



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Environmental & Land Case 320 of 2008**

**MWAUCO LIMITED.....PLAINTIFF**

**VERSUS**

**SIMON OLE KONTE .....1<sup>ST</sup> DEFENDANT**

**TARASH ENE SARUNI .....2<sup>ND</sup> DEFENDANT**

**KANANI OLE NASARINKE.....3<sup>RD</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....4<sup>TH</sup> DEFENDANT**

**THE PRINCIPAL REGISTRAR OF TITLES .....5<sup>TH</sup> DEFENDANT**

**RULING**

1. By its Chamber Summons dated 9/07/2008, the Plaintiff herein seeks a temporary order of injunction restraining the Defendants jointly and severally either by themselves or their servants, agents, assigns, employees and or anyone claiming under them from interfering, trespassing or otherwise dealing with the Plaintiff's property known as LR No. 13871, pending the hearing and determination of this suit. The Plaintiff also seeks a mandatory order of injunction compelling the 1<sup>st</sup> to 3<sup>rd</sup> Defendants or any person or entity other than those permitted by the Plaintiff to immediately and unconditionally vacate the Plaintiff's property known as LR No. 13871. The Plaintiff also wants the help of Karen Police Station with the enforcement of any orders of this Honourable Court.
2. The application is based on the grounds that the Plaintiff is the lawfully registered owner of all that parcel of land known as LR No. 13871, herein after referred to as the suit property; that on or about 24/06/2008, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants jointly and severally through their agents and or servants trespassed upon the suit property and further caused to be demolished a perimeter fence erected thereon. The Plaintiff avers that the said trespass is not only unconstitutional, but has also caused immense loss to the Plaintiff and interfered with the Plaintiff's right to quiet enjoyment of the suit property. The application is also premised on the supporting affidavit of **John Harun Mwau** dated 9/07/2008. The deponent says that he is a Director of the Plaintiff Company and therefore competent and duly authorized to swear the affidavit. The deponent says that unless the Defendants are restrained in their acts of trespass, the Plaintiff will be unable to carry forward its plans to develop the suit property for its enjoyment.

3. The application is not opposed. There is neither Replying Affidavit nor Statement of Grounds of Opposition filed by any of the Defendants. The application is thus unopposed.
4. The Plaintiff filed this application contemporaneously with its plaint dated 9/07/2008 and the reliefs sought by the Plaintiff in the plaint are:-

- (a) *A Permanent Order of injunction restraining the Defendants jointly and severally their agents, servants, employees and or anyone claiming under them from further encroaching, occupying, destroying and trespassing upon the property known as L.R. No. 13871.*
- (b) *A Mandatory Order of injunction do issue compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants their servants and or agents and any other person claiming under or alongside them or occupying LR No. 13781 to immediately and unconditionally vacate and remove any structures erected on the suit property*
- (c) *A declaration that the Plaintiff is the legal owner of the suit property for the period of the Lease.*
- (d) *General damages for trespass*
- (e) *Cost of this suit*

5. At the hearing of the application, Mr. Odera, counsel for the Plaintiff/Applicant urged the court to find that the Plaintiff has established a *prima facie* case with a probability of success against all the Defendants herein. He submitted that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants and 6<sup>th</sup> Defendant have trespassed onto the suit land without any colour of right. Counsel submitted that Section 23 of the Registration of Titles Act (RTA) provides clearly that the Certificate of Title in the Plaintiff's possession is conclusive evidence that it is the registered proprietor of the suit property. The said section 23 of the RTA reads:-

*“23(1) The Certificate of Title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.*

*(2) A certified copy of any register instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.*

6. It is thus clear that in the absence of any evidence to the contrary section 23 of the RTA cushions the Plaintiff against any intrusions into the suit property from outsiders.

I now come to the issue of whether or not the Plaintiff is entitled to the orders sought. The conditions for the granting of an injunction were set out in **Giella vs Cassman Brown & Co. Ltd. [1973] EA 358**. The conditions are:-

- (a) *an Applicant must show a prima facie case with a probability of success*
- (b) *an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury.*
- (c) *when the court is in doubt, it will decide the application on the balance of convenience*

7. Counsel for the Plaintiff cited a number of other authorities upon whose basis counsel urged me to grant orders as prayed. In **Kamau Mucuha –vs- The Ripples Ltd. – Court of Appeal at Nairobi Civil Appeal No. 186 of 1992**, one of the orders sought by the Plaintiff in the High Court case was a mandatory injunction for reinstatement in and unconditional repossession of the suit premises and for the return of his stock-in trade goods and effects. It was held

*“that the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction; that in a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that this is a higher standard than is required for a prohibitory injunction.”*

8. The other authorities to the court were:- **Michael Githinji Kimotho –vs- Nicholas Muratha Mugo – Court of Appeal at Nairobi, Civil Appeal No. 53 of 1995** and **Harrison Musau –vs- Simon Sabonyo & 2 Others – Nairobi HCCC No. 924 of 2004**. In the **Kimotho case**, it was held that a squatter cannot defeat the rights of a registered proprietor of land. The court in the **Harrison Musau case** applied the principles set out in the **Kimotho case** in granting an order for mandatory injunction.
9. The question that now arises is:- what is the Applicant’s position in light of the above principles? I think that in the absence of any response from the Defendants, and in view of the fact that the Plaintiff is in possession of a Certificate of title to the suit property, there is no doubt that if left unchecked the Defendants are likely to deprive the Plaintiff of the right to use the suit property.
10. In essence therefore, the Plaintiff has shown that he has a prima facie case with a probability of success. The suit property comprises land in the upmarket Karen area. If the same is taken away from the Plaintiff in the manner now being adopted by the Defendants, it is unlikely that the Plaintiff will be able to replace it easily and for this reason, I am persuaded that the Plaintiff will suffer irreparable injury if the order of injunction is not granted.
11. In the premises, the court finds and holds that the Plaintiff’s application dated 9/07/2008 has merit. The same is allowed in terms of prayer 3, 4, and 5 thereof, that is to say:-
  1. *That pending the hearing and determination of this suit or until further orders of this court, a temporary order of injunction be and is hereby issued restraining the Defendants jointly and severally either by themselves or their servants, agents, assigns, employees and anyone claiming under them from interfering, trespassing or otherwise dealing with the Plaintiff’s property known as LR No. 13871.*
  2. *That a mandatory order of injunction be and is hereby granted compelling the 1<sup>st</sup> to 3<sup>rd</sup> Defendants or any person or entity other than those permitted by the Plaintiff to immediately and unconditionally vacate the Plaintiff’s property known as LR No. 13781.*
  3. *That the Officer Commanding Karen Police Station, the station of jurisdiction do help in the enforcement of these orders.*
  4. *That costs of this application be paid by the 1<sup>st</sup> – 3<sup>rd</sup> Defendants.*

Orders accordingly.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Ontitta for Odera for the Plaintiff/Applicant

Mr. Nguyo (present) for the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents

Weche – court clerk