



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 808 OF 2012**

JOSEPH MWANGI GIKUNJU.....1<sup>ST</sup> PLAINTIFF/APPLICANT

SAMUEL MUGUCHIA NDUNG'U.....2<sup>ND</sup> PLAINTIFF/APPLICANT

SAILVESTER MAGENI KISANJI.....3<sup>RD</sup> PLAINTIFF/APPLICANT

JAMES KURIA NGARA.....4<sup>TH</sup> PLAINTIFF/APPLICANT

VERSUS

CRISPUS RAINI NYAGA .....1<sup>ST</sup> DEFENDANT/RESPONDENT

MARY KAMAU.....2<sup>ND</sup> DEFENDANT/RESPONDENT

PETER CHENGE.....3<sup>RD</sup> DEFENDANT/RESPONDENT

NAIROBI CITY COUNCIL.....4<sup>TH</sup> DEFENDANT/RESPONDENT

AND

MUMENYA MULTI-PURPOSE

CO-OPERATIVE SOCIETY.....INTERESTED PARTY

**RULING**

By an amended notice of motion dated 13<sup>th</sup> November, 2012 brought under section 3 and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules, the Plaintiffs are seeking orders that the Defendants be restrained from entering, encroaching, trespassing or dealing with plots no. 8, 9, 12, 13 & 14 of Kahawa West Phase II pending the hearing and determination of this suit. When the matter came for mention on 17<sup>th</sup> May 2013, the Plaintiffs informed the court that they were not laying any claim to the interested party's plot no. 14 and the injunctive orders touching on the said plot were discharged.

The application is supported by the 1<sup>st</sup> Plaintiff's affidavit sworn on 12<sup>th</sup> November 2012 where the Plaintiffs have stated that they were allocated the suit properties by the Nairobi City Council Vide

Reference no. CPD/9676 on 21<sup>st</sup> September 2001. The Plaintiffs have attached as evidence a copy of a letter of allocation from the Nairobi City Council dated 21<sup>st</sup> September 2001 issued to Samuel Mugucia Maina & others.

Further, the Plaintiffs have stated that they have been paying rates to the Nairobi City Council and have annexed payment receipts dated 24<sup>th</sup> March 2011, 20<sup>th</sup> May 2011 and 7<sup>th</sup> August 2012. It is alleged by the Plaintiffs that since the date of allotment, they have settled on the plots and have carried out extensive developments which include connecting electricity, water and other amenities. It is the Plaintiffs case that on 2<sup>nd</sup> November 2012, the Defendants trespassed on the suit property claiming that they had been allotted the suit properties by the Nairobi City Council.

In a further affidavit sworn by the 2<sup>nd</sup> Plaintiff on 10<sup>th</sup> May 2013, the Plaintiffs stated that the 1<sup>st</sup> -3<sup>rd</sup> Defendants did not have a good claim over the suit property as they paid the premiums after the plots had been repossessed by the 4<sup>th</sup> Defendant. According to the Plaintiffs, the offer to the 1<sup>st</sup> Defendant lapsed after 30 days and the 4<sup>th</sup> Defendant legally repossessed the suit properties and allotted the same to the Plaintiffs. The Plaintiffs have alleged that the 1<sup>st</sup> Defendant's application to fence was done with ill motives as the 1<sup>st</sup> Defendant was aware that there were developments on the suit plots. It is the Plaintiffs case that having incurred a lot of expenses in developing the suit properties, the Plaintiffs stand to suffer grave damages.

The application is opposed by the 1<sup>st</sup> Defendant who in a replying affidavit sworn on 21<sup>st</sup> February, 2013 stated that the amended notice of motion is defective and bad in law for failure to disclose the date of the alleged amendment and further, for being supported by an amended supporting affidavit, a document which does not exist in law. The 1<sup>st</sup> Defendant has contended that he was allotted plot no. 13 measuring 0.16 ha by the then Nairobi City Commission and has annexed a copy of the letter of allotment dated 26<sup>th</sup> October 1992. Further, the 1<sup>st</sup> Defendant has stated that he paid stand premium and ground rent for the plot on 22<sup>nd</sup> December 1992 and a receipt dated 22<sup>nd</sup> December 1992 has been annexed.

