



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 239 of 2012**

**ROBERT NGARUIYA CHUTHA.....PLAINTIFF**

**VERSUS**

**JOSEPH CHEGE NDUNG’U..... DEFENDANT**

**RULING**

The application for determination is a Notice of Motion dated 7<sup>th</sup> May 2012, which is supported by the Plaintiff’s affidavit sworn on the same date, and a further affidavit sworn on 12<sup>th</sup> June 2012. This application is brought under Order 40 Rule 1,2 & 3 and Order 50 Rules 1,2,and 3 of the Civil Procedure Rules. The Plaintiff is seeking the following orders in the said application:

1. That a temporary injunction be issued against the Defendant restraining him from entering, trespassing, erecting structures and interfering with the Plaintiff’s possession, occupation and legal ownership of the Parcel of Land Known as RUIRU WEST BLOCK 1/673 (hereinafter referred to as the suit property), pending the hearing of this Suit.
2. The O.C.S. Ruiru Police Station be ordered to supervise the enforcement of the above order.

The application is premised on the grounds that the Defendant has unlawfully entered, trespassed on and interfered with the Plaintiff’s quiet possession, occupation, use and legal ownership of the suit property, and has erected unauthorized structures thereon. The Plaintiff states that he bought the suit property from the original shareholder through Githunguri Constituency Ranching Co. Ltd offices in 1993, and was issued with the original ballot paper, plot share certificate and clearance letter which he lodged with the then Kiambu District Land Registry. He was thereafter directed to register and pay at the Ministry of Lands headquarters at Ardhi House in Nairobi where all leases are processed. The Plaintiff further stated that he paid the registration fees on 08/12/1994, the conveyance fees on 10/7/1995 and for the certificate of lease on 28/10/11.He has annexed certified photocopies of the original receipts.

The Plaintiff claims that he took possession of the plot immediately in 1993 and has been in occupation and possession of the parcel for 19 years. Further, that his lease was registered on 31/10/11 by the Commissioner of Lands and a Certificate of Lease in his name issued on 12<sup>th</sup> January 2012 by Thika District Land Registry. He has also annexed certified copies of the said Lease and Certificate of Lease, a certificate of official search dated 15/2/2012 showing that he is the proprietor of the suit property and correspondences from the office of the Commissioner of Lands to him on diverse dates.

This application is opposed by the Defendant who filed a Replying Affidavit sworn on 22<sup>nd</sup> May 2012 .The Defendant states in reply that the Plaintiff has failed to disclose the person who sold to him the suit property, and or the respective sale agreement in respect of the purported purchase, and averred that

this can only be authenticated by the production of the original documents. The Defendant further stated that he entered the land in 1990 and has put a dwelling house and other structures thereon, and it is therefore not true that the Plaintiff is in possession of the suit land. He annexed photographs showing the status and developments done on the plot.

The Defendant further averred that he is the *bona fide* owner of the land having purchased it from an original shareholder in 1990, formalized the sale in 2008 and a transfer effected to him in 2010. He annexed copies of the agreement for sale, payment receipts and share certificates and transfer. The Defendant states that the Plaintiff's title is faulty and its authenticity is questionable for want of material particulars to its issuance.

Counsel for the parties were directed to file submissions, and wholly relied on the same during the hearing of the application on 25<sup>th</sup> September 2012. The Plaintiff's Counsel in submissions dated 19<sup>th</sup> July 2012 argued that a certificate of title is *prima facie* evidence that the person named as proprietor of land is the absolute and indefeasible owner. The Defendant's Counsel in his submissions dated 24<sup>th</sup> September 2012 argued that under section 26(1)(a) and (b) of the Land Registration Act the Plaintiff's title can be challenged on the grounds of illegality and fraud. Further, that the Plaintiff can be adequately compensated for damages and had not given any undertaking for damages and/or security, and that an injunction would render the Defendant's Counterclaim nugatory.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. What I am required to do is to determine the application before me on the basis of the requirements stated in ***Giella vs Cassman Brown & Co Ltd, (1973) EA 358*** as to the grant of a temporary injunction. These requirements are that firstly, an applicant must show a *prima facie* case with the probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Lastly if the court is in doubt it will decide the application on a balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff's claim in the Plaint filed herein dated 7<sup>th</sup> May 2012 is for a permanent injunction and for eviction orders as against the Defendant, based on his legal ownership of the suit property. The Plaintiff has provided evidence of his title to the suit property, and to this extent I find that the Plaintiff has established a *prima facie* case. I also concur with the Plaintiff's averments in his further affidavit that the Defendant's sale agreement, payment receipts and share certificate that were produced in evidence do not indicate any reference to the suit property. The Defendant has in addition not provided any evidence of the allocation of the suit property to the original shareholder he alleges to have bought the same from.

I will not make any finding as to the adequacy of damages as the Defendant has not pleaded that they will be able to compensate the Plaintiff in monetary terms. I however do agree with the Defendant's submissions that he will suffer irreparable damage if the application is allowed on the terms prayed, as he has already built structures on the suit property. I therefore allow the Plaintiffs' application dated 7<sup>th</sup> May 2012 on the following terms:

1. The Defendant is hereby restrained from entering, trespassing on, continuing with the construction of any structures on, and/or interfering with the Plaintiff's possession and occupation of the parcel of land known as RUIRU WEST BLOCK 1/673 pending the hearing of and determination of this suit or until further orders.
2. The Plaintiffs shall not demolish or in any way interfere with any structures constructed on the said parcel of land by the Defendants pending the hearing and determination of the suit herein or until further orders.
3. The O.C.S. Ruiru Police Station to assist with the enforcement of the above orders.
4. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_16<sup>th</sup>\_\_\_\_ day of \_\_\_\_November\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**