



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 1 OF 2012**

**GUBO SHANU DAWE.....PLAINTIFF**

**VERSUS**

**EVANS MWANGI..... 1<sup>ST</sup> DEFENDANT**

**BEATRICE NYAMBURA.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming before me for determination is the Notice of Motion dated 30<sup>th</sup> December 2011 in which the Plaintiff/Applicant seeks that the court issues an order of temporary injunction pending the hearing and determination of this application and suit together with costs restraining the Defendant/Respondents from erecting, putting up any structure or building and/or demolishing the foundation on Plot No. 78 and 102 Umoja Zone 8 (hereinafter referred to as the "Suit Premises").

The Application is premised upon the grounds appearing on the face of it as well as the Supporting Affidavit of Gubo Shanu Dawe in which he stated that he purchased the Suit Premises from Umoja Zone 8 Self Help Group from their member Joseph Njoroge Mburu who transferred the same to him. He further stated that upon payment of the requisite fees to the City Council of Nairobi, he was issued with Allotment Letters in respect of the Suit Premises by the City Council of Nairobi. He produced copies of the said Allotment letters both dated 23<sup>rd</sup> September 2002. He further stated that he was also issued with a Beacon Certificate for the Suit Premises and has been paying the required rates to the City Council of Nairobi. He then stated that in the year 2008/2009, a dispute arose between him and the 2<sup>nd</sup> Defendant regarding ownership of the Suit Premises, which dispute was deliberated on by the Director Housing Development Department of the City Council of Nairobi who made a finding that the Suit Premises belong to him. He further disclosed that on 24<sup>th</sup> December 2011, the Defendants started to demolish the foundation he had erected on the Suit Premises without any good reason prompting the filing of this suit.

The Application is contested. The Defendants filed their Replying Affidavit sworn on 16<sup>th</sup> January 2012 by Evans Mwangi in which he stated that he was allotted Plot No. 320 Umoja II Zone 8 by the City Council of Nairobi on 7<sup>th</sup> July 2003. He produced a copy of his Letter of Allotment dated 7<sup>th</sup> July 2003. He confirmed that he paid the requisite fees, was issued with a Beacon Certificate and took possession of that plot on 6<sup>th</sup> August 2008. He further stated that his brother Edward Kangethe was on 17<sup>th</sup> July 2003 allotted Plot No. 159 Umoja II Zone 8 by the City Council of Nairobi, made the requisite payments and

was issued with a Beacon Certificate by the City Council of Nairobi. The Letter of Allotment and the Beacon Certificate were both produced in evidence. He further stated that the two plots being next to each other, both he and his brother jointly applied for and were granted approval by the City Council of Nairobi to develop their plots of land with two bedroomed flats. He further stated that the Plaintiff fraudulently connived to be allocated the two plots namely Plot No. 320 Umoja II Zone 8 and Plot No. 159 Umoja II Zone 8 using different plot numbers viz Plot No. 78 and 102. He further indicated that upon their making a complaint to the Criminal Investigations Department, the said CID together with the City Council of Nairobi carried out investigations and issued a Report dated 12<sup>th</sup> February 2010 in which they indicated that the genuine owner of Plot No. 320 Umoja II Zone 8 was himself and that of Plot No. 159 Umoja II Zone 8 was his brother Edward Kangethe. He further stated that the Plaintiff could not have bought the Suit Premises from the Umoja Zone 8 Self Help Group because the same is an unregistered body which has no legal status to own property. He also stated that the Plaintiff failed to show the evidence of ownership from Joseph Njoroge Mburu from whom he purports to have purchased the Suit Property. He also stated that only he and his brother had received approval from the City Council of Nairobi to develop the Suit Premises.

The Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> Defendants/Respondents filed their written submissions all of which have been taken into consideration by this court.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus 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 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 made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“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.”***

Looking at the facts of this case, the Plaintiff has produced two Allotment Letters both dated 23<sup>rd</sup> September 2002 issued by the City Council of Nairobi as the basis of his claim of ownership of the Suit Premises. However, the 1<sup>st</sup> Defendant has similarly produced two Allotment Letters dated 7<sup>th</sup> and 17<sup>th</sup> July 2003 issued by the City Council of Nairobi one in his name and one in his brother’s name, upon which he bases his claim of ownership over the Suit Premises, which according to him bear the numbers Plot 320 and 159 Umoja II Zone 8. It has also been demonstrated that the dispute of ownership between the parties in this suit has been considered by the Criminal Investigations Department whose findings were that the Suit Premises belong to the 1<sup>st</sup> Defendant and his brother while the City Council of Nairobi arrived at the decision that the Suit Premises belong to the Plaintiff. It appears to me that the issue whether the Suit Premises are one and the same as the Plot Numbers 320 and 159 Umoja II Zone 8 remains to be resolved. Evidence produced by the Plaintiff also seems to point to Plot Numbers 90 and 91 whose place in this suit is yet to be determined. At this point in time, it is unclear as to which parcels of land we are considering. Secondly, I find that it is difficult at this juncture to ascertain who, among the parties herein, is the bona fide registered proprietor of the Suit Premises. Each side has demonstrated their claim over the Suit Property and both claims appear to me almost equal. Accordingly, I find that the Plaintiff has failed to establish a prima facie case with a probability of success.

That being the conclusion of this court, I find no need in further interrogating whether the other conditions in the *Giella* case have been satisfied. Accordingly, I hereby dismiss this application. Costs shall be in the cause.

It would appear to me necessary to enjoin the 1<sup>st</sup> Defendant's brother named Edward Kangethe as well as the City Council of Nairobi to this suit for the purpose of assisting the court in determining this suit appropriately.

**SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup>**

**DAY SEPTEMBER 2013**

**MARY M. GITUMBI**

**JUDGE**