



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE 337 OF 2011

**LANYAVU GARDENS
LIMITED.....PLAINTIFF**

VERSUS

**1. WILSON MUNGUTI MBITHI ALIAS KAVUTI
2. JACKSON MUTUA
3. SYOKIMAU BRIGHT HOMES
LIMITED.....DEFENDANTS**

RULING

1. The application before the Court is the Notice of Motion Application dated 14th November, 2011 (“Application”). It is brought under Sections 1A, 1B, 3A, 63(c) and 63 (e) of the Civil Procedure Act and Order 40, rules 1, 4 and 8 the Civil Procedure Rules and all other enabling provisions of the law. It is supported by the Supporting Affidavit of Bishop (Rtd) Bonifes E. Adoyo sworn on the same day.
2. The Application is brought by La Nyavu Gardens Limited (“Applicant”) against Wilson Munguti Mbithi Alias Kavuti, Jackson Mutua, and Syokimau Bright Homes Limited (the 1st to 3rd Respondents, respectively) seeking five orders as follows:
 - a. First, that the Application be certified as urgent and heard *ex parte* in the first instance and service upon the Respondents be dispensed with.
 - b. Second, that an order of temporary injunction be issued to restrain the Respondents by themselves or their agents, employees, servants or nominees from either jointly or severally trespassing, entering, damaging, alienating, sub-dividing, or building any structures or otherwise dealing with the parcel of land known as LR No. 12610/4, IR No. 43769, Mavoko Municipality, Machakos District measuring approximately 231.4 hectares (“Suit Property”) in a manner which is adverse to the interests of the registered proprietor, the Applicant, pending the hearing and determination of this Application;
 - c. Third, an order to evict the Respondents and/or their agents from the Suit Property pending the hearing and determination of the suit filed herein;
 - d. Fourth, an order directing the Athi River Officer Commanding Police Division (OCPD) or his agents, to ensure compliance with the orders enumerated in (b) and (c) above.
 - e. Fifth, a provision for the costs of the application.

3. The Application is predicated on the Plaint dated 14th November, 2011. In the main, the Plaint seeks the above order, in permanent fashion – and, in addition, orders for damages and interests the properties respecting which the present Application is brought) between the Applicant and the 1st Respondent.

4. The legal principles for granting interlocutory injunctions are now well settled in Kenya. They are set out in the celebrated case of *Giella vs Cassman Brown* in the words of Spry V.P.:

First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

5. In his authoritative book on injunctions, Justice Kuloba (now retired) restated these legal principles thus:

[T]he right formulation of [the principles] would be this, *that among other considerations a court takes into account* in determining whether a temporary injunction should be issued, first, whether there is a significant likelihood that the applicant will prevail on the merits of the case at a full trial. Second, the court will ordinarily consider whether there is a threat of irreparable harm. Finally, there is the traditional consideration of whether harm to the respondent would outweigh the need for temporary relief. But there may be other matters, for example public interest, involved. [Emphasis his]

6. The Application first came before Justice Dulu on 15th November, 2011. He granted the first prayer (certifying the matter urgent) and ordered the Applicant to serve the Application for an inter partes hearing. He also directed that the Application be heard on a priority basis. On the strength of those orders, the High Court Registry fixed the matter for hearing for 2nd December, 2012. The Applicant was tasked to serve the Application.

7. The matter came up before me on 2nd December, 2012. Mr. Wambugu, Learned Counsel for the Applicant was present. There was no appearance for the Respondents. No Notice of Appointment of Attorneys had been filed for the Respondents. Mr. Wambugu pointed out to me that an Affidavit of Service had been filed in the matter. The Affidavit of Service demonstrated that Summons to enter Appearance; Plaint; and the Application (together with Supporting Affidavit and annexures) had all been served on the Respondents on 21st November, 2011.

8. Upon perusing the Affidavit of Service of Simon M. Mbinda, I became persuaded that the Respondents had been served with all the opposing papers and had, thus, been given an opportunity to oppose the present application but they had elected not to do so. In the circumstances, the Court has to deliver its ruling on the interlocutory injunction based on the uncontroverted affidavit evidence of the Applicant since there are no opposing papers filed on behalf of the Respondents.

9. Without a more developed factual record, the Applicant's affidavit evidence uncontrovertibly shows the following:

a. That the Applicant entered into an Agreement for Sale of the Suit Premises with Eva Three D Constructions Systems on 29th July, 2009;

b. That the Applicant duly perfected the Agreement for Sale stated above together with all the conveyancing procedures necessary to effect the transfer to the Applicant pursuant to which the transfer occurred and a valid Certificate of Title Issued to the Applicant;

c. That all available documentary evidence – including a copy of the Provisional Certificate of Title; a Charge in favor of Development Bank of Kenya Limited; and a letter dated 5th May, 2011 by the Senior Registrar of Titles, Ministry of Lands – all of which are annexed to the affidavit of Bishop (Rtd) Bonifes E. Adoyo, demonstrate that the Suit Property belongs to the Applicant;

d. That despite the clear ownership of the Applicant of the Suit Property, the Respondents, acting inconsistently with this ownership, have proceeded to invade the land and even purport to subdivide it and “allocate” sub-parcels of it to third parties using “Plot ballots” an example of which is attached to the Supporting Affidavit as exhibit BEA 6.

e. That the Respondents, acting in a scheme to deny the Applicant the vacant possession of the Suit Property, have enlisted the help of “hired hooligans” (See Supporting Affidavit at para. 11 and 21-22) to intimidate the Applicant and its agents or servants and keep them away from the Suit Property;

f. That the Respondents’ agents have, in fact, succeeded in invading the Suit Property and even erected some structures “in total disregard of the [Applicant’s] interest” (See Supporting Affidavit at Para. 24).

