



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC NO. 881 OF 2012**

**DANIEL N NDIRANGU.....PLAINTIFF**

**=VERSUS=**

**SIMON MWANGI T/A**

**NACANA HARDWARE.....DEFENDANT.**

**RULING:**

1. The Applicant herein **Daniel Maina Ndirangu**, has brought this Notice of Motion dated 22<sup>nd</sup> November, 2012 Under **Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap 21 laws of Kenya, Order 40 Rules 1 & 2, Order 51 Rule 1 of the Civil procedure Rules 2010** and all other enabling provisions of the law. The applicant has sought for orders:-
  - a. That pending the inter-parties hearing and determination of this suit, the 1<sup>st</sup> Defendant/Respondent either by himself, his agents, servants, or in any manner howsoever be evicted from all that Parcel of Land known as **Plot No.1271 A**, and be restrained from remaining on, entering into, constructing and/or interfering with the Plaintiff's quiet possession, occupation enjoyment, ownership, legal contractual and equitable rights and interest on all that parcel of land known as **Plot No. 1271 A** and/ or claiming interests rights or in any way dealing with or trespassing unto or continuing further trespass on the plot.
  - b. Costs of the application be borne by 1<sup>st</sup> Defendant.
2. The application was premised on the following grounds and also supported by the affidavit of **Daniel Maina Ndirangu**. That under the records held by the 2<sup>nd</sup> Defendant, the Plaintiff is the proprietor of Land known as **Plot No. P 1271 'A'** and Plot No.

**P1 351'A'** and has been issued with Share Certificate No. 1097 for 2 ( two) Shares. That on or about September, 2012, the Plaintiff visited **Plot No. 1271 'A'** when he discovered that the 1<sup>st</sup> Defendant erected and/or occupied a building in the said Plot and he operates a hardware business that the 1<sup>st</sup> Defendant has refused to move out of the Plot and 2<sup>nd</sup> Defendant has refused to evict the 1<sup>st</sup> Defendant. That Plaintiff has a **prima facie case** and will suffer irreparable loss if 1<sup>st</sup> Defendant is not restrained.

3. The 1<sup>st</sup> Defendant filed his Defence and denied all the allegations in the Plaintiff. He also filed his Replying Affidavit stated that he is only a Tenant and is not aware of the allegations made by the applicant. That applicant does not have any power to evict him as 1<sup>st</sup> Defendant is only a tenant of one **Kibathi** who is the Original Owner.
4. Parties agreed to canvass the Notice of Motion by way of written submissions. The applicant filed

his written submissions on 25/4/2013. However the 1<sup>st</sup> Defendant failed to comply. The Court will rely on the written submissions and the pleadings by the parties herein.

5. From annexure **DMI**, there is no doubt that the applicant herein **Daniel Maina Ndirangu** owns **Plot No. 1271 A & 1351 "A" at Witeithie Gwaka Investment Limited**, as per that Share Certificate. There is also no doubt that 1<sup>st</sup> Defendant occupies **Plot No. 1271 'A'** as alleged by the Plaintiff.

The 1<sup>st</sup> Defendant however, contends that he is a tenant of one **Kibathi** who is the rightful owner of the premises. However, the 1<sup>st</sup> Defendant did not attach any document to show that he is indeed a tenant, nor did he attach the **Share Certificate** for the alleged Kibathi his landlord. Without such proof that 1<sup>st</sup> Defendant is a Tenant, then the plaintiff evidence remains uncontroverted.

6. The Applicant has attached a Share Certificate confirming that he owns **Plot 1271'A'**, the suit property. Applicant has therefore demonstrated he has a prima facie case with high probability of success.

7. The 1<sup>st</sup> Respondent continues to occupy the suit property. The Applicant therefore, has been denied the use of the same, and even after persistent requests to move out, the 1<sup>st</sup> Defendant has failed to do so. The Applicant therefore, will suffer irreparable loss which cannot be compensated by an award of damages.

The Court finds that, the 1<sup>st</sup> Respondent did not file his written submissions and nor attach any documents to confirm that he is a Tenant in the said premises.

Having considered the Notice of Motion dated 22<sup>nd</sup> November, 2012 the Court finds that, the Applicant has satisfied the Court that he deserves to be granted the **Orders sought**. I rely on the guiding principles laid down in the case of **Giella Vs Cassman Brown Ltd [1973] EA 358**.

Consequently, the Court allows the Applicant's Notice of Motion dated 22<sup>nd</sup> November, 2012 in terms of Prayer No.3 .

- Costs in the Cause.
- It is so ordered.

Dated, Signed and delivered this 21<sup>ST</sup> day of June, 2013.

**L.N. GACHERU**

**JUDGE**

**In the Presence of:-**

..... For the Plaintiff

.....For the Defendant

Anne :Court Clerk

**L.N. GACHERU**

NVI.