According to the 1<sup>st</sup> Defendant, there was delay on the part of the City Council in pointing out the beacons of his plot and in 2008, the 1<sup>st</sup> Defendant paid survey fees of Kshs 15,000.00 and was issued with a beacon certificate number 2555 dated 11<sup>th</sup> June 2008. Copies of payment receipts for the survey fees as well as the beacon certificate have been furnished. It is the 1<sup>st</sup> Defendant's case that in December 2008, he found a group of about 30 people digging trenches on the plot and a demand letter dated 17<sup>th</sup> March 2009 instructing the trespassers to desist from erecting structures has been annexed. The 1<sup>st</sup> Defendant has alleged that the City Council has on numerous occasions confirmed that he is the legitimate allottee of the plot and has further stated that he has incurred expenses in payment of ground rent for the plot and receipts dated 9<sup>th</sup> September 2008, 30<sup>th</sup> January 2008, 30<sup>th</sup> January 2009 and 6<sup>th</sup> October 2010 have been attached and attest to this fact.

The 1<sup>st</sup> Defendant contends that he has approval from the City Council of Nairobi to fence the plot, but he and his workmen are unable to commence fencing for fear of being attacked by the trespassers who have constructed structures on the plot. In response to the Plaintiffs further affidavit, the 1<sup>st</sup> Defendant has stated that plot number 13 was allocated to him on 26<sup>th</sup> October 1992 and measures 0.16 hectares while the 1<sup>st</sup> Plaintiff's letter of allotment for plot 13 measuring 0.3 hectares is dated 21<sup>st</sup> September 2001. The 1<sup>st</sup> Defendant has further stated that whereas he paid for the survey fees on 3<sup>rd</sup> June 2008, the 1<sup>st</sup> Plaintiff paid for the survey fees on 8<sup>th</sup> May 2011. It is the 1<sup>st</sup> Defendant's case that there is no evidence that the Plaintiff acquired the requisite authority from the City Council before constructing the structures on plot 13. The 1<sup>st</sup> Defendant claims that he has all the necessary documents to prove ownership of plot 13 and further, that the Plaintiffs are trespassers who should be evicted from the plot.

The 2<sup>nd</sup> Defendant also opposes the application by way of a replying affidavit sworn on 3<sup>rd</sup> December,

2012 where she has stated that she is the owner of plot no. 8 located in Kahawa West Phase II having been allotted the said plot in 1992. The 2<sup>nd</sup> Defendant has annexed as evidence a copy of the allotment letter dated 27<sup>th</sup> October 1992 issued to her and has contended that she has been in possession of the said plot until 2008 when apparently some unknown persons generally invaded plots within the area intending to grab the land. The applicants encroached onto the 2<sup>nd</sup> Defendants land in 2011 prompting the 2<sup>nd</sup> defendant to send a demand letter and further caused an enforcement notice dated 16<sup>th</sup> November, 2011 to be served on the applicants to stop further construction and to remove the unlawful structures erected on the plot. Further, the 2<sup>nd</sup> Defendant has furnished letters dated 28<sup>th</sup> November 2011 and 5<sup>th</sup> December 2011 from the City Council of Nairobi addressed to the District Criminal Investigations Officer Kasarani confirming the 2<sup>nd</sup> Defendant's ownership of plot no. 8. It is the 2<sup>nd</sup> Defendant's case that she has been paying rates for the plot and a receipt dated 27<sup>th</sup> July 2012 has been annexed as evidence.

In a supplementary affidavit sworn on 8<sup>th</sup> February 2013, the 2<sup>nd</sup> Defendant alleged that despite seeking stoppage by the plaintiff of further construction on the land when the development was at the foundation level, the Plaintiffs went ahead and built permanent structures whose photographs have been annexed to the affidavit.

