



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 548 of 2012

JOSEPH KITINGU MAKAU PLAINTIFF

VERSUS

JOSEPHINE WANJIKU MWANGI.....DEFENDANT

RULING

The application for determination is a Notice of Motion dated 27th August 2012, brought by the Plaintiff under Rule 3(2) of the High Court (Practice & Procedure Rules), Order 40 Rules 1, 2, 3 and 4 and Order 5 Rule 17 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The application is supported by the affidavit of Joseph Kitingu Makau, the Plaintiff herein, deponed to on the same date. The application seeks the following orders:-

1. That a temporary injunction does issue restraining the Defendant from further trespassing on, building, constructing, developing and/or whatsoever dealing or interfering with the Plaintiff's plot No. 158 located in Gathera along Kangundo Road, Kayole, Nairobi pending the hearing and determination of the main suit.
2. That a mandatory injunction do issue directing the Defendant from erecting, building or further interfering with the Plaintiff's plot No. 158 located in Gathera, along Kangundo Road, Kayole, Nairobi unconditionally and forthwith.

The grounds for the application are that the Plaintiff is the lawful owner of the suit property and the Defendant has trespassed on the said property and commenced construction on the same. The Plaintiff provided details of his acquisition of the suit property in his supporting affidavit and in a supplementary affidavit sworn on 5th November 2012. He claims to have bought the said plot from Malimugu Jua Kali Association Development Project which later changed to Gathera Self Help Group, and was issued with share certificates which he annexed as evidence. He also annexed evidence of photographs showing the structures developed on the suit property by the Defendant, whom he claimed is the owner of a different plot namely plot 161.

The Defendant responded to the application in a replying affidavit sworn on 12th October 2012 and a further affidavit sworn on 10th December 2012. The Defendant claims that she has no interest in plot 158, that the Plaintiff was not aware of the location of his plot, and that the photographs he has provided in evidence are of houses on Plot 161. Further, that she had never been allocated Plot 161, which is allocated to another person. The Defendant also alleged that the share certificates annexed by the Plaintiff were fake and did not originate from Gathera Self Help Group.

The parties filed written submissions in which they reiterated the above arguments. The Plaintiff's counsel in submissions dated 20th November 2012 argued relying on various judicial authorities including **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** and **Cut Tobacco Kenya Limited vs British American Tobacco (K) Ltd, Civil Appeal No. 1260 of 2000** that he had established his case to the required standards, and that the Defendant had admitted that the suit property belonged to him. The Defendant's counsel submitted in written submissions dated 10th December 2012 that the Plaintiff has no cause of action against the Defendant, and had not met the applicable principles for the grant of an injunction.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. At this stage what I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** as to the grant of a mandatory injunction.

In the case of a temporary injunction, the requirements are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. For a mandatory injunction to issue that there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff in his Complaint dated 27th August 2012 claims to be the owner of the suit property, and is seeking a permanent injunction against the Defendant on this basis. He has brought evidence of the sale agreement entered into to purchase the suit property and share certificates issued to him in support of his claim. The Plaintiff's claim to the suit property is not contested, and what the Defendant disputes is the location of the said property, which she alleges to be plot 161 and not plot 158. The Defendant also denies being the owner of or having any interest in any of the disputed plots.

I find that the Plaintiff has established a *prima facie* case to the extent that he has produced some evidence of allocation of the suit property, and to the extent that the Defendant has shown no entitlement to the suit property, or evidence in support of her allegations as to the location of the suit property. Evidence has also been brought to show the structures on the suit property, which the Plaintiff states were put up by the Defendant.

This is however not a clear case to justify the grant of a mandatory injunction in the terms sought, which will have the effect of determining the suit herein with finality. The Plaintiff still needs to prove his case on a balance of probabilities and the Defendant should be given the opportunity to cross-examine him on his evidence.

The Plaintiff's application dated 27th August 2012 is therefore only allowed in part in terms of prayer 2 thereof, and the Defendant is hereby restrained from further trespassing on, building, constructing, developing and/or whatsoever dealing or interfering with the Plaintiff's plot No. 158 located in Gathera along Kangundo Road, Kayole in Nairobi, pending the hearing and determination of the suit herein.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____11th____ day of ____March____, 2013.

P. NYAMWEYA
JUDGE