



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 318 OF 2013**

**JOSHUA MURAYA KAMINA.....PLAINTIFF**

**VERSUS**

**ISABELLA GATHONI KARIUKI.....DEFENDANT**

**RULING**

The Plaintiff claims to be the lawful owner of the suit properties namely Plots Numbers C2320 and C2321 situated within Embakasi Ranch, and states that the Defendant has trespassed on the said suit properties by erecting a temporary house and fence, and putting stones thereon. He filed a Notice of Motion dated 1<sup>st</sup> March 2013 seeking the following orders from this court:

1. That an order of temporary injunction do issue restraining the Defendant, her servants and or agents from trespassing on the suit properties and/or from occupying, selling, charging, and or erecting any structure of any kind and or heaping, construction material on the said parcels of land property pending hearing and determination of this suit.
2. That a mandatory interlocutory injunction do issue compelling the Defendants, her agents and servants to demolish all structures erected on the suit properties and to forthwith remove all construction material heaped on the property pending hearing and determination of this suit.

The facts and grounds for the Plaintiff's application are in a supporting affidavit and supplementary affidavit he swore on 1<sup>st</sup> March 2013 and 7<sup>th</sup> May 2013 respectively. The Plaintiff states that he bought the suit properties from one Eric Njau, and was issued with a certificate of ownership by Embakasi Ranching Company Ltd which is the holder of the mother title to the said properties. He attached the said certificate of ownership as evidence. Further, that when the Defendant commenced trespass on the suit properties in January 2012 he reported the matter to the police and Embakasi Ranching Company Ltd, and after investigations it was found that he was the owner of the suit properties and that the Defendant owned plots 2318 and 2319.

The Defendant opposed the Notice of Motion in a replying affidavit sworn on 27<sup>th</sup> March 2013, and denied trespassing on the suit properties. She stated that she was allocated the suit properties in 1978 by Embakasi Ranching Company Ltd. She annexed copies of share certificates issue to her by the said company, and of receipts of payments made for the plots. The Defendant claims that she has been in physical possession of the suit property being where she resides, and now wishes to construct a permanent building thereon. She attached photographic evidence of the suit property in this regard.

The parties filed written submissions in court, which they relied upon during the hearing of the Notice of Motion on 17<sup>th</sup> June 2013. The Plaintiff's counsel in submissions dated 8<sup>th</sup> May 2013 argued that there as a serious question which needs to be determined on the ownership of the suit properties, and that the

Plaintiff had brought evidence of ownership and thereby established a *prima facie* case. Further, that the Plaintiff stands to suffer irreparable loss and damage, as the Defendant intends to lay a permanent claim on the suit properties and has started constructing thereon. The counsel further submitted that the balance of convenience lies in the Plaintiff's favour as the Defendant has been told her plots are different from the suit properties and it is the Plaintiff who stands to suffer if the orders are denied. The Plaintiff's counsel relied on the decision in **Kenya Breweries Ltd vs Okeyo, (2002) 1 E.A. 109** and on a passage from **Mulla on the Code of Civil Procedure**, 17<sup>th</sup> Edition volume 4 at page 265.

The Defendant's counsel in submissions dated 10<sup>th</sup> June 2013 submitted that the Plaintiff has not discharged the burden of proof laid in **Giella vs Cassman Brown (1973) E.A. 358** of proving a *prima facie* case, as the certificates of ownership he produced in evidence refer to different plots namely plots V7249 and P5118. Further, that the handwritten references to the suit properties at the back of the said certificates will have to be verified through cross-examination at a full hearing. The counsel also submitted that the Defendant had brought evidence that she is in possession of, and has developed the suit property, and that the balance of convenience thereby tilts in her favour. The counsel relied on the decision in **Geoffrey Kariuki & Another vs Julius K. Wanjau & Another**, Nairobi HCCC No 1510 of 2005 in this respect.

I have carefully considered the pleadings, evidence and submissions made by the parties. As to whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, I note that he relies on a certificate of plot ownership that refers to a plot no V7249 and not C2320 and C2321. He has therefore not brought sufficient evidence of his ownership of the suit property, and has not established a *prima facie* case. He is accordingly not entitled to the temporary prohibitory and the mandatory injunctions sought. However, the Defendant's share certificates that she produced in evidence also do not indicate which plots were allocated to her, neither did she bring any document evidencing allocation of the said plots to her.

In the light of these circumstances I will determine the Plaintiff's Notice of Motion on the basis of a balance of convenience. I find in this regard that the balance tilts in favour of the Defendant who is in possession of the suit properties. I accordingly hereby order as follows:

1. Pending the hearing and determination of the suit filed herein or until further orders, *the status quo* with respect to the parcels of land known and/or referred to as Plots Numbers C2320 and C2321 situated within Embakasi Ranch shall be maintained as follows:
  - a. The Plaintiff shall not interfere with the Defendant's occupation and possession of the said parcels of land.
  - b. The Defendants shall not undertake any further construction, developments and /or wastage on the said parcels of land.
  - c. Neither the Plaintiff nor the Defendants shall sell, transfer, charge or in any other manner alienate or dispose of the said parcels of land.
2. The costs of the Plaintiff's Notice of Motion dated 1<sup>st</sup> March 2013 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_24<sup>th</sup>\_\_\_\_ day of \_\_\_\_September\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**