



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**LAND AND ENVIRONMENT DIVISION**  
**CASE NO.1290 OF 2013**

**JOHN O. ONEKO.....1<sup>ST</sup> PLAINTIFF**  
**ERICK NYANGAU NYAMBAGA.....2<sup>ND</sup> PLAINTIFF**  
**PETERSON MWANGI KARANJA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**GITUAMBA STORES LIMITED.....DEFENDANT**

**RULING**

The application before this court for consideration is the Notice of Motion dated **29<sup>th</sup> October 2013** brought under **Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**, seeking for orders that the respondent be ordered forthwith to remove the fence partly covering part of **Plot LR No 11591**, and thereafter be enjoined from fencing, occupying or trespassing onto the said parcel of land by a permanent order of injunction pending the hearing and determination of this suit.

This application is grounded on the facts stated on the face of the application and the supporting affidavit of the 1<sup>st</sup> plaintiff herein stating that the plaintiffs were all members of Njiru settlement scheme and have been instructed by the members to institute this suit on their behalf. That the suit property measuring 178 acres was a parcel of land that was set aside by the founding President of the Republic of Kenya Mzee Jomo Kenyatta for the Njiru Settlement scheme which was initially members of the people who worked on the farm then known as Gituamba. That with the assistance of the government the survey plan was drawn and the area set out thereafter the survey department made out the deed plan. He averred that Gituamba Stones Limited has commenced fencing a huge land adjacent to that of the plaintiffs and had purported to proceed with the fencing to include their portion which is clearly distinct and set out and delineated on the survey map. He also added that even though the scheme had been in existence it was just recent that it was registered. He contends that the fence is being put up at a very fast pace and that the defendant had taken part of the plaintiffs land about 500 metres and though no fence had been put up the defendant had dug up holes. That since the plaintiffs are the descendants of the initial workers of the former President Kenyatta they have not had any contact with the Gituamba people as they are working through a company whose entity they did not know. They therefore sought for an order of injunction to stop the ongoing development by Gituamba Stones Limited pending the hearing and determination of issues by the court.

In opposing this application the defendant through its company secretary, **Jacob Ombogi**, stated that the suit is defective and bad in law for the reasons that this being a representative suit on behalf of the members of Njiru leave should first be obtained before instituting suit. That the applicants of this application are busy bodies and have no *locus standi* to present the suit as they have not exhibited any proof that they are the registered officials of the scheme. He also added that the defendant was not the registered owner of the suit property therefore it is non-suited and unnecessarily dragged into these proceedings. He therefore prays that this application and the suit be dismissed **in limine** with costs.

By an order of the court, parties filed their respective written submissions. The plaintiffs/applicants filed their submissions on 15<sup>th</sup> July 2014. They submitted that they have been in the suit property since time immemorial and partitioned the land in accordance with the late President's instructions. They also submitted that the defendant had not denied that they were fencing the suit land and that it had not shown any reason why it should not be enjoined from fencing the suit property. They believe the defendant is hiding behind a third party in committing the said offence. They relied on the case of ***Giella-vs Cassman Brown Limited*** where on *prima facie case*, they submitted that they had established that the defendant had trespassed and was fencing the suit property. That if the defendant is allowed to continue with the fencing and eviction of the plaintiffs and later found by the Court that it did not have the right to do so the plaintiffs would suffer irreparable loss. They further added that this court should opt for the lower risk of injustice in granting the injunction and at the end of the trial if it finds the case against the plaintiffs, it discharges its orders rather than evicting the plaintiffs then later the court establishes that the plaintiffs indeed had a claim re-establishing them would be challenge. They relied on the case of **Suleiman-Vs- Amboseli Resort HCCC No 1078 of 2003** to support their argument. On the grounds of misjoinder, they submitted that no suit should fail on grounds of misjoinder. They also submitted that the defendant admitted fencing the suit property complained of by the plaintiffs so there was no misjoinder. They relied on **Order 9 of the Civil Procedure Rules** which clearly states that **no suit shall be defeated by reasons of misjoinder and that the court should deal with any matter in controversy so far as regards the rights and interests of the parties before it**. They further submitted that the defendant has no right in the suit property but wants to continue with the fencing the suit property. They also relied on **Order 1 Rule 10 of the Civil Procedure Rules** which gives the court the power to deal with issues of misjoinder adding that the court would still order a joinder of a party while making orders that would preserve the parties' position which in this case is injunction.

