



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CASE NO.710 OF 2011**

**CHARLES KIAI GACHERU.....PLAINTIFF**

**-VERSUS-**

**ESTHER GATHONI MWANGI.....1<sup>ST</sup> DEFENDANT**

**JOHN GAKURU MWANGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

I have before me the plaintiff's Notice of Motion application dated 14<sup>th</sup> January, 2013 expressly to be brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks the following substantive orders:-

1. That this Honourable Court do grant an injunction restraining the Defendants, their employees, agents, assigns, servants and any other persons howsoever acting under their directions from selling, offering for sale, transferring, charging, mortgaging, constructing or continuing to construct and/or dealing in any manner whatsoever with all these parcels of land known as L.R. No. 13789/4 and L.R. No. 3789/5 Nairobi pending the hearing and final determination of the plaintiff's intended appeal.
2. That pending the hearing and final determination of this application, this court be pleased to issue a temporary injunction in terms of prayer 1 above.
3. That the costs of this application be provided for.

The application is supported on the grounds set out on the face of the application as follows:-

1. That the plaintiff filed an injunction application dated 6<sup>th</sup> December, 2011 seeking an injunction restraining inter alia the defendant from selling, offering for sale, transferring, charging, mortgaging and/or dealing in any manner whatsoever with all those parcels of land known as L.R. No. 13789/4 and L.R. No. 1389/5 Nairobi.
2. That the said application was heard and dismissed vide a ruling delivered by Honourable Lady Justice R. Ougo on 15<sup>th</sup> November, 2012.
3. That the plaintiff is aggrieved by the said decision and has filed a notice of appeal against the said decision.
4. That the plaintiff has an arguable appeal with high chances of success.

5. That the defendants have now commenced construction on the properties and unless restrained by an order of this court will continue to do so thereby rendering the plaintiff's appeal nugatory.
6. That the plaintiff will suffer substantial loss if the injunction is not granted.

The application is further supported by the affidavit of the plaintiff, Charles KiaiGacheru, sworn on 14<sup>th</sup> January, 2013.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants have for their part filed a replying affidavit sworn by the 2<sup>nd</sup> Defendant John GakuruMwangi and filed in court on 28<sup>th</sup> January, 2013. The 2<sup>nd</sup> defendant in paragraphs 5 and 6 of the Replying Affidavit state as follows:

***“5. That the applicant is misrepresenting facts by stating in his reply that we have commenced construction works in the suit property. The construction is to be done on the larger property save for the suit properties. The constructors however erroneously dug up the suit property in trying to ensure that the whole area is levelled something that would have not happened had the plots been removed from each other.***

***6. That I am informed by my advocates on record M/s Sichangi Partners Advocates which information I verify believe to be true the suit properties being a subject matter of this suit the doctrine of Lispendence applies and estops us from dealing with the two said properties in any manner whatsoever until this entire suit is finally determined. That our respect and adherence to this doctrine has been proved by our maintaining of the status quo of the property since the suit began and we undertake to keep it that way until this matter is finalized”.***

The parties have filed written submission and fortunately both parties are in agreement that the trial court has jurisdiction to grant an injunction to the unsuccessful party in an interlocutory application for injunction. Both parties cite with approval the case of **ERINFORD PROPERTIES LTD VS. CHESIRE COUNTY COUNCIL [1974] 2 ALL ER 448** where the court held that:

***“Where a judge dismisses an interlocutory motion for injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal; it is not necessary for the applicant to apply to the Court of Appeal”.***

The essence of the trial court granting such an injunction is to prevent the Court of Appeal's decision from being rendered nugatory should that court reverse the judge's decision.

The parties in their submissions equally are in agreement that the jurisdiction of the trial court to grant an injunction pending appeal is discretionary which discretion however should be exercised judiciously. The parties have both referred the court to the Court of Appeal decision in **BUTT VS. RENT RESTRICTION TRIBUNAL (CACA NO.NAI 6 OF 1979)** and the case of **MADHU PAPER INTERNATIONAL LTD VS. KERR (1985) KLT 840** where the court held that: ***“It would be wrong for the court to grant an injunction pending appeal where the appeal is frivolous or where to grant it would inflict greater hardship that it would avoid”.***

The plaintiff contends that he has an arguable appeal in that he had in the application for injunction dismissed by the court aptly satisfied the three principles established by the **GIELLA VS. CASSMAN BROWN** case for the grant of an injunction namely:-

- a. The existence of a prima facie case with a probability of success.
- b. The injury the applicant would suffer if the injunction was not granted could not be compensated by way of damages; and
- c. That the balance of convenience favoured the applicant.

The defendants while maintaining that the plaintiff did not establish a prima facie case or that damages would not be an adequate remedy nonetheless maintained they had not sold and/or transferred the suit

properties and they did not intend to do so. Indeed in paragraphs 5 and 6 of the 2<sup>nd</sup> defendants replying affidavit to the instant application referred to above stated that they had not interfered with the suit properties prejudicially and were prepared to observe the status quo until the suit was heard and determined finally.

In my view it would serve the parties interests well if the parties would focus on getting the suit ready for trial and having the trial court make a decision on the issue whether or not specific performance was an available remedy to the plaintiff upon the hearing and final determination of the suit. The intended appeal no doubt would not determine the issues raised in the suit save to determine whether or not the plaintiff's application for injunction was properly dismissed or should have been granted by the trial court.

I have considered the applicants instant application and the respondents response and the parties filed written submissions and my own view is that the interests of the parties will be served if the obtaining and present status quo is observed by the parties pending the hearing and determination of the intended appeal and/or the hearing and determination of the suit. The defendants have stated that they have no intention of selling and/or developing the suit properties pending the hearing and determination of the suit and hence an order for observance of the present status quo would not prejudice them.

In the premises I therefore make an order that the parties herein do maintain the present status quo as relates to L.R. Nos. 13789/4 and L.R No. 13789/5 pending the hearing and determination of the plaintiffs intended appeal and/or pending the hearing and final determination of the suit whichever is the earlier.

I direct that the costs of the instant application be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendant