



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 140 of 2011**

**MARTIN NZYUKO MBAU.....PLAINTIFF  
VERSUS**

**ESTHER K. KIMANTHI.....1<sup>ST</sup> DEFENDANT**

**KENNEDY M. KIMANTHI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff filed this suit against the defendants on 17<sup>th</sup> June, 2011 praying for a permanent injunction TO restrain the defendants from trespassing into and or carrying out any form of construction on, disposing, alienating, transferring or in any other manner dealing with the plaintiff's piece or parcel of land known as L.R. No. 337/3080, hereinafter the "*suit premises*". The basis of the suit was that at all material times the plaintiff was the registered proprietor of the suit premises having purchased the same from one, **Ruth Cheruiyot**. However, the defendants had since trespassed into the same, pulled down the fence and the plaintiff's plea to them to desist from such illegal acts had fallen on deaf ears. Even after reporting their activities to the police at the Athi River Police Station, the defendants still persisted in their illegal activities hence the suit.

Simultaneously with the filing of the suit, the plaintiff took out an application for an interlocutory injunction pending the hearing and determination of the suit. It is this application that is the subject of this ruling. In support of the application, the plaintiff advanced grounds similar to the averments in the plaint as aforesaid. The same goes for the supporting affidavit.

Served with the application, the defendants responded through **Messrs Mulu & Company Advocates**. In a replying affidavit sworn by the 1<sup>st</sup> defendant, they deposed where pertinent that they did not enter into the suit premises and demolished the fence in February, 2011 as alleged because they had been in occupation of the suit premises since time immemorial. Initially the suit premises were known as number 337/1410-Athi River which had now been fraudulently been subdivided into among other parcels, the suit premises which the plaintiff now claims to be his. They had fenced the suit premises, planted and had structures thereon and the plaintiff could not therefore claim to have purchased and fenced the same in the year 2011. In the premises this was not a clear case where an order of injunction could be issued because to do so will be tantamount to evicting them yet they had been in occupation of the suit premises for the last 30 years by dint of a fraudulently issued title deed. Lastly, they deposed that they had a counterclaim in the suit in which they were seeking the court to declare the suit premises to be theirs by way of adverse possession. That being the case an injunctive order cannot issue.

When the application came before me for *inter-partes* hearing on 5<sup>th</sup> July, 2012, parties agreed to have the same heard by way of written submissions. However, it was not until 21<sup>st</sup> September, 2012 that the respective submissions were on board. I have carefully read and considered them alongside cited authorities.

Considering the principles governing the grant of injunction orders as laid down in the celebrated case of *Giella vs Cassman Brown & Co. Ltd [1973]E.A 358* and the pleadings and documentation laid before me, I am not satisfied that the plaintiff has met the threshold. Indeed the plaintiff has not even alluded to having established a *prima facie* case with probability of success or the irreparable loss that he may engender in the event that the injunction is not granted, both in his grounds in support of the application, the supporting and even the supplementary affidavits. Yes, he may for now be the registered

proprietor of the suit premises. However, that does not mean that the title cannot be impugned on account of fraud or be subject to other overriding interest and or even a question of trust. Indeed the defendants have already challenged the plaintiff's title to the suit premises in their defence and counterclaim. They have even gone further and claimed ownership of the suit premises on account of adverse possession. They have also raised the issue of several suits pending in court over the suit premises, whose proceedings are still ongoing, some of which are, *HCCC No. 2420 of 1993(Nairobi)*, *HCCC Misc Application No. 1155 of 1993 (J.R. Nairobi)* and *HCCC No. 5688 of 1992 (Nairobi)*. The plaintiff has not in any way countered this assertion. If that be the case, then the outcome of those cases will have a direct bearing on the plaintiff's title to the suit premises.

It is not in dispute that the plaintiff obtained the title deed over the suit premises on 8<sup>th</sup> February, 2011 when the defendants were in occupation. The documents annexed to the replying affidavit of the defendants attest to this fact. An order of injunction will in the circumstances amount to eviction of the defendants and effectively determine the suit at an interlocutory stage, bearing in mind that the only prayer in the plaint is for a permanent injunction. This court can only make an appropriate decision after taking evidence from all the parties and also upon interrogating how the plaintiff obtained the title deed in respect of the suit premises when they were in occupation by the defendants.

In the end, I have come to the conclusion that an order of interlocutory injunction is in appropriate at this stage. Accordingly, the application is dismissed with costs to the defendants.

**DATED at MACHAKOS this 22<sup>ND</sup> day of NOVEMBER, 2012.**

**ASIKE-MAKHANDIA  
JUDGE**

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> day of NOVEMBER, 2012.**

**GEORGE DULU  
JUDGE**