



**REPUBLIC OF KENYA**

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

**Environmental & Land Case 56 of 2012**

**PHILIP KAMUNYA & 24 OTHERS.....PLAINTIFF**

**=VERSUS=**

**PATMWA LIMITED.....DEFENDANTS**

**RULING:**

1. By a notice of Motion Application dated 1/2/2012, the applicants/Plaintiff's herein sought for orders that:-
  - a) A temporary injunction be issued restraining the defendants  
( **Patmwa Ltd**) from evicting the Plaintiffs from the parcel of land known as **LR No. 9042/126**( suit land) or from demolishing or fencing the plaintiff's buildings or interfering with the plaintiff's possession of the same or alienating, transferring, disposing off or dealing with the suit land in any manner whatsoever pending hearing and determination of this suit.
  - b) Costs of the application.
2. The application was brought under section **1A, 1B, 3A, and 63**

*(c &e) of the Civil Procedure Act, Order 40 Rule 1,2 and 9 of the Civil Procedure Rules and all enabling provisions of the law.*

The Application was supported by the grounds on the face of the application and on the Supporting Affidavit of **Nelson Ikhute** . Among the grounds for the support of the application are that the Plaintiffs' have occupied the suit land since 1992 and have constructed dwelling houses thereon. That further the Defendant has threatened to forcefully evict the Plaintiffs by use of any means necessary to demolish the Plaintiffs buildings and the Defendant has issued a Notice to Vacate. The Plaintiffs stated that they have a prima facie case by virtue of their continuous open un interrupted occupation of the suit land. That the Plaintiffs will suffer irreparable loss unless the Defendant is restrained from evicting them and that in the interest of Justice, the orders sought should be granted.

3. In his Supporting Affidavit , **Nelson Ikhuta** the 3<sup>rd</sup> Plaintiff stated that since 1992, the Plaintiffs have occupied the suit land **LR No. 9042 /126** and have put up structures thereon and when they occupied the land it was un occupied and so they assumed the land belonged to the Government or the City Council of Nairobi.

The Deponent averred that the plaintiffs have since been in continuous and un interrupted possession of the suit land and on 27/1/2012 the defendants representatives went to the suit land and claimed ownership

and issued a notice that the Plaintiff's do vacate the suit land as evident from annexures marked **NI 2**. Further that by virtue of their continuous occupation of the suit land, the plaintiffs have acquired prescriptive rights by way of adverse possession having occupied the suit land for over 12 years.

The Deponent further averred that it is fair and just to protect the **Status Quo** by an order declaring that the plaintiffs are entitled to be registered forthwith as the owners of **LR No. 9042/126** and the Defendant to transfer the said plot to the plaintiffs and in default the Deputy Registrar be authorized to do so and / or sign all document to effect the said transfer to the plaintiffs. He further stated that there is a danger that the Defendant will use all means necessary to illegally evict them and their families as evident from annexures **M3**.

4. The application was not opposed as it was alleged that the Defendant though served did not Enter Appearance or file Replying Affidavit.

I have considered the Affidavit of Service sworn by **Francis M Njoroge** who alleges that on 27/2/2013, he received **Hearing Notice** with instructions to serve the Defendant. That he proceeded to Gikomba area at **Raki Investment** where he met one **Ruth Kabura Mwangi** who is one of the Directors of **Patmwa Investments**.

That she received the Hearing Notice but declined to sign the documents. There is no evidence that **Ruth Kabura Mwangi** is one of the **Directors of Patmwa limited**. I find the return of service not proper and I decline to find and hold that the Defendant was properly served and therefore declined to attend Court.

5. Supposing the return of service was proper, has the Applicants' herein met the threshold Principles for granting of interlocutory orders?' The Applicant seeks for Interim Injunction against the Defendant pending the hearing and determination of the suit. The principles for granting an interlocutory Injunction are clearly articulated in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358**, where it was held that an applicant must demonstrate a prima facie case with probability of success. Secondly, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if there is doubt, the Court to decide on a balance of convenience.

The application is also premised under **Order 40 Rule 1 of the Civil Procedure Rules** which provides that:-

"Where in any suit it is proved by affidavit or otherwise:-

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

(b) *That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may order grant of a temporary injunction to restrain such act....*

6. The applicant herein alleged that they Defendant who is the registered owner of the suit property as per annexure **NI 2** has threatened to evict the Plaintiffs herein. The Defendant was registered as the proprietor on 1/2/1987.

The applicants also allege that they started to occupy the suit land in 1992 and have been in occupation since then. They also allege that the Defendant gave them a Notice to vacate as per NI3. That Notice of eviction is allegedly dated 27/1/2012 but not signed by or for Patmwa ltd. It is not evident that Patmwa Ltd issued such a Notice. Without evidence of Issuance of such Notice, it is not evident that the plaintiffs are in danger of being evicted. The Plaintiffs have not brought any evidence to prove that they have been in occupation of the suit land since 1992. The plaintiffs have not therefore established a **prima facie case** with probability of success. There is no evidence of threat of eviction and so no evidence that plaintiffs will suffer irreparable loss or injury which cannot be compensated by way of damages. In the instant case,

the balance of convenience cannot tilt in favour of the plaintiffs/ Applicants. The applicants should set the main suit for hearing after proper service so that the issue at hand can be solved once and for all.

Having considered the Notice of Motion dated 1/2/2012, the Court finds that the Applicants have not met the threshold principles for grant of temporary injunction. Consequently, the court *dismisses the said notice of Motion dated 1/2/2012.*

- Costs in the cause.

Dated, signed and delivered this 17<sup>th</sup> day of May 2013

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

In the Presence of:-

.....For the Plaintiff/Respondent

.....For the Defendants

.....Court Clerk

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