



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL MISC. NO. 15 OF 2014**

**SAMUEL MUCHIRI KAMUNYU.....PLAINTIFF**

**VERSUS**

**ROSEMARY WANGARI NDUTA.....DEFENDANT**

**RULING**

Before me for determination is the plaintiff's Notice of Motion dated 14<sup>th</sup> January 2014 and filed on the same date. The application expressed to be brought under sections 1A, 1B and 3A and order 40 Rules 1,3,8 and Order 51 Rule 1 of the Civil Procedure Act and Rules inter alia seeks orders that :-

1. That pending the hearing and determination of this application and the suit herein, an order do issue restraining and prohibiting the Defendant/Respondent whether by herself, through agents, servants and/or all claiming under her from dealing in any manner whatsoever, including disposing of any interest and/or transferring and/or interfering with the occupation of Plot **NO.355 KARIOBANGI LIGHT INDUSTRIES AREA, Nairobi**.
2. That the Officer Commanding Huruma Police Station do provide security in the implementation of the order.
3. That costs of this application be provided for.

The application is grounded firstly, on the grounds that appear on the face of the application and secondly, on the supporting affidavit sworn by **Samuel Muchiri Kamunyu** the plaintiff herein on 14<sup>th</sup> January 2014. Principally the plaintiff avers that the suit plot **NO. 355 Kariobangi** Light Industries, Nairobi belongs to him and he holds the necessary ownership documents. The plaintiff has annexed as "**SMK1 & 2**" letters issued by the City Council respectively dated 17/4/1985 and 19/9/2006 confirming his allocation of the plot and has annexed payment receipts for rent and rates marked as "**SMK3**". The plaintiff avers that the Defendant on or about 6<sup>th</sup> January 2014 unlawfully entered onto the suit plot and started constructing therein and further avers that unless the defendant is restrained, she will continue with the trespass and construction to the prejudice of the plaintiff and that the plaintiff shall suffer irreparable losses.

The Defendant has filed a replying affidavit sworn by **Rosemary Wangari Nduta**, the Defendant herein, on 23<sup>rd</sup> January 2014 in opposition to the plaintiff's application. The Defendant in answer to the plaintiff's claim to the suit plot avers that she is the lawful owner of the disputed plot having been allocated the same by the City council of Nairobi. The Defendant has annexed a copy of a letter dated

22/11/2011 marked "RWN-1" from the Nairobi City Council confirming the allocation of the suit plot to her and requesting payment of outstanding dues computed at Kshs.96,110/- to facilitate the processing of the title documents. The Defendant states she paid all the dues being on account of ground rent Kshs.36,870/- and survey fees Kshs.15,000/- together aggregating Kshs.96,110/-.

The Defendant further states that after making the payments and after survey of the plot she was issued with a Beacon certificate annexed and marked as "RWN- 2". The Defendant further contend she has been in possession of the suit plot since the year 2007 and avers that the plaintiff has never been in possession of the suit property and neither has the plaintiff ever put any structure(s) on the plot. The Defendant states that in 2007 when she occupied the plot it was swampy and that in order to rehabilitate the plot she deposited over 20 lorry loads of hardcore and 6 lorry loads of murram and that in year 2008 she and her husband who owned an adjacent plot NO. 351 constructed temporary structures for a food kiosk a store and a business yard on the 2 plots which they let out to tenants who still continue to carry on business thereon. Photographs of the site are annexed and marked "RWN-5".

The Defendant asserts that she has been in possession of the disputed plot since 2007 as owner and contends that the plaintiff's claim of the plot raises eyebrows as it is unclear how the plaintiff would have allowed the Defendant to construct on the plot yet the plaintiff claims to have been in possession of the plot albeit through a care taker.

The parties at the direction of the court filed written submissions in which they articulate their respective positions. The parties in their submissions restate the facts as set out in the various affidavits. The court has reviewed and considered the material placed before the court by way of through the filed affidavits and the annexures thereto and the submissions and make the following observations:-

- i. That both the plaintiff and the Defendant claim ownership of the disputed plot,
- ii. That each of the parties holds documents which each of them claim entitles them to ownership allegedly issued by the City Council of Nairobi being the allocating authority,
- iii. Either of the parties claims to have been in possession though the evidence point to the Defendant having been in possession over a length of time during which period she constructed some structures on the plot which are used by tenants to carry out business. From the photographs exhibited it is clear that the structures were put up much earlier than 14<sup>th</sup> January 2014 when the plaintiff claims the defendant trespassed onto the plot and started constructing.
- iv. The Defendant has been issued with a beacon certificate for the disputed plot by the City Council of Nairobi which denotes she is acknowledged by the Council as entitled to ownership of the disputed plot.
- v. The City Council of Nairobi appears to have confirmed allocation of the disputed plot to both the plaintiff and the Defendant and it is not possible at this interlocutory stage to make a definitive finding of ownership of the plot without hearing evidence at the trial.

The plaintiff seeks an injunctive order against the Defendant.

The conditions upon which a temporary order of injunction can be granted are well settled and the case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** remains the leading authority.

- An applicant has to satisfy and demonstrate to the court that he has a prima facie case with a probability of success,
- The Applicant has to demonstrate that he stands to suffer irreparable damage that cannot be compensated for in damages, unless the injunction is granted,
- If the court is in doubt the court may determine the application on a balance of convenience taking into account all the attendant circumstances.

In the instant case I am not satisfied that the plaintiff's has demonstrated a prima facie case with a probability of success to warrant the grant of an injunction. What has emerged is that there is a possibility of double allocation and that the Defendant is in actual occupation and possession of the suit

property on the basis of the ownership documents she holds and that she has put up temporary structures thereon which she lets out to tenants for business. The plaintiff's claim of possession is not established and even going by the documents he has tendered in support of his ownership claim there is acknowledgement by the City Council of Nairobi in their correspondence that the Defendant stakes claim to ownership of the plot as per correspondence marked as **SMK4(a)-(c)** annexed to the plaintiff's supporting affidavit.

I therefore hold and find that the plaintiff has not established a prima facie case against the Defendant with a probability of success.

However, as this case involves two parties who each claim ownership of the suit plot my view is that even though the plaintiff has not made out a case for the grant of an interlocutory injunction, the ends of justice demand that the court preserves the property in the condition it is in upto the time the suit is heard and determined when the rightful owner shall be determined and declared. Therefore the order that commends itself to me is an order that the current obtaining status quo be maintained and observed until the suit is heard and determined. For the avoidance of doubt the status quo shall mean that the Defendant remains and continues in possession but that there will be no further construction/development of a permanent nature and there will be no sale or transfer of the plot pending the hearing and determination of the suit.

In the premises the court vacates the interim order of injunction granted on 14<sup>th</sup> January 2014 and in its place directs the parties to observe and maintain the status quo on the terms set out herein above. To facilitate and expedite the hearing and determination of the suit on merits the court directs the parties to make full compliance with the provision of Order 11 of the Civil Procedure Rules within the next 60 days from the date of this ruling and thereafter to list the matter for taking of pretrial directions.

The costs of the application shall be in the cause.

Orders accordingly.

Ruling dated, signed and delivered this...30th.....day of.....July .....2014.

**J. M.MUTUNGI**

**JUDGE**

**In the presence of:**

..... For the Plaintiff

..... For the Defendant