctions sought as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to 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 answer is whether the Plaintiff has established a *prima facie* case.

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** 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.”

The Plaintiff in her Complaint dated 16th November 2012 is seeking mandatory injunctions against the 1st Defendant to vacate the suit properties, and for both Defendants to remove the structures and constructions thereon. She also seeks special damages and general damages against the 1st and 2nd Defendants. She has brought evidence of the tenant purchase agreements entered into with the 2nd Defendant by herself and her deceased husband Samuel Kamau Karanu On 16th October 1987 with respect to plots A111 and A112 Sector II which she annexed as exhibit “EWK 4” to her supporting affidavit. Also annexed were the receipts for payment for the said plots, and two letters from the 2nd Defendant dated 13th October 1989 and 5th January 1999 respectively, confirming that loan outstanding against the said plots had been paid in full.

The assignment of plot A112 Umoja Inner Core Sector II to Stephen Chomba Kamau dated 28th June 1999 is also annexed as Exhibit “EWK 6”, while the leases and titles issued to Steven Chomba Kamau with respect to Nairobi/Umoja 83/14/450 and Nairobi/Umoja/Block 83/14/451 were annexed as exhibit “EWK 8”. The leases and title with respect to Nairobi/Umoja 83/14/450 was registered and issued respectively on 24th July 2000, and with respect to Nairobi/Umoja/Block 83/14/451 on 18th May 1999.

The 1st Defendant on the other hand relies on a sale agreement entered into with allottees of plot A111 and A112 on 3rd September 2008. He also attached copies of the letters of allocation to the said allottees, Denis M. Silla and Catherine Wairimu with respect to the said plots, both dated 23rd September 2002. The Plaintiff has however brought evidence to show that by this date the said plots had been fully paid for, and title for the same issued to Steven Chomba Kamau.

From the foregoing, it is evident there is a dispute where ownership documents have been issued with respect to the same suit properties to the Plaintiff and 1st Defendant. It is also evident that in the circumstances of this application the Plaintiff has shown a *prima facie* case, going by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation, a party who has been issued with a good title takes precedence over other equitable rights to the title. The only question to determine is whether damages would be an adequate remedy for the Plaintiff, and this court in this regard takes judicial notice of the fact that land is a scarce commodity, and it is unlikely that the Plaintiff can be adequately compensated in damages.

The remaining issue to be addressed is whether the Plaintiff has met the threshold for the grant of mandatory orders of injunction is therefore also moot. Although couched in terms of a conservatory order, the prayer that the monies received by the 1st Defendant from the suit properties be paid into an escrow account to be held jointly between the Registrar of this Court, the Plaintiff and the 1st Defendant, is in essence a prayer for a mandatory injunction, as it seeks to enjoin certain parties to do certain acts. In addition conservatory orders are only available as a public law remedy, and are not provided for in private law disputes or under the Civil Procedure Act and Rules, pursuant to which the Plaintiff’s application is brought.

As regards the grant of a mandatory injunctions, It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. In the present application, notwithstanding that the Plaintiff has shown a *prima facie* case, she has not brought any evidence to show that she has developed the suit properties to entitle her to the proceeds from the same. She also does not contest the 1st Defendant’s averments that he has used his money to develop the suit properties.

I also note that the Plaintiff is seeking in the Plaint filed herein to remove the structure and construction on the suit properties, and in the circumstances it would be inequitable for the Plaintiff to benefit from the same structures in the interim period in the event that she succeeds in her suit. In addition, as this is an issue that will have to be resolved after full hearing, the mandatory injunction sought cannot therefore issue, and the Plaintiff’s remedy in this regard is to have this matter heard and determined expeditiously.

Lastly, on the issue as to whether an injunction can issue against the 2nd Defendant, under section 41(3) of the repealed Local Government Act, the 2nd Defendant was a local authority and a body corporate capable of suing and being sued, and section 16 of the Government Proceedings Act does not apply to it.

The Orders

Arising from the foregoing reasons, the Plaintiff’s Notice of Motion dated 16th November 2012 is therefore allowed only to the extent of the following orders:

1. That the Defendants by themselves, their servants and or agents or any person claiming under them be and are hereby restrained from further developing, wasting or selling, transferring, charging or in any other manner disposing of all that land known as Nairobi/Umoja 83/14/450 and Nairobi/Umoja 83/14/451 pending the hearing and determination of this suit or until further orders.
2. That pending hearing and determination of this suit or until further orders, the Plaintiff either by herself or through her representatives, agents or servants is restrained from interfering with the possession and occupation by the 1st Defendant of land parcels known as as Nairobi/Umoja 83/14/450 and Nairobi/Umoja 83/14/451, and from demolishing or in any manner interfering with the structures constructed thereon by the 1st Defendant as at the date of this ruling.
3. The costs of the Plaintiff's Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 29th day of May, 2014.

P. NYAMWEYA

JUDGE