



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 817 of 2012

EDWARD MWANGI IRUNGU.....PLAINTIFF/APPLICANT

VERSUS

ROSE WANJIRU KAMAU.....RESPONDENT/DEFENDANT

RULING

The applicant herein **Edward Mwangi Irungu** has brought this Application dated 8<sup>th</sup> November, 2012 under Order 40 and order 51 (Rule 1) of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act Cap 21 of Laws of Kenya, the Registered Land Act Cap 300 Laws of Kenya and all other enabling provisions of the Law.

The Applicant sought for an order that “*Pending the hearing and determination of this suit, an injunction be issued against the Defendant, her servants, agents, or anyone claiming under her or on her behalf from trespassing, selling, disposing, transferring, leasing, charging or in any manner entering into the said land, remaining and utilizing the said land, in any manner whatsoever in the land reference known as Umoja III Housing Settlement Scheme Plot No. 576.*”

Applicant also sought for cost of the Application.

The Application was premised on the grounds set on the face of the application and on the annexed affidavit of **Edward Mwangi Irungu**.

Among the grounds stated are that: -

- (a) The Defendant has trespassed on the Plaintiff's Land and should be restrained from causing any further waste on the Plaintiff's Land.
- (b) That unless the Defendant is restrained by way of an injunction, she may evoke violence which may lead to blood shed as she has no **good title** as the registered owner of the said plot.
- (c) That the plaintiff is the lawful beneficiary of the Parcel of Land known as **Umoja III Housing Settlement Scheme Plot No. 576**, which is registered in the name of Edwin Gichaga Chege now the seller on whose sale and transfer was effected to the plaintiff and agreement of the sale executed through an agreement dated 6/11/2007.

In his Affidavit, the Plaintiff/Applicant stated that he is the lawful owner and a resident of the Umoja III Settlement Scheme Plot No. 576 vide ID No. 169.

He further averred that the Defendant has invaded his said land by **trespassing, dumping construction**

**materials** and **erecting a permanent structure, clearing Plaintiff's fence** and thereby erecting a foundation on the Plaintiff's plot.

That before 1<sup>st</sup> November, 2012 the Plaintiff had owned the plot *peaceful* without *any interruption*. The Defendant has persistently remained on the said parcel of land despite repeated call for her to remove herself from the said parcel of land. That Defendant has also demolished the beacons and isolated the compound which includes the Plaintiff's demarcation of the plot and has acted with impunity and restricted and barred any of the Plaintiff's members from **entering, utilizing the utilities and keeping the beacon boundaries**. Applicant therefore prayed for the application to be allowed pending the determination of the main suit.

The application was opposed and the Defendant **Rose Wanjiru Kamau** in her Affidavit filed in court on 15/11/2012 averred that the Plaintiff is a stranger to her but she is known to one **Edwin Gichaga Chege** who allegedly sold an unidentified plot to the Plaintiff.

The Respondent admitted that she has been having a dispute with the said **Edwin Chege** over her Plot **No. D176** situated within **Umoja III D** in Nairobi which she was allocated the said plot by the City Council of Nairobi as per annexures R2 (a) and (b).

She further averred that on 18/10/2012, the afore mentioned **Edwin Chege** engaged goons to destroy a building that she had put up on the property and she duly reported the same to Buru Buru Police Station.

The Respondent further stated that she was served with the hearing notice for the application but the application did not have a hearing date and that was meant to mislead the Defendant. That the Plaintiff has attached some documents on ownership of the plot but the same could be obtained anywhere. The Respondent further stated that the documents annexed to show ownership i.e EMI III a copy of *Transfer Form* is of a plot which is not indicated but only shows *Umoja III Settlement Scheme*. That what the Plaintiff presented in court is nothing to show basis of ownership.

The Respondent on her part annexed a copy of Nairobi City Council ownership card annexure R2b which is a letter dated 24/10/2012 from the City Council of Nairobi confirming that the Defendant is the owner of the plot described.

It was the contention of the Respondent that she has a land dispute with one *Edwin Gichaga Chege* and the said *Edwin Gichaga Chege* is the one who sold the suit premises to the Plaintiff and the dispute was over the same property herein.

Respondent further contented that she is already on the ground and has commenced development on the said property and that she had attached documents from a recognized institution whereas the Plaintiff had not.

The Respondent urged the court to dismiss the suit with cost since the Plaintiff has not established a *prima-facie* case and also not shown what damages she would suffer if application is not allowed.

The court has now considered the instant application which is contested. The court has considered the grounds for and *against* the said application and the *relevant* law and the court makes the following findings.

The application herein is brought under **Order 40** of the Civil Procedure Rules which deals with temporary injunctions. Order 40 Rule 1 states as follows: -

“Where in any suit it is proved

(a) That any property in dispute in a suit is in danger of being **wasted,damaged** or **alienated** by any party to the suit, or .....

