

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 269 OF 2010

JOHN SIMON NJENGA

NGIGI.....PLAINTIFF

-VERSUS-

TABITHA NYAWIRA

WAMATHAI.....DEFENDANT

RULING

The application under consideration is a chamber summons by the Plaintiff is dated 2nd June 2010 seeking an order that a temporary injunction be granted restraining the Defendant or her servants, agents or licencees from trespassing into the Plaintiff's Land Parcel Number Ruiru/East Block 1 (Githunguri) 1423 (hereinafter referred to as the suit property), interfering with the existing beacons and replacing them with new ones, or interfering with the Plaintiff's quite enjoyment of the suit property until the hearing and Determination of this suit.

The Plaintiff claims that he is the absolute registered proprietor of Land Parcel Number Ruiru/East Block 1 (Githunguri) 1423, and he produced as evidence a copy of the title deed to the suit property issued to him on 28th October 1986. Further, that the Defendant has trespassed into his said land and caused the same to be sub-divided and erected beacons thereon, and that unless restrained by this Court, the Defendant intends to sell the suit property to third parties and this will put the Plaintiff to a lot of loss and damage.

The Defendant filed Grounds of Opposition dated 16th March 2012, wherein it is stated that the Plaintiff's application is defective in law and is unsustainable and calculated to defeat the ends of justice. The Defendant also made oral submissions at the hearing on 10th May 2012, and filed submissions dated 8th May 2012 to which was annexed a copy of a green card showing that the owner of the suit property is Tabitha Nyawira Wamathai, and that a title deed was issued to her on 20th January, 2009. The said title deed is not produced in evidence. It is also submitted that according to a copy of Kenya Gazette notice dated 14th November, 2008 the previous owner of the property was Githunguri Ranching Company which company sold the suit property to the Defendant.

The Defendant's Advocate argued that the title deed to the suit property ceased to exist upon subdivision of the said land into parcel number L.R. RUIRU EASTBLOCK/3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382 and 3383. Further that the parcels have been sold out by the defendant to third parties who are not named or enjoined in these proceedings, and the court should not make orders in vain as the orders sought by the Plaintiff cannot be lodged for registration at the lands office.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The main issue before this Court is whether the application before me meets the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, to entitle the Plaintiff to the temporary injunction sought.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has produced evidence of ownership of the suit property by annexing a copy of a title to the suit property issued on 07/06/1989. The Defendant has also produced in evidence a copy of a green card showing that she is registered owner of the same land. The validity of both titles is an issue to be determined at the full

trial after production and examination of further evidence, and for this reason I am unable at this stage to find a *prima facie* case in favour of the Plaintiff.

Since both parties have provided evidence of their proprietary interests in the suit property, I will decide the application before me on the basis of balance of convenience. In my opinion the balance of convenience in this respect tilts in favour of the Plaintiff for three reasons. Firstly the title to the suit property was issued to the Plaintiff on 28th October 1986 before the one issued to the Defendant, which is shown in the green card to have been issued on 20th January 2009. Secondly the Defendant has not produced a copy of her title in evidence. Lastly, evidence has been produced by the Plaintiff and none by the Defendant showing the allotment of the suit property by Githunguri Constituency Ranching Company, which neither party disputes to be the previous owner of the suit property.

The Defendant's Advocate raised the issue that the order sought is incapable of being enforced as the suit property has since been sub-divided. It is my view that the issues of the ownership of the suit property, and the validity of the sub-divisions thereof is yet to be determined by this Court, and pending such determination, this Court has powers under Order 40 Rule 1 of the Civil Procedure Act to preserve any property in dispute however known or registered.

For the reasons given in the foregoing and pursuant to sections 3A and 63(e) of the Civil Procedure Act I hereby order that the *status quo* be maintained as follows: the Defendant, her servants, agents, licencees are restrained from further sub-dividing, selling, disposing of, transferring or alienating in any manner whatsoever whether by grant, sale or encumbrance the property originally known as RUIRU/EAST BLOCK 1 (GITHUNGURI) 1423, and/or any of the sub-divisions thereof namely L.R. RUIRU EASTBLOCK 1/3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382 and 3383, and from interfering with the Plaintiff's quiet enjoyment of the same pending the hearing and determination of the Plaintiff's suit or until further orders.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of ____July____, 2012.

P. NYAMWEYA

JUDGE