10. In the circumstances, the Applicant prays for the orders prayed in the Application. When the matter came before me on 2nd December, 2011, after noting that no opposing papers were filed by the Respondents and that a valid affidavit of service on record demonstrated that the Respondents had been filed in the matter, I heard Mr. Wambugu’s submissions in the matter. In particular, I asked Mr. Wambugu to address me on Prayer Number 4 in the Application, namely, the order for an order to evict the Respondents and/or their agents from the Suit Property and to demolish all “illegal” structures built on thereon. Mr. Wambugu expressly indicated that he wished to abandon that particular prayer. The Applicant was no longer interested in getting an order for eviction or demolition or property already on the Suit Property. All they wanted, Mr. Wambugu said, were orders restraining the Respondents from interfering with the vacant possession of the Suit Property.

11. Even though this Application is not opposed, the law requires that I satisfy myself that the conditions for grant of interlocutory injunction are met. Even without the benefit of a developed factual record due to the Respondents’ failure to respond to the Applicant’s allegations and prayers, I have adverted my mind, in the mode of *Giella v Cassman Brown* (supra), to the fact that a party seeking the drastic remedy of an interlocutory injunction bears the burden of demonstrating:

- a. A likelihood of success on the merits in the substantive suit;
- b. The prospect of irreparable injury if the provisional relief is not granted; and
- c. That the balance of equities is in favor of the Applicant.

12. In the specific circumstances of this case, I am satisfied that the Applicant easily meets the *Giella* standard. In the absence of any opposing or rival factual account, and on the basis of the documentary evidence before the Court, I easily conclude that the Applicant has established a high likelihood, nay, probability of success on the merits. The copies of the documents placed before the Court which this Court takes as valid and legitimate in the absence of any controverting evidence, demonstrate that the Applicant owns the Suit Property. As the Court of Appeal remarked in the case of *George Orango Orago v George Liewa Jagalo and Others*, Civil Appeal No. 62 of 2009 at Kisumu (unreported), if it is proved that a person before the Court is in possession, and has title to the land, there is no proper basis for dispossessing him of that land. In that case, the Court of Appeal held that a denial of injunction in such circumstances “would cause [the Applicant] such loss as may not be adequately compensated by an award of damages.” Hence, the second prong of the *Giella* case is thereby satisfied as well. A litigant who, *prima facie*, demonstrates that it holds the *bona fide* title to a parcel of land, and nothing on the record suggests that the title is validly impugned, is deserving of the presumption that a denial of injunction would result in irreparable harm if an injunction to restrain a third party from interfering with the disputed parcel of land does not issue.

13. In the instant case, the Applicant not only incontrovertibly demonstrates its ownership of the Suit Property but has also shown that it has a Charge of Kshs. 200 Million on the property, and that it was relying on the development of the property through subdivision and development in order to repay the loan secured by the Charge. It follows that it will suffer irreparable injury if no injunction will issue to

protect its interest in the Suit Property.

14. In a case of unopposed application for interlocutory injunction, the third prong of the *Giella Case* is also easily satisfied. Without any evidence on the opposing side, the Court is entitled, in the absence of compelling evidence to the contrary, to believe the Applicant that the balance of equities is in its favor. This is especially true where, as here, there is no evidence on record that the Applicant has done anything to disentitle itself from the exercise of the sound discretion of the court to grant equitable relief.

15. In the specific circumstances of this case, I hereby conclude that the Applicant has satisfied the requisite standard for the issuance of an interlocutory injunction and I hereby grant the following orders:

- a. **THAT** an order of temporary injunction be issued to restrain the Respondents by themselves or their agents, employees, servants or nominees from either jointly or severally trespassing, entering, damaging, alienating, sub-dividing, or building any structures or otherwise dealing with the parcel of land known as LR No. 12610/4, IR No. 43769, Mavoko Municipality, Machakos District measuring approximately 231.4 hectares in a manner which is adverse to the interests of the registered proprietor, the Applicant, pending the hearing and determination of this suit;
- b. **THAT** the Officer Commanding Police Division (OCPD), Athi River Police Division, or his agents, to ensure compliance with the orders enumerated in (a) above; and
- c. **THAT** costs of this Application be in the cause.

DATED and DELIVERED at MACHAKOS this day 9TH day of DECEMBER 2011.

J.M. NGUGI
JUDGE