



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)**

**ENVIRONMENTAL & LAND CASE 358 OF 2013**

**JAMES NYAGAH KAMAU .....PLAINTIFF**

**VERSUS**

**1. STEPHEN ONYINO MKOBE .....1<sup>ST</sup> DEFENDANT**

**2. COMMISSIONER OF LANDS..... 2<sup>ND</sup> DEFENDANT**

**RULING**

Coming before me for determination is a Notice of Motion application dated 15/3/13 which has been brought by the Applicant under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the Law. It seeks the following order:-

a) Spent

b) That the Defendants/Respondents by themselves, their Servants and or Agents be restrained from evicting the Applicant from or interfering with, constructing, selling, disposing, charging, transferring or in any other manner alienating the property known as plot No. 257 (new Survey No. 944) now known as Nairobi/Block/157/944 which is a subdivision of the parcel of land originally known as L. R. 11379/3/R (hereinafter referred to as the "Suit Property") until the hearing and determination of the application.

c) That the Defendant/Respondents by themselves, their servants and/or agents be restrained from evicting the Applicant from or interfering, constructing, selling, disposing, charging, transferring or in any other manner alienating the Suit Property until the hearing and determination of this Suit.

d) Costs of this Application.

The Application is supported by the Supporting Affidavit of JAMES NYAGAH KAMAU sworn on 15/3/13 in which he states that on 25/6/10 he purchased the Suit Property from one RAYMOND WAWERU MWANGI. He further swore that on or about 26/6/11 his house was broken into and his documents, including his original Allotment Letter, Sale agreement, Power of Attorney and receipts were stolen whereupon he reported the matter to Kayole Police Station vide OB No. 28/26/6/2011. He further averred that he followed up the matter with Kiambu Dandora Farmers Company Limited who issued to him copies of the documents in their possession. He further stated that he was in the process of pursuing issuance of the Title and he was issued with a Letter of Allotment in his name dated 12/8/2011. He further swore that he was greatly shocked when he went to the Suit Property and found some agents who informed him that the Suit Property had been sold to someone else who was preparing to start

building. He stated he started following up this matter and found out the 1<sup>st</sup> Defendant works with the Ministry of Lands at Ardhi House and he is the one who had acquired the Suit Property. He further stated that he learnt that the purported sale transaction was carried out in the offices of M/S Mariaria & Company Advocates and was able to obtain a copy of the purported Sale Agreement. He averred that he was not the one who sold the Suit Property or signed the Sale Agreement and the same is a forgery. He further stated that the 2<sup>nd</sup> Defendant issued a Title to the 1<sup>st</sup> Defendant even though he was not the one who sold the Suit Property. He further stated that he was apprehensive that 1<sup>st</sup> Defendant may alienate his Suit Property unless restrained by an order of this Honourable Court.

The Motion is uncontested. Though service was effected upon both Defendants, none of them filed Replying Affidavits or attended Court on the date slated for the hearing of the application.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of **Giella v. Cassman Brown [1973] EA** 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.”***

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **Mrao v First American Bank of Kenya and Two 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 “.***

Has the Plaintiff/Applicant established a prima facie case with a probability of success? The Plaintiff has produced a copy of the Letter of Allotment dated 12/8/11 which is in his name and issued by the Department of Lands allocating him the Suit Property. He also produced a copy of the Sale Agreement entered into between himself and the previous owner indicating how he came to be the Proprietor of the Suit Property. Further, he attached the purported Sale Agreement between him and the 1<sup>st</sup> Defendant which was purportedly signed by him. This looks likely to be a forged signature as the signature on the earlier Sale Agreement is quite different. Whereas further evidence will have to be adduced at the full trial to enable the Court reach a just decision, at this juncture, this Court is satisfied that the Plaintiff/Applicant has established that he has a ‘genuine and arguable case’ which “calls for an explanation or rebuttal from the latter”. This court finds that he has established a prima facie case with a probability of success.

Will the Plaintiff/Applicant suffer irreparable injury which cannot be adequately compensated by an award of damages? It emerges quite clearly that the Plaintiff/Applicant faces a real danger of being evicted out of the Suit Property. Further, land is unique and no one parcel can be equated in value to another. It may be possible to ascertain the monetary value of the Suit Property. However, I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right of breach. See **J. M. GICHANGA v CO-OPERATIVE BANK OF KENYA LIMITED [2005] eKLR**. Accordingly, I find that this condition has also been satisfied.

The Court being not in doubt, there is no reason to consider the issue of deciding on a balance of convenience.

In light of the foregoing, this court allows the Plaintiff/Applicant’s application as prayed.

**SIGNED AND DELIVERED AT NAIROBI ON THE 17<sup>TH</sup> DAY OF MAY 2013**

**MARY M. GITUMBI**

**JUDGE**