



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 248 of 2012

IN THE MATTER OF LAND TITLE NO .L.R NO. 209/4843/10

AND

IN THE MATTER OF SECTION 37 AND 38 OF THE LIMITATION OF ACTIONS ACT
(CHAPTER 22 OF THE LAWS OF KENYA)

JOSEPH MWANGI NJERI.....PLAINTIFF

VERSUS

KIMANI MUNGAI.....DEFENDANT

RULING

The Plaintiff Joseph Mwangi Njeri has brought a Notice of Motion dated 10th May, 2012 under Sections 3A and 63(c) and (e) of the Civil Procedure Act and Order 40 rules 1, 2, 3 and 4 of the Civil **Procedure Rules** seeking the following orders:-

- a) Spent.
- b) That the Defendant, his agents and servants be restrained by an order for temporary injunction from pulling down the workshop sheds and structures used by the Plaintiffs and his employees and or interfering with the business of the Plaintiff on Plot No. L.R. 209/4843/10.
- c) That the officer commanding Makongeni Police Station Nairobi and the officer commanding Industrial Area Police Division be served with these orders to ensure observance of law and order and to ensure compliance.
- d) Costs be provided for.

The application is based on the grounds on the face of the application and the supported by the affidavit of the Plaintiff, Joseph Mwangi **Njeri** sworn on 10th May, 2012 in which he avers that; he is a businessman and specialises in mechanical engineering and manufacture, repair and supply of engines generally. That his said business occupies about 0.10 acre of plot known as L.R. No. 209/4843/10 and has annexed 'JMN-1' which he refers to as a **certified copy of extract** of title to that effect. He states that he entered upon and took possession of the portion of land sometime in the year 1994 which he has occupied and lived in to date i.e. for a period of over twelve (12) years now without any interruption. He states that sometime in the month of May and June, 1997. He put a gate and fenced the area he occupies. He has also put up a workshop, sheds and fixed machines on the said area. A few weeks after fencing, a man who identified himself as Eddy Ndungu Kimemias visited his premises and claimed being the registered owner

of the suit property. Eddy Ndungu Kimemia found him in the presence of **Joel Nganga Kabogo**.

In opposition to the Plaintiff's application, the Defendant has filed replying and supplementary affidavits sworn by Eddy Peter Kimemia on 15th June, 2012 and 19th November, 2012 respectively. He avers that he is the Defendant's donee vide a power of attorney registered as P/A 5848. He states that on the 11th May, 2012, the Plaintiff was granted interim orders restraining the Defendant from pulling down the workshop, sheds and structures on the suit parcel of land used by the Plaintiff and his employees and/ or interfering with the Plaintiff's business operated thereon. That at the time the interim orders were issued, the Plaintiff and other tenants of the suit premises had already vacated the premises. That the Defendant fully complied with the said interim orders and did not instruct the District Officer Makadara Division or any other person to destroy the Plaintiff's property and allegations to the contrary are false and geared to misleading this court. That it is highly unlikely that the District Officer Makadara Division took such action particularly as first, the Plaintiff has failed to adduce any of the conventional photographic evidence that would be expected of a bona fide and proper claim and secondly, as at the time of issuance thereof, the Plaintiff was not in occupation of the suit premises. That as this matter was before this court on 28th May, 2012, which is after the annexed photographs were taken, if indeed the Plaintiff's property had been damaged and/ or he had been evicted from the suit property his advocates were present and would have brought this factual matter to the attention of this honourable court. That the Defendant and he are strangers to the provincial administration of this country, the D.O Makadara is not subject to their instructions but rather those of his superiors. He contends that the suit property was not grabbed. That he has not been requesting and or colluding with the city council of Nairobi and or its employees to interfere with the suit premises and or the Plaintiff's business.