The defendant filed its written submissions on 8<sup>th</sup> July 2014 whenever it submitted that it was not the registered owner of the suit premises therefore non-suited and unnecessarily dragged into the proceedings. It relied on the case of **Kwame Kariuki & Anor -vs- Hassconsult & 2 others [2014]** in defining a cause of action and added that a cause of action founded against a party who has no interest in the subject matter is defectively incurable. It also relied on the case of **Michael Njenga -vs- Ramjuk Investment Limited** where a court dismissed an application for injunction against a defendant who was not a registered owner of the suit property. The defendant also submitted that the plaintiff did not seek leave to file this suit as it was representative suit. They cited **Order 1 Rule 8** stating that the suit was incompetent. They relied on the case of **El Busaidy -vs- Commissioner of Lands & Others KLR as quoted in Jack Anzaya & 9 Others [2013] e KLR** where the court held that

***“...it is mandatory that leave of the court has to issue before the suit is filed and the court has mandatorily got to make a direction that the notice of the institution of the suit has to be given to all parties concerned preferably through the print media or as the court will deem sufficient”***

Adding that the suit as predicated was defective and should be struck out. The defendant also raised the issue that the plaintiffs had no *locus standi* present this suit since they have not exhibited proof that they are the registered officials of the scheme or that they have authority to bring this suit on behalf of the other members and the authority of the members was not filed. On the registered owner's indefeasible title the defendant submitted that the plaintiffs had failed to prove that they had proprietary interest in the suit property. The defendant further submitted that the suit property is registered in the name of Edge worth Properties Limited and the plaintiff could not logically or otherwise lay claim over the suit property. On the grant of the prayers sought the defendant submitted that the plaintiffs had failed to demonstrate that they had a *prima facie case* with a probability of success therefore the application should

be dismissed with costs.

I have considered the affidavits on record and written submissions together with the authorities relied therein. There are several issues for determination in this application but I shall consider the prayer of injunction against the Defendant on the construction of the fence on **LR No 11591**. First, it is important to determine whether the Plaintiffs have met the thresholds required in the issuance of an injunction. **Order 40 of the Civil Procedure Rules 2010**, allows an applicant to go to court to request for preservation of property pending trial so as to preserve an asset where Defendant who may render a judgment against him nugatory by the disposal of the assets or otherwise disintegrating it prior to the conclusion of the trial.

The principles underlying the jurisdiction of the court to grant an injunction are well enunciated in the case of **Giella –vs- Cassman Brown Ltd (1973)358** where the applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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. It is therefore essential to examine whether the Plaintiff has met the above thresholds in order for an order of injunction to issue.

Have the Plaintiffs made out a prima facie case with a probability of success? In the case of **Mrao -vs- 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 plaintiffs have come to court seeking the orders of this court claiming to have occupied the suit property having worked for the former President Kenyatta in Gituamba farm. They have annexed deed plans of the suit property but they do not have a title deed to claim ownership. Their contention is that the defendant is fencing a huge land adjacent to the suit property which has in the process included some 500 metres. The defendant on the other hand has not disputed that it was constructing a fence on the adjacent property which has encroached on the suit land but have raised the issue that they are not the title holders of the suit property as they have erroneously been enjoined. They annexed a grant which showed that the suit property was registered and belonged to **Edge Worth Properties Limited**. I find that the plaintiffs have failed to prove that they have proprietary interests over the suit property. Their allegation that the land was allotted to them by the first president of the Republic of Kenya is of no probative value as was enunciated in the case of **Wreck Motor Enterprises –vs- Commissioner of Lands & 2 others [1997] e KLR** the Court of Appeal held that,

*“His excellency, the president only approves the application for the consideration by the commissioner of lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance of a letter of allotment pursuant to the provisions held”.*

I am guided by the above the pronouncements of the Court of Appeal. There is a registered owner to the suit property who has not been enjoined in this suit. The law protects a registered owner’s indefensible title. **Section 26(1) of the Land Registration Act 2012** provides that,

*“ The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

1. *on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

**2. Where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme.”**

There is no doubt that the defendant has produced a title deed belonging to a third party who is not a party to this suit. The above legal provision binds this court to find and hold that certificate of title is prima facie evidence of ownership unless it can be challenged on the grounds of fraud or misrepresentation or where the title deed has been acquired illegally, un procedurally or through a corrupt scheme. From the available evidence, the plaintiffs have not been able to demonstrate to this court, albeit at this interlocutory stage, that the title deed produced by the defendant can be challenged on any of those grounds. Those being my finding, I further find that the Plaintiffs have not succeeded in establishing a prima facie case with probability of success at the main trial. Since the plaintiffs have failed to attain the threshold of the first limb of the principles for the grant of injunction, this court will not grant the prayers sought in the plaintiffs Notice of Motion dated 29th October 2013.

Having now considered the Plaintiffs’ Notice of Motion dated 29<sup>th</sup> October, 2013 and written submissions, the court finds the same not merited and the end result is that the said application is dismissed with costs to the Defendant.

Orders Accordingly.

**Dated, Signed and delivered this 11<sup>th</sup> day of December 2014**

**L. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiffs/Applicants

..... for the Defendant/ Respondent

Kamau: Court Clerk

**L. GACHERU**

**JUDGE**