



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

Civil Case No.47 of 2011

JOHN MWAI MAKAU PLAINTIFF

VERSUS

MOSES WARUI MUTHIKEDEFENDANT

RULING

This is the Notice of Motion dated 19/4/2011 brought under Order 40 rule 1 and 2 Civil Procedure Rules and Order 51 rule 3 & 4 Civil Procedure Rules seeking a temporary injunction restraining the Defendant, his families, servants and agents from trespassing and interfering with plot No.C183-Wang\uru market belonging to Makau Mukingo pending the hearing and determination of this suit.

The same is supported by the grounds on the face of the application plus a supporting affidavit. The Applicant states that action has been taken through Kirinyaga County Council to stop the Respondent from interfering with the plot C183 in vain. He has annexed documents to confirm that. (Annexures JMM 1-4). He says the Respondent has embarked on developing the plot.

I have perused the whole of this file and failed to see any replying affidavit by the Defendant/Respondent to this application.

Counsels agreed to file written submissions which they have done. From the documents before me the facts that present themselves are;

- 1. One Makau Mukingo who is the Plaintiff's father owned plot No.C183 Wanguru. This is acknowledged by the Kirinyaga County Council.**
- 2. The Defendant/Respondent owns plot No.A506 Wanguru market. Both parties have documents confirming this.**
- 3. From the letters JMM 1-4 its clear that on the ground the disputed plot has been confirmed by the Kirinyaga County Council which is the issuing authority to belong to the Plaintiff herein. Minute extracts JMM2 confirms this position. It shows that the inspection exercise done by the Council confirmed that plot A506 was fully developed. Recommendations were also made. The Council approved the Defendant's/Respondent's plans in respect of plot A506 and not C183. The Defendant/Respondent has been warned in letters (JMM 3 and 4) that the plot in issue belongs to the**

Plaintiff/Applicant. Why did he have to persist in developing the same when he knew there were unresolved issues?

It is important for the Kirinyaga County Council to come out clear and explain where plot A506 is. Infact if all parties involved were co-operative this matter could have been sorted out by the short changed party being given an equal plot. From the Defendant\'s/Respondent\'s letter dated 13/2/2011 to the clerk Kirinyaga County Council he says the Council stopped him from further construction which I believe has been the case to date.

From the case of ***GIELLA -VS- CASSMAN BROWN [1970] E.A.*** - the principles in granting the prayer sought herein were set down . They are;

1. ***The Applicant should prove a prima facie case with a probability of success.***
2. ***The Applicant should show that if the order is not made he will suffer irreparable loss which can\'t be compensated in monetary terms.***
3. ***If in doubt the Court should decide the case on a***
4. ***balance of probability.***

From the material before me I am satisfied that the Plaintiff/Applicant has demonstrated that *prima facie* he has a right to this plot. The County Council documents confirm so. The Defendant/Respondent has been warned to remove structures. Construction was stopped by the Council. The Council also found that plot A506 is fully developed so it can\'t be the one the Defendant is developing.

I therefore find for the Applicant and issue a temporary injunction in terms of prayer No.1 of the Notice of Motion dated 19/4/2012.

Costs to the Applicant.

DATED AND DELIVERED AT EMBU THIS 25TH DAY OF SEPTEMBER 2012.

H.I. ONG\'UDI
J U D G E

In the presence of;

Mr. Momanyi for Applicant

Mr. Okwaro for Mr. Kiama for Respondent