



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**ENVIRONMENTAL & LAND CASE 471 OF 2011**

**GEORGE MAINGI NGARARIGA .....PLAINTIFF**

**- VERSUS -**

**SAMSON WAMBUGU ..... DEFENDANT**

**RULING**

1. This is the plaintiff's chamber summons dated 7<sup>th</sup> September 2011. It is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and sections 1A and 3A of the Civil Procedure Act. There is annexed a deposition sworn by the plaintiff on even date. The plaintiff prays that the defendant be restrained by injunction from encroaching upon, trespassing or dealing with plot or parcel number 43 (as consolidated with plots numbers 44 and 45) lower civil servants scheme, Kariobangi, Nairobi.

2. In a synopsis, the plaintiff avers that he is a member of an association known as "lower civil servants Kariobangi South". The association allotted the plaintiff plots numbers 43, 44 and 45. The plaintiff avers that all those plots were later consolidated into one plot known as number 43. The defendant, alleges the plaintiff, was also a member and was allotted plots numbers 40, 41 and 42 which were consolidated to be known as plot No 40. The plaintiff's claim is that the defendant has without colour of right encroached upon the plaintiff's former plots numbered 44 and 45 now comprised in plot 43. The defendant is alleged to have entered, trespassed upon and pulled down some structures on the plaintiff's property.

3. The application is contested. There are two affidavits in reply. There are affidavits of Samson Wambugu the plaintiff, and Walter Onyango sworn on 16<sup>th</sup> September 2011. There are then two other affidavits of Joseph Otieno Ougo sworn on 7<sup>th</sup> September 2011 and 16<sup>th</sup> November 2011. The latter two are in support of the motion and are meant to be a rebuttal of the averments of Walter Onyango in the affidavit of 16<sup>th</sup> September 2011. Walter Onyango is the secretary of the association, at least up to some point admitted by the defendant. Joseph Otieno Ougo is the chairman of the association. The defendant's case is that the plaintiff is not the owner of plot 43. The defendant has exhibited a plot card marked "SW 3" for plot No 43. He bought the plot from Mercy Wanjiku for Kshs 530,000 under the terms of the exhibited sale agreement dated 16<sup>th</sup> May 2000. That position is supported by a letter dated 15<sup>th</sup> September 2011 from the City Council of Nairobi. He has also exhibited a statement of account from the latter's housing development department showing he has paid for rates, stand premium and transfer fees. The defendant states that the plaintiff's claims of consolidation of the plots does not lie. The reason given is that the plaintiff has never made an application for consolidation and none has been approved by the department of housing. Those averments are regurgitated in the affidavit of Walter Onyango Opondo,

the secretary of the association, sworn on 16<sup>th</sup> September 2011. Onyango also disowns minutes annexed to the plaintiff's affidavit marked "GMN 3" of 10<sup>th</sup> March 2010.

4. I thus have two parties staking a claim on one plot numbered 43. I have reached the inescapable conclusion that one of them is untruthful. After considering the evidence and submissions of the parties, I am of the following further opinion. The plaintiff concedes that he was allotted three plots numbered 43, 44 and 45. He concedes that he opted for the number 45 for identification of the consolidated plots. That position is supported by the affidavit of Joseph Ougo sworn on 7<sup>th</sup> September 2011. At paragraphs 8, 9 and 10 is deponed to as follows;

*8. THAT there was no particular system that we adopted in the naming of the consolidated plots.*

*9. THAT I remember very well that Mr. George Maingi Ngarariga had three plots No. 43, 44 and 45 but we consolidated them into a single plot and chose no. 45 as the plot for identification being the standing number for his plots no. 43, 44 and 45.*

*10. THAT I am aware that Mr. Samson Wambugu after some time acquired plots no. 40 and 41 belonging to Clinton Amino and Risper Wairimu respectively whereby he approached us with the intention of effecting changes in the register whereby we consolidated his three plots i.e. 40, 41 and 42 and named them as plot no. 40 which to date appears in our current register.*

5. That rendition of events is contested. The replying affidavit of Walter Onyango, the secretary, states at paragraphs 6 and 7;

*6. THAT I am aware that the Defendant acquired Plot no. 43 in the scheme from Mercy Wanjiku since both I and the Chairman of the group Joseph Otieno Ougo endorsed the said transfer by signing on the Transfer form annexed to the Defendant's Replying Affidavit and further countersigned on the changes to the List of Members Plots.*

*7. THAT having personally facilitated the transfer from the Mercy Wanjiku to the Plaintiff, the Chairman of the group is falsely misleading this court when he alleges in his affidavit that the Defendant has never owned Plot 43.*

6. To counter that, Mr. Ougo, the chairman, in the further replying affidavit sworn on 16<sup>th</sup> November 2011 avers that Walter was not the secretary at the inception and that only the chairman has authority to transfer. The question that then begs an answer is why the chairman would have executed two separate instruments in favour of the disputants. The answer, in my mind, is that the chairman is not entirely forthright. Not that I believe the secretary either. The trial court will be better placed to disentangle the truth.

7. But from the evidence at this stage, I am of the opinion that the defendant has established a stronger case of ownership. I find that he was initially allotted plot number 40 and subsequently acquired plot number 42. He then purchased plot No 43 from Mercy Wanjiku. That position has been verified by the City council of Nairobi housing development department. I am also fortified in that finding by annexure "SW 3", the plot card for plot number 43 showing receipt by council of payment of stand premium, rates and transfer fees. The plaintiff does not have an equivalent level of documentation. I had also stated earlier that from the sale agreement, the defendant paid consideration for the plot of Kshs 530,000. Exhibit 12 is a letter of 15<sup>th</sup> September 2011 from the City council of Nairobi confirming that from its records, the defendant is the owner. The plaintiff, by his own admission, states that his "consolidated" plot was to be known as plot No 45. I have also taken into consideration the averment at paragraph 19 of the defendant's deposition that he borrowed a sum of Kshs 1,000,000 from the National Cooperative Housing Union to undertake development on plot number 43.

8. When the plaintiff approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those

principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR.

9. Granted the evidence before me, I am not satisfied that the plaintiff has established a strong *prima facie* case with a probability of success. And I am also satisfied that the value of plot number 43 can be ascertained. This is then a case where damages would be available. The plaintiff has not claimed to have developed the plot substantially. He says he has only laid a foundation. Considering that the defendant is in possession, has more credible proprietary documentation at this stage and has borrowed Kshs 1,000,000 to develop the property, I also find that the balance of convenience tilts in his favour.

10. For all the above reasons, I find that the plaintiff's chamber summons dated 7<sup>th</sup> September 2011 has not reached the threshold for grant of interlocutory injunction. I am also alive that under the Civil Procedure Rules 2010, the application should have been brought by way of a notice of motion. The application is thus also fraught with procedural difficulties. In the result, I order that the application be and is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 28<sup>th</sup> day of June 2012.

**G.K. KIMONDO**  
**JUDGE**

**Ruling read in open court in the presence of**

No appearance for the Plaintiff.

Mr. Arithi for Mr. Thuita for the Defendant.

Collins Odhiambo for the Court clerk.