



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 1039 of 2012**

**ESTHER MUKAI MWENDWA .....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING**

1. Coming up before me in this case is a Notice of Motion dated **21<sup>st</sup> December, 2012** brought by the Plaintiff/Applicant under Section 1A, Order 40 Rules 1, 2 and 4 of the Civil Procedure Act and Rules and all other enabling provisions of Law. The application seeks a temporary injunction restraining the Defendant from interfering with **the property known as L.R No. 209/9943 Parklands (the “suit property”)** pending the hearing and determination of this suit.

2. The application is premised upon the Supporting Affidavit of the Plaintiff sworn on 21<sup>st</sup> December, 2012. In it, the applicant terms herself as the beneficial owner of the suit property having occupied it on or about the year 1981 and has been in continuous, uninterrupted and peaceful possession thereof since that year. She quite clearly admits that she took possession of the suit property without force, without secrecy and without title. She concedes as to having filed an originating summons in **HCC ELC NO. 667 OF 2009** in which she is now seeking title to the suit property under the principle of adverse possession. She further swore that there are in fact two individuals who are each claiming ownership over the suit property in **HCC ELC NO. 472 OF 2009** and that they each have a Title Deed over the suit property. She averred that both suits are ongoing in the Courts of Law and that the same are scheduled for hearing in 2013.

She further swore that the Defendant demolished the structures at the suit premises on 20<sup>th</sup> December, 2012 but the police intervened to stop the demolition.

She swore that the Defendant did not notify her of its intention to demolish her structures and had even given her licenses to occupy and work on the suit property. She concluded by stating that if the Defendant forcefully evicts her from the suit property she will suffer irreparable harm, loss and damage.

3. The application is contested. The Defendant filed their Reply Affidavit sworn by Karisa Iha on 14<sup>th</sup> January, 2013, whereby they stated that the Plaintiff/Applicant had not demonstrated how she is the beneficial owner of the suit premises and as such lacks *locus standi* to institute this suit. It further swore that the Plaintiff/Applicant did not comply with the provisions of the Physical Planning Act by failing to obtain development approvals and that any developments without its approval is illegal. The Defendant further averred that it is mandated by law to regulate any Physical Planning and Developments within its jurisdiction pursuant to Section 29 of the Physical Planning Act.

4. Both the applicant and the Defendant have filed their written submissions herein and I have considered the same.

5. I have heard the rival arguments on the issue as to whether I should grant the applicant with a temporary injunction stopping the Defendant from evicting the applicant from the suit property and demolishing the structures thereon.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of **GIELLAVERSUS 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.”***

6. Has the Plaintiff 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:

***“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.”***

7. Looking at the facts of this case, it is difficult to conclude that the Plaintiff/Applicant has established that she has a legal right which has been infringed.

The facts show that she does not own the suit property in the sense that she does not hold any title document in respect of the suit property. Her only claim to ownership of the suit property is through a suit she has filed claiming ownership on the principle of adverse possession. As at now, this suit has not been determined in her favour and the best she can do right now is speculate on the expected outcome thereof. No one knows how the suit shall be concluded. Filing suit claiming ownership through adverse possession does not confer upon her any legal right over the suit property. Accordingly, as of now, this Court finds that she has not established a prima facie case with a probability of success. Having established that the first requirement has not been met, this Court sees no need to interrogate the other requirements for the grant of an interlocutory injunction.

8. In light of the above, the application dated 21<sup>st</sup> December, 2012 is dismissed. No order as to costs

**SIGNED & DELIVERED THIS 8<sup>TH</sup> DAY OF MARCH 2013.**

**MARY M. GITUMBI  
JUDGE**