



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 746 of 2009

SIMON SOSSION.....PLAINTIFF

VERSUS

KIANGO GENERAL SUPPLIES LIMITED.....DEFENDANT

R U L I N G

This ruling is relates to a chamber summons application dated 7th October, 2009 brought under section 3A of the Civil Procedure Act and Order XXXIX Rules 1 (a), 2, 2A(1) and 9 of the Civil Procedure Rules. The said application seeks the following orders.

1. That pending the hearing and determination of this application this Honourable court be pleased to issue a temporary injunction restraining the Defendant either by itself or servants or agents from trespassing upon, constructing upon, entering upon, alienating, encumbering, disposing of, wasting, damaging or in any other way interfering or dealing with the land parcel referred to as Ngong/Township/Block 2/507.
2. That pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the Defendant either by itself or servants or agents from trespassing upon, constructing upon, entering upon, alienating, encumbering, disposing of, wasting, damaging or in any other way interfering or dealing with the land parcel referred to as Ngong/Township/Block 2/507.
3. That costs of this application be in the cause.

The application is premised on the following grounds

- i) The Plaintiff is the registered proprietor of the parcel of land referred to as Ngong/Township/Block 2/507.
- ii) On or around 4/10/2009 the Plaintiff was unable to access his property because he found a perimeter fence around his concern.
- iii) Upon making inquiries he was informed that the Defendant was constructing the same.
- iv) The Defendant's set of building a perimeter fence is illegal and amounts to trespass.
- v) Unless this application is allowed, the Plaintiff stands to suffer great irreparable loss and damage that cannot be adequately compensated by an award for damages.
- vi) It is only just and fair that the instant application be allowed.

During the hearing of the application, the applicant's counsel submitted that they were relying on the

plaintiff's affidavit and further affidavit sworn on 6th November, 2009. In support of the above submission, counsel quoted the case of **GIELLA vs. CASSMAN BROWN & CO. LIMTIED 919730 EA** page 2 in which the court stated that the applicant must show a *prima facie* case with a probability of success. Secondly, the court stated that the Applicant must show that he will suffer irreparable damage that cannot be compensated by an award of damages. According to the applicant's counsel, his client has already satisfied the above two conditions. Lastly, he also relied on the authority of **James. M. Chege vs. Evangeline Makena & Another (2003) eKLR.**

On the other hand, the application was opposed by Mr. Kigunda, the Respondent's counsel. He relied heavily on the replying affidavit of Isaac Onderi Lumumba. The learned counsel further submitted that the respondent is only an agent of the Government who had been given a tender by the District Commissioner, Kajiado District. Further to the above the learned counsel also submitted that the applicant should have enjoined the Government of Kenya in this suit. He was of the opinion that there is a misjoinder of the parties. He was also of the opinion that the issues being raised cannot be resolved unless the right parties are called to court. Apart from the above, he also referred to a letter which was quoted in paragraph 10 of the replying affidavit in which it is stated that the dispute is between the applicant and the Government. Besides the above, he also submitted that the facts do not favour the applicant for an injunction. In addition to the above, the learned counsel also submitted that the applicant has admitted that the perimeter wall has already been built and hence an injunction would not prevent anything. That also means that the law would not apply. As far as he was concerned the applicant has not met the principles laid down in the case of **Giella vs. Cassman Brown & Co. Limited.** The learned counsel also took issue with the fact that the applicant had not produced an official search to confirm the ownership of the disputed premises.

After carefully considering the submissions by the learned counsels, the court is of the considered opinion that the disputed property Ngong/Township/Block 2/507 belongs to the applicant. The court is satisfied that the certificate of lease which has been availed by the applicant is a genuine document. Apart from the above, this court finds that the respondent entered into the said disputed plot without the authority nor permission of the applicant. Further to the above, this court is also satisfied that the applicant has established the principles as laid down in the case of **Giella vs. Cassman Brown & Co. Limited [1973] KLR.** Of significance is that the balance of convenience is actually in favour of the applicant who is the lawful owner of the disputed land. Having availed the certificate of lease, the applicant has also established a *prima facie* case with a probability of success. Though the respondent claimed that there is a misjoinder of parties, order 1 rule 9 of the Civil Procedure states as follows:

"9. No suit shall be defeated by reason of the misjoinder or non joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

In addition to the above, order 1 rule 10(2) states as follows:

"10(2). The court at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

In view of the above, I hereby grant the application in terms of prayer No. 3. Specifically I hereby order that pending the hearing and determination of this suit, this court hereby issues an injunction restraining the defendant, either by itself, or servants, or agents, from trespassing upon, constructing upon, entering upon, alienating, encumbering, disposing off, wasting, damaging or in any other way interfering or dealing with the land parcel referred to as Ngong/Township/Block 2/507.

Those are the orders of this court.

**MUGA APONDI
JUDGE**

Ruling read signed and delivered in open court in the presence of
Counsel

N/A for Defendant's/Respondent's Counsel

Matheka - Plaintiff's/Applicant's

MUGA APONDI
JUDGE

27th JANUARY 2010