



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 238 OF 2013**

**JOHN MUGAI SON OF SIDONEY MUNGAI.....APPLICANT**

**-VERSUS-**

**TIMOTHY MACHARIA MAHINDI.....1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA.....2<sup>ND</sup> DEFENDANT**

**FERRARI REAL ESTATES LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 15<sup>th</sup> February 2013 brought under Order 40 Rules 1,2 and 4, Order 51 of the Civil Procedure Rules, Sections 63 (c) & (e), 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders:

1. Spent
2. Pending the hearing and determination of this application, the Respondents, either by themselves, their servants, agents, employees or otherwise howsoever be restrained from selling, alienating, disposing, offering for sale or in any other manner interfering with the Applicant's occupation and quiet possession of property title No. Dagoretti/Riruta/268 (hereinafter referred to as the "Suit Property")
3. Pending the hearing and determination of this suit, the Respondents, either by themselves, their servants, agents, employees or otherwise howsoever be restrained from selling, alienating, disposing, offering for sale or in any other manner interfering with the Applicant's occupation and quiet possession of the Suit Property.
4. This Honourable Court be pleased to issue a declaration that the invasion, entry and/or demolition and looting of the Applicant's property that took place on 5<sup>th</sup> February 2013 on the Suit Property was and remains unlawful.
5. The costs of this application be borne by the Respondents.

The Application is premised on the grounds appearing on the face of the Application and the Supporting Affidavit of John Muigai Son of Sidoney Mungai sworn on 15<sup>th</sup> February 2013 in which he swore that until sometimes in the year 1994, he was the registered proprietor of the Suit Property located at Kawangware area of Nairobi. He further stated that around November 1993, the Suit Property was purportedly sold to the 1<sup>st</sup> Defendant by a financier, Consolidated Finance Limited, which sale is under challenge in HCCC No. 1409 of 1994 which is yet to be determined. He stated that this notwithstanding, he continued to be in possession of the Suit Property to date and has erected several permanent and semi-

permanent houses. He further swore that there are 3 civil suits namely HCCC No. 1409 of 1994, 2422 of 1995 and Miscellaneous Case No. 1284 of 1994 which were consolidated and have been dealt with together and are part-heard. He further swore that it emerged from the said civil suits that the 1<sup>st</sup> Defendant borrowed a sum of Kshs. 2 million from the 2<sup>nd</sup> Defendant and used the Suit Property as the collateral through a charge that was registered on 4<sup>th</sup> November 1994. He further stated that through a court order that was issued by this court on 30<sup>th</sup> January 2001, Garam Investments was restrained from in any way dealing, selling, disposing, alienating by public auction with the Suit Property and that such orders were to remain in force until the full and final determination of the suit. He also indicated that this court had also issued other orders on 9<sup>th</sup> June 2008 restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from dealing, selling, disposing, alienating by public auction or otherwise the Suit Property and that such orders were to remain in force until the full and final determination of an application dated 3<sup>rd</sup> June 2008. He stated that that application is yet to be heard on account of the court file going missing at the registry. He further swore that on 5<sup>th</sup> February 2013, a group of about 50 rowdy youths accompanied by police officers from Muthangari Police Station raided the Suit Property where he resided together with the tenants and demolished some of the buildings standing thereon, looted his house together with those of the tenants, damaged the gate and part of the fence surrounding the property. He further stated that the raiders did not give anyone living on the Suit Property any opportunity to salvage even their personal effects and most of them were stolen in the ensuing barbaric act. He further averred that he was not given the reason for the raid immediately but was invited to visit the police at Muthangari Police Station which he did and was informed that the raid was done under the authority of the court order issued on 25<sup>th</sup> November 2011 by Hon. S.A. Okato Senior Principal Magistrate in CMCC No. 5458 of 2011 at the instance of the 3<sup>rd</sup> Defendant. He further stated that he was not aware of that suit since he has never been served with any document or informed about its existence. He stated that he was also shown a copy of a Certificate of Official Search issued on 19<sup>th</sup> June 2012 which showed that the 3<sup>rd</sup> Defendant was the registered proprietor of the Suit Property having been issued with a title deed around March 2011. He further stated that at the time of the alleged transfer of the Suit Property to the 3<sup>rd</sup> Defendant the injunctive orders issued on 30<sup>th</sup> January 2001 and those issued on 9<sup>th</sup> June 2008 were still in force. He further stated that as a result of the unlawful and barbaric actions of the Defendants, he had suffered massive losses, inconvenience, mental torture and ridicule. He further swore that he was justifiably apprehensive that unless this court grants the prayers sought in the instant application, the Respondents will go ahead and conduct further demolition of the remaining structures where he still resided, thereby occasioning further untold loss and suffering on his part.