The 2<sup>nd</sup> Defendant reiterated she has legal interest in the plot and contended that the letters of allotment furnished by the Plaintiffs do not conform to the minutes stated in the letter of allotment and excerpts of the minutes of the town planning committee meeting of 16<sup>th</sup> March 2001, ordinary monthly meeting of 16<sup>th</sup> November 2001 and general purposes committee meeting of 9<sup>th</sup> February 2000 have been annexed. It is the 2<sup>nd</sup> Defendant's case that the plot measurements according to the plaintiffs is 0.3 hectares while the real measurement of the plot is 0.16 hectares. The 2<sup>nd</sup> Defendant insisted that the delay in developing the plot was occasioned by lack of approved development plans.

The 4<sup>th</sup> Defendant opposed the application through a replying affidavit sworn on 25<sup>th</sup> April 2013 by John K. Barreh who stated that he was the acting deputy director of city planning department of the City Council of Nairobi. According to Mr. Barreh, allocation of plots in Kahawa West Phase II was done in 1998 but some of the initial allottees did not take the offer and the plots were repossessed by the 4<sup>th</sup> Defendant and given out to other deserving allottees. Further, it was stated that an allotment letter is an offer which is subject to acceptance and payment to the 4<sup>th</sup> Defendant of the standard premium within the stipulated period of 30 days of receipt of the offer.

Parties were directed to file written submissions and the Plaintiffs in submissions dated 13<sup>th</sup> May 2013 stated that they had fulfilled the requirements for the issuance of the orders sought as laid down in the case of **Giella -vs- Cassman Brown**. Counsel submitted that the Plaintiffs had annexed allotment letters showing that they had been allocated the plots by the 4<sup>th</sup> Defendant. The Plaintiffs argued that even if the 2<sup>nd</sup> Respondent had been allocated plot no. 8 before the same was allocated to them, the allotment was no longer valid as a result of non-compliance with the mandatory requirements stipulated on the allotment letter. It was submitted for the Plaintiffs that even though the 2<sup>nd</sup> Defendant acknowledged that the size of her plot was different from the allotment she had, the 2<sup>nd</sup> Defendant did not adduce evidence to show that the actual size of the plot was different from what the Plaintiffs had stated. Counsel contended that there were serious inconsistencies in the 2<sup>nd</sup> Respondent's case to warrant the court to give the Plaintiffs the benefit of doubt and preserve the suit property pending the determination of the case.

The Plaintiffs further submitted that the 4<sup>th</sup> Respondent had stated that the Defendants did not take up the offer as required by their allotment letters and therefore, that the plots were repossessed and the 1<sup>st</sup> Plaintiff was duly allotted plot no. 13 and went ahead to develop it. Counsel contended that despite the 1<sup>st</sup> Respondent alleging to have found trespassers on his property in December 2008, he never took any action and since he was guilty of delay, the balance of convenience tilts in favour of the 1<sup>st</sup> Plaintiff and the persons who reside in plot no. 13. The Plaintiffs contended that the discrepancies in the allotment letters issued to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents casts doubts as to their authenticity.

As to whether irreparable harm that cannot be compensated by way of damages will be suffered, Counsel submitted that the fact that the Plaintiffs have constructed permanent structures on suit properties is not disputed and therefore, that the Plaintiffs stand to suffer irreparable harm if the orders sought are not granted and the case is later determined in the Plaintiffs favour. Further, it was submitted that the balance of convenience tilts in favour of the Plaintiffs who have already constructed on the suit property. Lastly, Counsel for the Plaintiffs stated that the allegations that the amended notice of motion does not show the date it was amended cannot stand since the said application has a date and further that the court would revert to the original notice of motion were the amended application found defective. Counsel submitted that the court should not be unduly tied down by procedural technicalities and should instead do substantial justice considering that it is quite clear that the application before the court is one for injunction.

The 1<sup>st</sup> Defendant's in submissions dated 10<sup>th</sup> June 2013 argued that the Plaintiffs amended application was defective since the date of the alleged amendment is not indicated on the face of the application and secondly, that the application was supported by an amended supporting affidavit which does not exist in law.

Counsel for the 1<sup>st</sup> Defendant reiterated the facts and stated that the two allotment letters issued to the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant required the allottee to accept the offer and make payment within 30 days. It was argued for the 1<sup>st</sup> Defendant that the Plaintiffs are estopped from claiming that the 1<sup>st</sup> Defendant delayed in payment of stand premium for plot no. 13 by 26 days yet the Plaintiffs are guilty of delay of close to 10 years in payment of the stand premium.

