



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 511 OF 2008**

**DHAMINI LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**TANAD TRANSPORTERS LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUSA HASSAN..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Chamber Summons dated 21<sup>st</sup> October 2008 in which the Plaintiff/Applicant seeks for orders of interim injunction restraining the Defendants from trespassing, occupying, transferring, developing or in any manner whatsoever interfering with all that parcel of land known as L.R. No. 209/11956 situated in Eastleigh, Nairobi measuring 0.1980 hectares (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Bazara Tabulo, a director of the Plaintiff, sworn on 21<sup>st</sup> October 2008 in which he averred that the Plaintiff is the lawful and registered owner of the suit property having been granted the same by the Government of Kenya. He produced a copy of the original Grant No. I.R. 63413 dated 23<sup>rd</sup> September 1994 as well a Certificate of Official Search in respect of the suit property both indicating that the Plaintiff is registered as the proprietor of the suit property. He further stated that he had embarked on the sale of the suit property and negotiations with potential purchasers were underway when the surveyors he dispatched to the suit property with the intention of locating the beacons discovered that a concrete wall on one side and a barbed wire fence on another side had been erected on the suit property. He further averred that the said surveyors were at the instigation of the 2<sup>nd</sup> Defendant arrested and taken to the Eastleigh Police Patrol Base where the 2<sup>nd</sup> Defendant accused them of trespass and warned them against carrying out any further surveys on the suit property. He further averred that the Defendants have put up a sign post on the suit property which indicates that there is “a proposed domestic building ”coming up. He stated that the Plaintiff will suffer irreparable economic loss and damage and will not be able to secure an alternative plot of similar aesthetic, social and sentimental value and the Defendants should be restrained by this court from further trespassing on the suit property.

The Application is contested. The 2<sup>nd</sup> Defendant filed his Replying Affidavit sworn on 25<sup>th</sup> February

2009 in which he stated that he is a director of the 1<sup>st</sup> Defendant. He further averred that the suit property was originally part of L.R. No. 36/IV/R which was originally allotted to Eastsidaz Self Help Group by the City Council of Nairobi (as it then was). He further averred that the said Eastsidaz Self Help Group subsequently sold the suit property to the 1<sup>st</sup> Defendant. He also stated that the City Council of Nairobi (as it then was) gave the 1<sup>st</sup> Defendant a 99 year lease on the suit property. He deposed that the 1<sup>st</sup> Defendant is therefore not a trespasser but a lawful proprietor of the suit property. In support of his claim, he attached a Letter of Allotment dated 5<sup>th</sup> October 1999, a Deed Plan, a Lease dated 27<sup>th</sup> January 2009 and a letter dated 23<sup>rd</sup> February 2009 from the City Council of Nairobi (as it then was) to the Commissioner of Lands. He further indicated that there was therefore a conflict of proprietary interest over the suit property which can only be resolved upon full trial and further upon the joinder of the Nairobi County Government as a party. He therefore sought for this Application to be dismissed with costs.

In further response to the Application, the 2<sup>nd</sup> Defendant filed a Further Affidavit sworn on 4<sup>th</sup> June 2009 in which he averred that the 1<sup>st</sup> Defendant had been issued with a Certificate of Title in respect of the suit property a copy of which he produced. The Certificate of Title he produced was in respect of parcel of land known as L.R. No. 36/IV/107 measuring 0.3444 hectares and was issued on 2<sup>nd</sup> February 2009.

Both the Plaintiff and the Defendants filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”**

In this case, the Plaintiff/Applicant has based its ownership claim over the suit property on a Grant issued by the Government of Kenya to it on 23<sup>rd</sup> September 1994. According to that Grant, the suit property measures 0.1980 hectares. The Defendants also lay claim over the suit property but claim that it is not L.R. No. 209/11956 but is L.R. No. 36/IV/107 measuring 0.3444 hectares. The Defendants also produced a Certificate of Title dated 2<sup>nd</sup> February 2009, among other supporting documentation. Arising from this scenario for determination is the question whether the parcel of land being claimed by the Plaintiff is the same parcel of land being claimed by the Defendants bearing in mind the varying measurements and land reference numbers. This question cannot be determined at this juncture. If this court finds that the parcel of land in question is the same, then there is the question as to which title documents are valid. Again, this issue cannot be determined at this interlocutory stage of the proceedings. In the circumstances, I find that the Plaintiff has failed to establish a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of

**Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”**

I have also noted that whilst this suit and Application were filed on 21<sup>st</sup> October 2008, this Application has remained unprosecuted for well over 6 years. No interim orders have ever been issued in this suit. There is no explanation for the delay in prosecuting this Application and it seems to me that the Plaintiff/Applicant is only keen to obtain interim orders with no real need to see this suit determined conclusively.

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

**DELIVERED AND SIGNED IN NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**MARY M. GITUMBI**

**JUDGE**