The Application is contested. The 3<sup>rd</sup> Defendant filed the Replying Affidavit of David Wainaina Njoroge sworn on 6<sup>th</sup> March 2013 in which he stated that he was the Director of the 3<sup>rd</sup> Defendant. He stated that the 3<sup>rd</sup> Defendant bought the Suit Property from the 1<sup>st</sup> Defendant sometime in the year 2011 at a consideration of Kshs. 20,300,000/-. He stated that before buying the Suit Property, the 3<sup>rd</sup> Defendant conducted a due diligence exercise and obtained a search which showed that the 2<sup>nd</sup> Defendant had a legal charge over the Suit Property. He further indicated that the said search did not show any restrictions, inhibitions and/or cautions whatsoever apart from the legal charge. He also stated that the search did not also show any court order restricting dealings therewith at the time of the purchase. He also explained that upon paying the 1<sup>st</sup> Defendant the purchase price, he proceeded to discharge the property from the 2<sup>nd</sup> Defendant and transferred the same to the 3<sup>rd</sup> Defendant. He further stated that all transactions were done above board and that in fact the 3<sup>rd</sup> Defendant paid Kshs. 812,040/- as stamp duty to the Commissioner of Domestic Taxes for the transfer of the Suit Property from the 1<sup>st</sup> Defendant. He stated further that upon completion of the mandatory legal procedures, the Land Registrar issued a title deed in the name of the 3<sup>rd</sup> Defendant on 3<sup>rd</sup> October 2011. He further stated that upon application to the relevant authorities, the Suit Property was approved for subdivision and the Land Control Board also granted consent to subdivide. He stated further that the Suit Property is no longer in existence as the same was subdivided into 5 parcels of land known as Dagoretti/Riruta/6259, 6260, 6261, 6262 and 6263. The copies of the title deeds of the said parcels were produced. He further stated that on 25<sup>th</sup> November 2011, the court granted an eviction order to evict the Plaintiff and other persons who were in illegal occupation of the 3<sup>rd</sup>

Defendant's land, which eviction was carried out with the assistance of police officers in compliance with the law. He further stated that the Plaintiff has never challenged the court order that resulted in his eviction as he has nothing to show that he is the owner of the Suit Property. He further stated that it would be a miscarriage of justice to stop the 3<sup>rd</sup> Defendant from developing its property since it has already spent substantial amounts of money to buy the property, transfer, subdivide and carry out improvements on the property.

I have considered submissions made by counsels for the Applicant and the 3<sup>rd</sup> Defendant which were made on 18<sup>th</sup> April 2013.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of ***Giella vs. 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 be adequately 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 Applicant made out a *prima facie* case with a probability of success? ***In the case of Mrao vs. First American Bank of Kenya Limited 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? Looking at the evidence adduced in this court by the Plaintiff/Applicant, this court has been able to establish that the Suit Property did indeed belong to him but was charged to Consolidated Finance Limited. However, the said Consolidated Finance Limited exercised its statutory power of sale and sold the Suit Property to the 1<sup>st</sup> Defendant through a public auction conducted on 26<sup>th</sup> November 1993. Thereafter, it emerges quite clearly that the Plaintiff/Applicant was able to remain in possession of the Suit Property for a long time thereafter courtesy of court orders issued in the pending court cases. In the meantime, ownership of the Suit Property changed hands from the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant in the year 2011. The transfer was done and the Suit Property was subdivided into 5 different parcels of land, each with a title deed issued in the name of the 3<sup>rd</sup> Defendant. The demolition of the structures on the Suit Property was sanctioned by a court order. With this background, it is evident that the Plaintiff/applicant has not established a *prima facie* case with a probability of success. This being the case, this court sees no value in interrogating whether the Plaintiff/Applicant has satisfied the other two conditions cited earlier in the ***Giella*** case.

In light of the foregoing, I find that the Plaintiff/Applicant has not satisfied the requirements for the grant of a temporary injunction as prayed. Accordingly, the application is dismissed with costs to the Defendants.

It is so ordered.

**SIGNED AND DELIVERED AT NAIROBI ON THE 14<sup>TH</sup>  
DAY OF JUNE 2013.**

**MARY M. GITUMBI**

**JUDGE**