(b) That the Defendant threatens and intends to **remove** and **dispose** of his property in circumstances affording reasonable probability that the Plaintiff will and may be obstructed and delayed in the execution of any decree that may be passed against the Defendant on the suit;...the court may order grant of temporary injunction to restrain such act or make such order for the purpose of staying and preventing the **wasting, damaging, alienation, sale, removal** and **disposition** of the property as the court thinks fit until the disposal of the suit and until further orders.”

In the instant suit, the applicant has alleged that he is the owner of the disputed parcel of land known as *Umoja III Housing Settlement Scheme Plot No. 576* which he bought from one *Edwin Gichaga Chege* as per annexure EMI 3.

He further alleged that the Respondent (**Rose Wanjiru Kamau**) has illegally entered into the said parcel of land without *good title* and has started to construct a permanent building on it thus interfering with Plaintiff's quiet possession of the said land. The Respondent has not disputed that fact but averred that she is a *bonafide* owner of this parcel of land as per annexure R2 (a) & (b).

The principles for granting a temporary injunction are well set out in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358.**

The Applicant must satisfy the court that: -

(a) He has a prima-facie case with probability of success.

(b) That he stands to suffer damages which cannot be compensated by way of damages.

(c) If the court is in doubt to decide the application on the balance of convenience.

Order 40 Rule 1 provides that “*It should be proved that the property in dispute is in danger of being wasted, damaged, or alienated.*”

The property in dispute herein as per the Plaintiff's application is *Umoja III Housing Settlement Scheme Plot No. 576*. The Defendant alleged the land in dispute is *Plot NO. D176* situated in *Umoja III D*. The Applicant contented that he bought the land parcel from one *Edwin Gichaga Chege* as per annexure EMI I & II. There is indeed a copy of the sale agreement dated 6/11/2007 signed by both *Edwin Gichaga Chege* (seller) and *Edward Mwangi Irungu* (buyer). The plot indicated in the sale agreement is *No. 576 Umoja Housing Settlement Scheme*. The Applicant also obtained a transfer of the said plot from the seller as per the transfer form dated 19/11/2007 **annexture EMI 3** and the plot identification certificate No. 169 (**annexture EMI I**).

The Applicant has been able to show through the three annexures that he bought *Plot No. 576 Umoja III Settlement Scheme* from one *Edwin Gichaga Chege* in the year 2007.

The Defendant has indicated in the Affidavit that she owns *Plot No. D176* also in *Umoja III*. This fact was buttressed by annexures R2 (a) & (b). she also admitted that she has a land dispute with one *Edwin Gichaga Chege* who allegedly sold land to the Plaintiff herein. What is not clear hereto is whether *Plot No. 567* is the same as *Plot No. D176* owned by the Defendant.

It is also not in doubt that the Defendant/Respondent has taken possession of the Plot in question and has started *construction work*. The Plaintiff/Applicant claims this parcel of land having allegedly bought it from one *Edwin Gichaga Chege*. The Defendant/Respondent is constructing on it. The said construction changes the **Status Quo** of the Plot. If Defendant continues with the construction and completes the same and the Plaintiff/Applicant herein succeeds in his claim, then it would be difficult for the Plaintiff/Applicant to execute the Decree as the land will be no longer vacant. The *status quo* will have changed.

The Plaintiff/Applicant has demonstrated through annexures EMI I, II & III that he purchased land parcel

No. 576 Umoja III Settlement Scheme from one Edwin Gichaga Chege. He has therefore satisfied the court that he has a *prima-facie* case with probability of success.

There is evidence that the Defendant has started constructing a *permanent structure* on the suit property. That will change the *status quo* of the suit property as it will be no longer vacant. Plaintiff/Applicant may find it difficult to execute a Decree in the event he emerges successfully in his claim.

Plaintiff/Applicant therefore stands to suffer damages which cannot be compensated by way of damages.

The Defendant/Respondent alleged that she is the *bonafide* owner of the suit land. She has documents to demonstrate that. However the issue of ownership herein needs to be canvassed through a full hearing.

Having now considered the instant application brought by the Applicant, the court finds that the Applicant has been able to satisfy to the court that he has a *prima-facie* case with high probability of success as set out in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** and later considered in the case of **East African Development Bank vs Hyundai Motors Kenya Ltd Civil Appeal No. 194 of 2004.**

Consequently the court finds that the Applicant's application has merit and allows it in terms of prayer No. 3 only. Costs be in the cause.

Main suit be set down for hearing expeditiously so that the issue of ownership of the suit property can be determined without delay.

Dated, signed and delivered this 15<sup>th</sup> day of January, 2013

**L.N. GACHERU**  
**JUDGE**

In the Presence of:

.....for the Plaintiff/Applicant

.....for the Defendant/Respondent

.....Court clerk