Counsel submitted that the Plaintiffs do not deserve the orders sought since they commenced construction before the beacons were pointed out to them by the surveyors of the City Council and ended up constructing their structures on the 1<sup>st</sup> Defendant's plot. While submitting that the Plaintiffs have not established a prima facie case with probability of success, the 1<sup>st</sup> Defendant contended that the Plaintiffs letter of allotment was issued 9 years after the 1<sup>st</sup> Defendant's letter of allotment and after the 1<sup>st</sup> Defendant had paid the stand premium for the plot and reliance was placed on the equity maxim that equity favours the first in time. Counsel stated that the 1<sup>st</sup> Defendant had produced evidence to show that he is the legitimate owner of plot no. 13 and further, that the 1<sup>st</sup> Defendant's ownership was confirmed by the City Council which issued him with a beacon certificate and authorized him to fence the plot.

As to whether the Plaintiffs stand to suffer irreparable harm which cannot be compensated by an award of damages, Counsel stated that since the Plaintiffs had not obtained building plans approvals, the structures constructed without approval from the City Council are bound to be brought down any time. Lastly, it was submitted that the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant as the first allottee.

In a reply to the Plaintiffs submissions dated 6<sup>th</sup> June 2013, the 2<sup>nd</sup> Defendant submitted that since there are two allotment letters, the Plaintiffs cannot tell with certainty that they have a genuine allotment letter. Counsel for the 2<sup>nd</sup> Defendant stated that equity should not favour the Plaintiffs who have demonstrated that they followed shortcuts to get their respective letters of allotment. The 2<sup>nd</sup> Defendant argued that the fact that the Plaintiffs trespassed and built permanent structures on the 2<sup>nd</sup> Defendant's land does not make them lawful owners of plot no. 8. Counsel for the 2<sup>nd</sup> Defendant submitted that the Plaintiffs had not made out a sufficient case for the court to grant an interim injunction and relied on the case of **Abraham Kiarie Mburu -vs- Lydia Wairimu Mburu & another (2008)eKLR** and **Samuel Wanjau -vs- Attorney General & 2 others (2009)**

The 4<sup>th</sup> Defendant in submissions filed on 5<sup>th</sup> June 2013 placed reliance on the case of **Kenleb Cons Limited -vs- Gatitu Services Station Limited & anor CA No. 3112 of 1990** for the proposition that for the Plaintiffs to succeed, they must show that they have legal or equitable rights which require protection of injunction. Further reliance was placed on the case of **Giella -vs- Cassman Brown & Co Ltd**. Lastly, it was submitted that the evidence adduced is not sufficient for the court to grant a mandatory injunction relief pending the hearing of the suit.

I have considered and evaluated the material placed before the court by the parties and the issue that falls to be determined is whether the plaintiff/applicant has discharged the burden required of him to obtain an order for grant of a temporary injunctive.

The facts of the case are contested with each of the parties insisting that the allotment letters issued to them are genuine. Each party has made allegations of non compliance of the conditions stipulated in the allotment letters and the fact that the plots were repossessed and re-allotted by the 4<sup>th</sup> Defendant is contested. In my view, the Plaintiffs have not established a prima facie case with a probability of success since their ownership of the suit properties is highly contested. The court of appeal held in the case of **Ougo & anor -vs- Otieno(1987) KLR 1**, that the general principle is that where there are serious conflict of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.

In my view the contested issues can only be resolved at the trial where each of the parties will have a chance to testify and call witnesses and cross examine and be cross examined in turn. In the premises the order that would commend itself in the circumstances in this case is an order requiring the parties to maintain and observe the present status quo whereby there will be no further construction by either party and there will be no transfer, disposal and/or alienation of the suit property by either party pending the hearing and determination of the suit.

And I so order.

To facilitate the expeditious disposal of the suit I direct that the parties do within the next 60 days from the date of this ruling make full compliance with the provisions of order 11 of the civil Procedure Rules whereupon the hearing of the suit will be fixed on a priority basis.

The costs of the application shall be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendants