



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Suit 688 of 2011**

**SAHIHI HOUSING LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**HON. FERDINAND NDUNGU WAITITU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPH ONG'ETE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PETER OCHIENG.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**PHILEMON OLOO.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**NAFTAL OGOLLA.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

Sahihi Housing Ltd the plaintiff in this suit has sued the 5 defendants, the 1<sup>st</sup> defendant is Hon. Ferdinand Ndungu Waititu, the 2<sup>nd</sup> defendant is Joseph Ongete, the 3<sup>rd</sup> defendant is Peter Ochieng, the 4<sup>th</sup> defendant is Philemon Oloo and 5<sup>th</sup> defendant is Naftal Ogolla. The plaintiff filed suit on the 5/12/11. In its plaint the plaintiff is seeking injunction orders, a mandatory injunction against the defendants. general damages plus costs of the suit. The plaintiff filed a Notice of Motion the same day seeking injunctive orders against the defendants. At prayer 3 he seeks that the Court grants an interim injunction restraining the respondent either by themselves, her agent, representative, employees or any other trespassers or persons claiming under her or under similar claim from entering upon, trespassing alienating, encumbering, developing, subdividing, selling and/or in any other manner dealing with or in all that property known as L.R. No. 11531/113 (original No. 11531/4/2010) pending the hearing and determination of the suit. The 4<sup>th</sup> prayer is that the Court grants an order compelling the demolition of all structures erected by the respondents or them by themselves, their agents and/or servant or the property known as L.R. No. 11531/13 (original No. 11531/5/10) and No 5 that costs and incidentals To the application be provided for.

The application was supported by the affidavit of Azim Virjee the managing director of the plaintiff company. It is premised on 9 grounds (a) to (1) as stated on the face of the application.

The application was opposed. The 2<sup>nd</sup> respondent Joseph ongete swore a replying affidavit dated the 13/2/12. He stated he had the authority of the 3<sup>rd</sup> and 4<sup>th</sup> respondent to swear the said affidavit.

The brief facts in this matter are that the applicant claim that he is the registered owner of parcel Land.

L.R. No. 11531/13 (original 11531/4/10) the suit property, that after it bought the suit property it took possession of it and was not informed of any compelling or overriding interest or encumbrance over the suit property. That the respondents have encroached in the suit property and commenced construction or erection of structures and is subdividing and selling the said suit property to unsuspecting innocent 3<sup>rd</sup> parties. That it is apprehensive that the respondent may take steps geared at alienating, wasting and or damaging the suit property and therefore he seeks order is to protect it and to restrain the respondents from interfering or dealing with the suit property. The applicant attached a copy of certificate of title for L.R. 11531/3 (original No. 11531/4/10) showing that the property was transfer to it on the 16/12/10, it also attached a transfer between Alpha fine foods Ltd the original lesee to the suit property to itself dated the 12th of October 2010.

In the replying affidavit sworn by Mr. Ongete he depones that they are strangers to the suit, that they have never encroached on the suit property as alleged or erected any structures hereon, that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant on a plot next to suit property and have been carrying their own business and the same plot L.R. 1153/14 and that their activities have never interfered with the applicants property. That they have no relationship with the 1<sup>st</sup> respondent and the 5<sup>th</sup> defendant nor did they collude with them to trespass into the suit property and that the applicant has not demonstrated they are breaching its entitled suit property. He deponed that they have been drawn to the suit by mistake and maliciously by the applicant and they pray that their names be expunged from the record in the suit otherwise they will be dragged into unnecessary litigation and subjected to imminent unnecessary costs.

When the defendants were served Mr. Daniel Orange filed on Notice of appointment for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant on the 26/1/12 and Mr. Njeru Nyaga filed a Notice of appointment on behalf of the 1<sup>st</sup> defendant on the 18/6/12. There was a notice of change filed by the firm of Waithka Wachira on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. On the 18/6/12 the firm of Waitheka Wachira filed on a notice of appointment on behalf of the 5<sup>th</sup> defendant.

The 1<sup>st</sup> and 5<sup>th</sup> defendant did not file any replying affidavit in opposition to the plaintiff's application. Counsel for the applicant made oral submission in Court.

I have considered them. He reiterated what is deponed in the affidavit of Mr. Azim and added that the applicant has a prima facie case with a probability of success that, they will suffer irreparable loss, that they do not know the defendants background. That they cannot tell if the defendant can compensate them and that the balance of convenience lies in their favour. Counsel relied on 2 authorities, **Civil appeal No. 201/02 of Southern Credit Banking corporation Vs. Salim Manji and Civil suit No. 42/05/07 Benson Muchiri Muthoka and other Vs. kellen Waitherero Gichimu**. I have read the authorities. In the first case cited the Court of appeal made a ruling on an appeal against J. Osiemo on ruling where he had granted an injunction restraining the defendants from advertising for sale the suit premises . The circumstances is that case are not at par with this case. In the case of **Benson Muchiri and other Vs Kellen** the issue was one of ownership of the property and sub-division for the suit property, the judge had to deal with the issue of them, the suit land was transferred whether it was fraudulent and he made a decision on that.

In this case the plaintiff has shown that it owns. L.R. No. 11531/13 (Original No. 11531/4/10) the applicant claims that the defendants have encroached in the suit property and commenced construction or erection of structure and that it is subdividing and selling the same. At paragraph 5 of the supporting affidavit of Mr. Azima Virjee he refers to AV4 being the true copy of photographs showing the structures being developed by the respondent. The said photograph was not attached to show the structures being erected. The respondents 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> state they are strangers to the suit. For an injunction to be granted it is upon the applicant to show the danger or interference. The respondent is causing. Order 40 rule (1) and (2) gives situations where an injunction can be granted. Order 40 Rule (1) states that an injunction can be granted if the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit and (b) where the defendant threatens to or intends to remove or dispose off his property in circumstance affording reasonable probability. That the plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant. The said order provides that

if any of the above situations are proved or demonstrated then the Court may grant the injunction for the purpose of staying or preventing the wasting damaging, alienation, sale, removal or disposition of the property as the Court thinks fit. Order 40 (2) deals with injunction to restrain a breach of contract or other injury. The other injury has not been specifically described but it would be upon the party to do so.

In this case the applicant alleges respondents have encroached on its land. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendant deny that. The applicant has to show the threat or danger it will face or is facing on the injury its likely to suffer. The applicant has only made allegations against the respondent without adducing evidence to support its claim. In the case cited orders of injunction were granted as the applicant demonstrated they were facing a threat. What threat is the applicant facing? While submitting in Court counsel for the applicant stated from the bar that the 1<sup>st</sup> defendant attempted to purchase the property that was a statement from the bar and not from the applicant. I am unable to comprehend the threat or damage the applicant is likely to suffer on the facts deponed.

I find them vague to the extend of demonstrating the threat or danger in encroaching or erecting of structures. The applicant has shown it owns the suit property as to whether the defendants are interfering with it he has failed to show that. An order of injunction can only be granted if it will serve some useful purpose either to preserve the status quo or to stop a threat on injury from continuing. To grant the injunction sought in this matter, I would be issuing an order in vain. The applicant has failed to establish a prima facie case for orders sought. The applicant has failed to show the irreparable loss it will suffer. The respondents 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> state they are in their own premises, they have stated they are L.R No. 11531/14. The applicant is not claiming L.R. 11531/14.

The defendants interference has not been demonstrate at all. I therefore dismiss the application acted 5/12/11 with no order as to costs.

Orders accordingly

Dated and delivered this 26<sup>th</sup> day of July 2012

**R. OUGO**  
**JUDGE**

In the Presence of:-

..... For the plaintiff

..... For the defendants

..... Court Clerk