



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 628 OF 2013**

SEBASTIAN KAGOCHE M'NJAU .....PLAINTIFF

VERSUS

PETER NJERU MUGO ..... DEFENDANT

**RULING**

This is in respect to the plaintiff/applicant's application dated 15<sup>th</sup> July 2013 seeking to injunct the defendant/respondent from unilaterally developing, constructing on or in any other manner dealing with plot No. EMBU/MUNICIPALITY/440 without involving and/or consulting the plaintiff pending the hearing of this suit and also the defendant/applicant's application dated 19<sup>th</sup> August 2013 seeking to dismiss the plaintiff's suit as being scandalous, frivolous or vexatious and an abuse of the Court process.

The parties agreed that the two applications be canvassed together by way of written submissions which have now been filed.

I have considered the two applications and the submissions by counsels.

It is not in dispute that the plaintiff and defendant are joint proprietors of a plot in Embu known as EMBU/MUNICIPALITY/440 (hereinafter the suit property). According to the plaintiff, the defendant, without consulting him, has embarked on developing his half portion of the suit property hence this suit in which the plaintiff seeks a declaration that the defendant has no right to develop the plot without consulting him and an injunction restraining him from so developing the said property.

However, the defendant's case is that the two met on 13<sup>th</sup> March 2013 and agreed that the plaintiff should develop the plot. The defendant also accuses the plaintiff of perjury by misleading the Court that there is no other suit pending between the parties yet there is Nairobi H.C.C.C No. 1953 of 1993 pending between them.

With respect to the plaintiff's application for injunction, it is clear that the parties jointly own the suit property. Each of them therefore has a right to develop their share of the plot. It would be a rare case to injunct an owner of a property from developing it. I am not entirely satisfied that the plaintiff has established a prima facie case as set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and I am in doubt if the first test has been proved as set out in that case.

Secondly, the plaintiff has not shown what irreparable injury he would suffer if the defendant is not injuncted. That is the second test in the **GIELLA** case (supra).

In my view, the plaintiff's application for injunction will have to be determined on a balance of

convenience. As stated above, the parties jointly own the suit property. Should it turn out that the defendant's development of his portion of the property would amount to interfering with the plaintiff's proprietary rights over the same property, an injustice may result. As was held in the case of **FILMS ROVER INTERNATIONAL 1986 3 ALL E.R. 772**, a further fundamental principle that the Court ought to consider is the risk of an injustice occurring if an injunction is not granted and generally, the Court should take whichever cause appears to carry the lower risk of injustice.

Taking all that into account, the balance of convenience tilts in favour of granting the plaintiff the injunction sought in the Notice of Motion dated 15<sup>th</sup> July 2013.

The second application is that by the defendant seeking to strike out the plaintiff's suit as being scandalous, frivolous, vexatious or an abuse of the Court process. In his pleadings, the plaintiff has pleaded in paragraph 9 of the plaint that the defendant is preparing the plaintiff's half portion of the suit property for purposes of constructing on it. The plaintiff has also pleaded that the defendant is acting in contravention of the agreement between them on the utilization of the suit property. Whether that is true or not are matters that will be determined at the trial. The plaintiff has further pleaded that the defendant has unilaterally exercised proprietary rights over the suit property to the detriment of the plaintiff who was not consulted yet he is a co-proprietor of the same. Those cannot be said to be scandalous or frivolous pleadings. While the Court has inherent jurisdiction to strike out a pleading which is an abuse of the Court process, this is a discretionary power to be exercised very sparingly and only in absolutely clear cases. At this stage, the Court cannot go into the merits or otherwise of the case. That is a function of the trial Court. For now, having looked at the plaint in this case, I am satisfied that it raises serious issues that need to go for trial. In the circumstances, the application to strike out the plaint must be dismissed.

One other issue that was raised by the defendant and which I need to address is the averment that the plaintiff has failed to disclose that there is NAIROBI H.C.C.C No. 1953 of 1993 pending between the parties over the same property. However, apart from a letter dated 3<sup>rd</sup> November 2006 from the firm of Waweru Gatonye Advocate to the firm of Muriithi Wanjira Advocate notifying them that the said Nairobi case is coming up for the hearing of an application on 27<sup>th</sup> November 2006, (annexture **PNM 2**), no pleadings were attached and so this Court cannot confirm with certainty if indeed the subject matter in the Nairobi Case is similar to this one. If indeed a similar suit exists in Nairobi, then the parties would be well advised to have the two consolidated.

Most importantly, the parties are joint owners of the suit property. It can only be assumed that they must have acquired it when their relationship was cordial. Surely they can sit down and sort out their differences over the same rather than engage in this litigation. I encourage them to do so.

Ultimately therefore, the plaintiff's Notice of Motion dated 15<sup>th</sup> July 2013 is allowed. The defendant's Notice of Motion dated 19<sup>th</sup> August 2013 is dismissed.

Each party shall meet their own costs.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> JULY, 2014**

18/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

No appearance for plaintiff

Mr. Kamiru for Mr. Mugo for Defendant – present

COURT: Ruling delivered this 18<sup>th</sup> day of July 2014 in open Court.

Mr. Kamiru for Mr. Mugo for Defendant present

Mr. Okwaro for Plaintiff absent

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> JULY 2014**