He states further that the District Officer's letter dated 4th June, 2012 has been misrepresented by the Plaintiff as the directives in the said letter were not only directed to the Plaintiff but to both the Plaintiff and the Defendant. That the Plaintiff who seeks to vary the said orders as in the present application he prays to be allowed to commence construction on the suit premises and to be allowed into the premises the Plaintiff vacated from April, 2012. That as the Plaintiff was not in occupation of the suit premises at the time of issuance of the interim orders of 11th May, 2012, his alleged loss and damages is not genuine and is clearly an afterthought. In the supplementary affidavit, he avers that the question of the Defendant's nationality raised by the Plaintiff is not relevant to the pending interlocutory application. That it is disingenuous for the Plaintiff to question the identity of the person he has sued at his stage or at all, as such concerns should have been dealt with prior to the institution of the suit. That the copies of the Defendant's passport exhibited in the Replying affidavit of 15th June, 2012 clearly show annotations of the Defendant exit from Kenya on 19th January, 2004 and entry into United States of America on 20th January, 2004. That therefore, the Plaintiff's allegations to the contrary are false whose only possible intention is to mislead this court. Similarly, to the extent that the Plaintiff has full knowledge that the deponent is neither in occupation of the suit premises nor has he stated that in his replying affidavit of the Plaintiff is intentionally making false averments to this court. That the Plaintiff is being pretentious in trying to challenge the validity of the decree issued in high court civil case No. 1162 of 1997 through these proceedings as he has actual and/ or constructive knowledge that the same can only be done via review in those proceedings or by appeal.

Temporary orders of injunctions that are granted on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally. The object of the interlocutory injunction is to protect the applicant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. Grant of an interim relief in regard to the nature and extent thereof depends upon the facts and circumstances of each case as no strait-jacket formula can be laid down. There may be a situation wherein the Respondent may use the suit property in such a manner that the situation becomes irretrievable. In such a fact situation, interim relief should be granted. Grant of temporary injunction is governed by three basic principles, i.e. prima facie case, balance of convenience, and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case, but it may not be appropriate for any court to hold a mini trial at the stage of grant of temporary injunction.

I have carefully read the pleadings filed by the parties in support of their positions in this case. I have also considered the rival arguments made by the learned counsel for the Plaintiff and for the Defendant. The issue for determination by this court is whether the Plaintiff had established a case so as to entitle this court to grant him the orders of interlocutory injunction sought. The principles to be considered by this court in deciding whether or not to grant the orders of temporary injunction are well settled as was held in the case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A 358**. In the present case, the Plaintiff/ applicant claims ownership of a portion of L.R. No. 209/4843/10 measuring approximately 0.10 acres by way of adverse possession. He claims that since he started occupying the said portion in the year 1994 more than twelve years have lapsed without any interference. That it was until few weeks after fencing the area around May and June, 1997 that he was approached by one Eddy Ndungu Kimemia who claimed ownership of the suit land. The Plaintiff other than making the allegations therein has put forth no evidence to prove his entitlement to the suit property. The Defendant on the hand has deponed that the Plaintiff does not own the suit property and in fact is not in occupation at the moment. To support his allegation he has availed to court photographs of the suit property which clearly show no developments alleged by the Plaintiff or at all. Having carefully evaluated the affidavit evidence in this case and the submissions made by learned counsels of the parties to this application, it is clear to this court that the Plaintiff has not been in occupation of the suit parcel of land or has no right to the same. There is no nexus at all between the Plaintiff and the registered lease ('**JMN- 1**') referred to as an extract of title in the Plaintiff's supporting affidavit to prove his entitlement to the suit property. In view of the above, it is evident that the Plaintiff has not established a prima facie case. This court cannot therefore grant him the orders of injunction. It would be unnecessary for this court to consider the other principles enunciated in the **Giella vs. Cassman Brown Case**. The upshot of the above is that the Plaintiff's application for interlocutory injunction lacks merit and is dismissed with costs to the Defendant. Orders accordingly.

**R. OUGO
JUDGE**

Dated, signed and delivered this 16th day of April 2013

In the presence of:-

.....Plaintiff/Applicant

.....Defendant/Respondent

.....Court Clerk