REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 149 OF 2010

DANIEL GITHAIGA MWANIKI……..…....PLAINTIFF/APPLICANT

VERSUS

COUNTRY COUNCIL OF NYERI.....….DEFENDANT

RULING

DANIEL GITHAIGA MWANIKI, the Plaintiff/Applicant herein, took out the summons dated 27th October 2010 in which he sought for the following orders:

(a) That this application be heard ex-parte in the 1st instance owing to its urgency.

(b) That a temporally injunction do issue directed against the defendant, its agents, employees, hiring or anybody acting under them from in any way whatsoever interfering with the plaintiff's right to lawful occupation and utility of plot No. 39 Mweru Market until the hearing and determination of this application in the first instance; and suit in the fullness of time.

(c) That the Honourable Court do order the defendant to remove, by way of mandatory injunction, all that fence, now erected around plot No. 39 Meru Market, the property of the plaintiff pending the hearing and determination of the suit herein.

(d) That the Honourable Court do allow the Plaintiff to re-fence the said plot to stem and prevent the continuing theft of his material on the demolished building.

(e) That costs be provided for.

The Applicant filed a supporting and two further affidavits in support of the Summons. The County Council of Nyeri, the Defendant/Respondent herein, resisted the Summons by filing the Replying affidavit of David N. Ng'ang'a its clerk.

I have considered the grounds set out on the face of the Summons plus the facts deponed in the affidavits filed in support and against the summons. I have further considered the oral submissions made by learned counsels from both sides plus the authorities cited. The substantive suit is expressed in the Plaint dated 27th October 2010 in which the Plaintiff sought for judgment in the following terms:

(a) Kshs.3,500,000/= being the value of destroyed building.

(b) Loss of income at the rate of Kshs.15,000/= for such period as the court may deem fit and reasonable.

(c) General damages for trespass and defamation.

(d) Injunction directed as against the defendant, its agents, servants hiring or anybody working under its authority as such, from in any way interfering with the plaintiff's peaceful occupation and lawful utility of plot No. 39 Mweru trading centre, without lawful cause.

(e) Costs plus interest on (a) to (d) as the case may be.

The Defendant filed a defence to deny the Plaintiff's claim. The Defendant further filed a counter-claim seeking for judgment against the Plaintiff in the following terms:

(a) Vacant possession of the portion of the parcel of land now identified as "Plot No. 39" occupied by the Plaintiff and eviction of the Plaintiff therefrom.

(b) A declaration that the Plaintiff is bound to settle all costs and expenses incurred by the Defendant in the course of enforcement of compliance with its Notice.

(c) General damages for trespass.

(d) Costs of the Counterclaim with interest at court rates.

When the Summons came up for interpartes hearing, Mr. Karweru, learned advocate for the Plaintiff, beseeched this court to issue the orders sought in the application. The learned advocate gave a brief summary of the facts leading to the institution of the suit. It is alleged that in 1977, the Defendant allocated the Plaintiff Plot No. 39, Mweru Market upon an application made by the Plaintiff within the same year. The Plaintiff averred that he faithfully paid the Defendant the ground rents while awaiting ground allocation which was done on 23rd March 1996. The Plaintiff further alleged that the Defendant delayed to give him physical allocation despite having paid the pegging fees, thus he was prompted to seek for the intervention of the officials from the Ministry of Local Government. The Plaintiff claimed that he was shown the full extent of Plot No. 39 by the Defendant's officials on 23rd March 1996. In the year 2000, the Plaintiff put up a storey building on the Plot in dispute after securing the necessary approvals from the Defendant. The building never went beyond the first floor due to shortage of funds. The building is said to have housed a pub, a clinic and an aggrovet shop. In the years 2008 and 2009 the Plaintiff was summoned by the Defendant to appear in its offices with ownership documents of the Plot. The Plaintiff stated that in the year 2010, he carried out further constructions of extensions on the ground floor but was stopped by the Defendant. He said he attended the Defendant's committee meetings to explain himself out. The Defendant said he was told to wait for a communication from the committee on its deliberations. The Plaintiff alleged that on 19th September 2010 and without notice nor any warning the Defendant pulled down his building using hired bulldozers from the Ministry of Public Works. The Plaintiff has attached to his affidavit, photographs showing the structure standing on the Plot in dispute had been pulled down to the ground after which the council fenced the entire plot thus blocking the Plaintiff from accessing it. The Plaintiff alleged that the Defendant has threatened to remove all the materials of the demolished structure from the Plot in dispute hence it should be restrained.

The Defendant stated that the Plaintiff did not show that he has a *prima facie* case with any chance of success. It is alleged that the ownership documents attached to the Plaintiff's affidavit do not establish that the Plaintiff was a bonafide allottee of Plot No. 39 Mweru Market. The Defendant further averred that the Plaintiff had failed to annex documents to his affidavits to show that he had obtained permission and approvals from the relevant authorities to put up the building which was later demolished. The

Defendant acknowledged that the Plaintiff was one of the successful applicants for Plot allocation on a cite to be procured by the Defendant. It is alleged that the process of acquisition of the Plot was never completed hence the process of allocation was therefore not finalized. In short, the Defendant has clearly stated that the Plaintiff was never allocated any Plot. The Defendant also denied ever showing the Plaintiff the physical location of Plot No 39 Mweru Market. The Defendant alleged that the Plaintiff moved to settle on a Plot reserved for a public market whereupon he put up a structure without seeking for the necessary approvals as required under the Physical Planning Act. It is alleged that no pegging certificates were issued regarding Plot No. 39, Mweru Market. The Defendant is said to have told the Plaintiff to stop the unauthorized developments on the land in question. The Plaintiff appears to have stopped further developments for a while before starting to continue. The Defendant alleged that members of the public who were affected by the building joined the Defendant in pulling down the Plaintiff's building. The Defendant admitted having fenced the Plot thereafter.

Having given the history behind the filing of the suit and the subsequent application, let me now consider the merits or otherwise of the Summons. The principles to be considered before granting a temporary order of injunction are well settled. First, an applicant must show a *prima facie* case with a probability of success. Secondly, that an applicant must show that if he is denied the order he will suffer irreparable loss. Thirdly, that if the court is in doubt the application can be decided by taking into accountthe convenience of the parties. Let me now apply the aforesaid principles to this case. In an attempt to establish that he has a prima facie case, the Plaintiff presented documents showing that he was allocated by the Defendant Plot No. 39, Mweru market. The Defendant denied having done so. The Defendant admitted that the Plaintiff had applied for allocation of a Plot at Mweru market. It said that the process of acquisition of the land is yet to be concluded. I do not think the Defendant was candid in this respect. It is clear from the annexure 'M.1' attached to the further affidavit of Daniel Githaiga sworn on 20th January 2011 that the Defendant gave the Plaintiff a letter of allocation of Plot No. 39 at Mweru Market. The aforesaid letter is dated 28th September 1977. Attached to the supporting affidavit of the Applicant sworn on 28th October 2010 is annexure 'M.1' which shows that the records held by the Defendant indicates that the Plaintiff is the registered allottee of Plot No. 39 Mweru Market, as of 9th September 2010. There is also no dispute that the Plaintiff had put up a storey building on a 'Plot No. 39'. The Defendant admits that it demolished the aforesaid building because the same was put up without the necessary approvals and authorization. In my view, what I have stated hereinabove is enough to show that the Plaintiff has shown a prima facie case with a probability of success.

In order for a party to succeed in getting an injunction, he must show that if he is denied the order, he is likely to suffer irreparable loss. Looking at the entire case, I doubt whether the Applicant's application has satisfied this principle. To begin with, the Applicant has clearly prayed for special damages in his Plaint. He has asked to be paid Ksh.3,500,000 being the value of the destroyed building and for payment of Ksh.15,000 per month for a period to be determined. The Plaintiff has asked to be allowed to fence the Plot to prevent people from stealing materials from the demolished building. Again, this latter prayer does not make sense because, it is admitted by both sides that the Defendant has fully fenced the entire Plot. In short, I am convinced that the damage which the Plaintiff is likely to suffer if he is denied the order is quantifiable in monetary terms. In fact the Plaintiff has provided the figures he expects to demand to be paid. He has therefore failed to satisfy the second principle.

The third principle which should be taken into account is that of convenience. The parties to this dispute did not seriously address me on this principle. There was an attempt by the Defendant to show that the Plot in dispute being a public utility Plot, members of public would be inconvenienced if the order is given. The issue as to whether or not the Plot is a public market is a matter which will be dealt with at the trial. It is therefore clear that the Defendant will not suffer any inconvenience. In any case it is admitted that the Defendant has already fenced the Plot, meaning members of public do not have the right of ingress and igress hence they cannot be deemed to suffer any inconvenience. The Plaintiff on his part has stated that he will be more inconvenienced if he is denied the order because he will not gain access to the property. It is true the Plaintiff's building was demolished and that the Defendant has fenced the Plot. The only inconvenience the Plaintiff will suffer is not gaining access to the Plot. What use will it be to the Plaintiff to access the Plot? He claims he needs to re-fence the same to stop members of public from stealing his building materials. In my view if the Plaintiff is allowed to re-enter the Plot he may

interfere with the evidence which may be used to assess the value of the damaged building. The prospect of theft of building materials from the damaged building taking place is minimal in view of the admission by the parties the Plot has been fenced. It is the duty of the Defendant to ensure that the site and the materials from the demolished building are secure and safe. A fair order in the circumstances is to refuse the orders sought.

In the end the Summons dated 27th October 2010 is dismissed. Costs shall abide the outcome of the suit.

Dated and delivered at Nyeri this 3rd day of June 2011.

J. K. SERGON
JUDGE

In open court in the presence of Chweya holding brief Karweru for Plaintiff/Applicant and Kimunya holding brief for Mugambi for the Defendant/Respondent.