



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 412 OF 2013**

JAMES TONGI MIRUKA ..... PLAINTIFF

VERSUS

GEORGE MAUTI OMBACHO .....DEFENDANT

**RULING**

1. What I have before me is the plaintiff's application that was brought by way of Notice of Motion dated 9<sup>th</sup> October 2013 under Order 40 rules 1, 2 and 3 of the Civil Procedure Rules, 2010 and article 40 and 43 of the Constitution of Kenya for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. **That an order of temporary injunction do issue restraining the defendant by himself or through his agents, servants and/or employees from entering into, alienating, wasting, cultivating, constructing, damaging, doing any activity on the plot or in any manner interfering with Plot No. 34 at Riosiri market in South Gucha District in Kisii (hereinafter referred to as "the suit property") pending the hearing and determination of this suit.**
  - d. **That the costs of this application be provided for.**
  - e. **Any other relief the honourable court may deem fit and just to grant.**

The plaintiff's application was brought on the grounds set out in the body thereof and on the affidavit of the plaintiff that was sworn on 9<sup>th</sup> October, 2013. The plaintiff contended that he purchased the suit property from one, Jason Nyayiemi Omweri sometimes in the year 2008. He paid transfer fees to Nyamarambe Town Council and had the property transferred to his name. He has since then been paying plot rents for the suit property to Nyamarambe Town Council. He annexed to his affidavit; a copy of Plot Card dated 7<sup>th</sup> December, 2009 issued in his name by Nyamarambe Town Council, a copy of a receipt dated 19<sup>th</sup> February, 2009 issued to him for transfer and plot rent payments for the years 2007 and 2008 and, copies of receipts dated 10<sup>th</sup> February, 2011, 13<sup>th</sup> February, 2011 and 16<sup>th</sup> February, 2012 issued to the plaintiff for payments made for plot rents for the years 2009 to 2012.

2. The plaintiff contended that he has constructed temporary commercial premises on the front half of the suit property which he has rented out to tenants. The plaintiff contended that on 1<sup>st</sup> May 2013 while the plaintiff was on the suit property with masons and other workers whom he had engaged to erect for him a storey commercial building on the suit property, the defendant in the company of a gang of eight men armed with pangas, rungas, jembes and crude weapons trespassed into the suit property and while thereat, harassed and intimidated the plaintiff causing the said workers to flee.

3. The plaintiff reported the incident at Etago Police station which, led to the arrest of the defendant and one, Justus Omwari to assist the police with investigations. The two were released on police bond awaiting finalization of the said investigations by police. On 7<sup>th</sup> May 2013, the plaintiff brought in new workers to continue with the construction works on his storey building aforesaid. Undeterred by his earlier arrest, the defendant this time round brought in some workers to erect some temporary structures on the rear part the suit property thereby blocking the plaintiff's access to the construction site and paralyzing the works as he could not take building materials such as bricks, sand, ballast and timber to the site. For the second time, the plaintiff made a report to Etago Police Station of the incident. When the police officers came to the scene, the defendant and the men he had hired fled. The plaintiff contended that he has severally asked the defendant to stop trespassing on the suit property and to remove the temporary structures that he had erected on the rear part of the suit property but the defendant has not heeded to his demand. The defendant contended that the defendant has no right over the suit property and that the defendant's said unlawful activities has curtailed his right to exclusive and quiet enjoyment and use of the suit property.
4. The plaintiff's application was opposed by the defendant. The defendant filed a replying affidavit sworn on 21<sup>st</sup> November 2013 in response to the application. In his replying affidavit, the defendant contended that he is the owner of Plot No. 34B measuring 25 feet by 100 feet at Riosiri Market within Nyamarambe Division in Gucha South District of Kisii County (hereinafter referred to only as "**Plot No. 34B**") which he purchased from one, Justus Omambi Omwari. The defendant contended that the said Justus Omambi Omwari and Jason Nyanyiemi Omwari who is said to have sold the suit property to the plaintiff are the sons of the original owner of the suit property one, Richard Omwari (deceased). The defendant contended that Jason Nyanyiemi Omwari and Justus Omambi Omwari were entitled to a half share each of the suit property which measures 50feet by 100feet. The defendant contended that Jason Nyanyiemi Omwari sold to the plaintiff his share of the suit property measuring 25feet by 100 feet which he referred to as Plot No. 34A while Justus Omambi Omwari sold to the him (defendant) the remaining 25 feet by 100 feet which he referred to as Plot NO. 34B.
5. The defendant contended that the Plot Card which has been exhibited by the plaintiff in proof of his ownership of the suit property is a forgery as there are no extract of minutes both from the planning committee and the full council meeting to back it up. The defendant contended that no succession had been done with respect to the estate of Richard Omwari (deceased) and as such there is no way his property could have been disposed of to the plaintiff by Jason Nyanyiemi Omwari. The defendant contended that the dispute over the suit property between the two brothers started way back in the year 2009 and that the town council of Nyamarambe had resolved the issue by subdividing the suit property into two portions of 25 feet by 100 feet for the two sons of the Richard Omwari and this explains the two numbers (34A and 34B). The defendant contended that he has also been making payments to Nyamarambe town council for rent for Plot No. 34B. The defendant contended that the plaintiff has failed to meet the conditions for granting the injunction sought.
6. The defendant denied that he has trespassed on the plaintiff's parcel of land and contended that it is the plaintiff who has trespassed on his share of the suit property which measures 25 feet by 100 feet. On 21<sup>st</sup> November, 2013, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The written submissions by both parties were duly file and the same are on record.
7. I have considered the plaintiff's application and the defendant's replying affidavit filed in opposition thereto. I have also considered the rival submissions by the advocates for the parties and the case law cited. This being an application for injunction the only issues that I need to determine are whether the plaintiff has established that he has a prima facie case against the defendant with a probability of success and that he will suffer irreparable harm unless the order sought is granted. In the event that I find the plaintiff's case doubtful, I would determine the application on a balance of convenience. These are the principles that were pronounced in the case of **Giella –vs- Cassman Brown Ltd 1973 E. A 358**.
8. In the case of **Mrao –vs- First American Bank of Kenya and 2 others [2003] KLR 125**, a prima facie case was described as follows:-



**JUDGE**