



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**E. L. C. CASE NO. 400 OF 2013**

**THE UNITED FIVE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**HELLEN W. KIRUMBA..... 1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 22<sup>nd</sup> March 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction to issue restraining the Defendants from trespassing, alienating and transferring the Plaintiff's plot no. B4-159 Kayole Site & Scheme Nairobi (the "Suit Property) pending the hearing and determination of this application and suit.

The Application is premised upon the grounds set out on the face of it together with the Supporting Affidavit of Johnson Maina Ndotu sworn on 22<sup>nd</sup> March 2013 in which he states that he is a Director of the Plaintiff and that the Plaintiff purchased the Suit Property from one Justus Makeri Kimani via a Sale Agreement on 2<sup>nd</sup> April 1996 which they exhibited. He stated further that the said Justus Makeri Kimani purchased the Suit Property from the original allottee via a Sale Agreement a copy of which was also exhibited. The further averred that since the Plaintiff purchased the Suit Property, it has been paying the requisite fees and rates to the 2<sup>nd</sup> Defendant. He averred further that the Plaintiff took possession of the Suit Property immediately and has been enjoying quiet possession until November 2012 when the 2<sup>nd</sup> Defendant without any legal basis allocated the Suit Property to the 1<sup>st</sup> Defendant. He stated that the when the Plaintiff when to the 2<sup>nd</sup> Defendant's offices in Dandora to pay rates, the cashier declined to receive the money alleging that the Suit Property had been allocated to the 1<sup>st</sup> Defendant. He further averred that the 2<sup>nd</sup> Defendant had failed to respond to his enquiries on how the 1<sup>st</sup> Defendant had been allocated the Suit Property. He also averred that the 1<sup>st</sup> Defendant had now trespassed on the Suit Property and had commenced constructing thereon to the detriment of the Plaintiff.

The application is opposed. The 2<sup>nd</sup> Defendant filed its Grounds of Opposition dated 5<sup>th</sup> April 2013 in which it stated that the Plaintiff has no *locus standi* to institute this suit against the 2<sup>nd</sup> Defendant because the Plaintiff had not annexed any legal document conferring upon it interest in the Suit Property. It further indicated that the Plaintiff has been in illegal occupation of the Suit Property without the 2<sup>nd</sup> Defendant's

knowledge and/or consent and that the Plaintiff is a trespasser. It further stated that it did indeed allocate the Suit Property to the 1<sup>st</sup> Defendant because according to its records, the Suit Property was vacant for allocation. It further claimed that owing to the multiple transfers of the Suit Property and the fact that the Plaintiff's name did not reflect in the 2<sup>nd</sup> Defendant's records as the rightful allottee, it is highly probable that the alleged transfer to the Plaintiff was fraudulent and the documents pertaining to it a forgery.

The Application is further opposed by the 1<sup>st</sup> Defendant who filed her Grounds of Opposition dated 3<sup>rd</sup> June 2013 in which she stated that the Suit Property was vacant for allocation and the 2<sup>nd</sup> Defendant allocated it to her. She exhibited a copy of the allotment book and Beacon Certificate issued to her by the 2<sup>nd</sup> Defendant. She stated further that the Suit Property was vacant when it was allocated to her and that the Plaintiff did not appear until construction was at an advanced stage. She further stated that the Plaintiff had not produced any tangible allotment documents or receipts issued by the 2<sup>nd</sup> Defendant to prove that he was allocated the Suit Property.

The 1<sup>st</sup> Defendant also filed a Replying Affidavit sworn by her on 3<sup>rd</sup> June 2013 by means of which she exhibited the receipt issued by the 2<sup>nd</sup> Defendant to her upon payment of ground rates, ground rent, market sale and survey fees amounting to Kshs. 58, 120/- and payment of Kshs. 46,540/- for building plan approval and beacon.

All the parties herein filed their written submissions all of which have been read and considered 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.”***

Has the Plaintiff established a prima facie case? This heavily depends on whether the Plaintiff/applicant has been able to convince this court that he is indeed the registered proprietor of the Suit Property. The conventional way of proving this is by production to this court of valid title documents in respect of the Suit Property. The documents that the Plaintiff has produced as evidence of ownership of the Suit Property are a Sale Agreement between it and Justus Makeri Kimani dated 2<sup>nd</sup> April 1996. There was no proof given that the said Justus Makeri Kimani was the registered proprietor of the Suit Property and therefore capable of passing good title to the Plaintiff. The copies of receipts exhibited by the Plaintiff allegedly issued by the 2<sup>nd</sup> Defendant bear the name of one Peter Munyiri Wahome. No connection has been made between this person and the Plaintiff. Overall, the Plaintiff has not been able to convince this court, on a prima facie basis, that he is the duly registered proprietor of the Suit Property and therefore his interest should be protected through an interlocutory injunction. The documents exhibited by the 1<sup>st</sup> Defendant as proof of ownership of the Suit Property do not, in my opinion, satisfy me that the 1<sup>st</sup>

Defendant has a stronger claim over the Suit Property. However, this being the Plaintiff's application, it behooves him to convince the court of his ownership rights which he has failed to do. That being the case, I make the finding that the Plaintiff has failed to establish a *prima facie* case with a probability of success at the trial.

This court sees no need to interrogate whether the other two conditions in the *Giella* case have been satisfied. Accordingly, the application is hereby dismissed. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI**

**ON THE 20<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**MARY M. GITUMBI**

**JUDGE**