



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

Environmental & Land Case 333 of 2009

JOSEPH MAINA GITHAIGA.....PLAINTIFF/APPLICANT

VERSUS

GEOFFREY MAINA WANJAU.....DEFENDANT/RESPONDENT

R U L I N G

1. By the Chamber Summons application dated 8/07/2009, the Plaintiff/Applicant prays for ORDERS:
 1. *THAT this application be certified as urgent and service therefore be dispensed with in the first instance.*
 2. *THAT the defendant by himself, his servants, agents and/or employees be and are hereby restrained by way of interim injunction from ingressing, trespassing, carrying on any construction or erecting structures, carrying out any operations and/or activities of any nature or doing any such nature of things whatsoever on the plaintiff's parcel of land known as plot No. 2050 being a portion of parcel No. L.R. No. 8480/1 situated in Mwiki, Kasarani District pending the hearing and determination of this application, and/or as the court may deem fit.*
 3. *THAT the Honourable Court do subsequently confirm the interim orders sought in paragraph 2 hereinabove, restraining the defendant by himself, his servants, agents and/or employees from interfering with the plaintiff's quiet enjoyment and user of plot No. 2050 being a portion of parcel No. L.R. No. 8480/1 situated in Mwiki, Kasarani pending the hearing and determination of this suit.*
 4. *THAT this Honourable Court do issue any other orders it deems fit to grant in the interest of justice.*
 5. *THAT the costs of this application be provided for.*
2. The application which was filed under Certificate of Urgency and brought under Order 39 Rules 2, 2A, 3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law is premised on grounds that the Plaintiff is the beneficial owner of all that parcel of land known as plot No. 2050 being part of LR No. 8480/1 (hereinafter referred to as the suit land) and that the suit land was owned by Ruaraka Sabuni Development Co. Ltd. before subdivision and sale of plot No. 2050 to the Plaintiff.
3. The application is also premised on the supporting affidavit sworn by the Plaintiff, Joseph Maina Githaiga, on 8/07/2009. The deponent says he bought the suit property from one Edith N. Gichuki who was a member of

Ruaraka Sabuni Development Company Ltd.. By a Certificate of Site Ownership dated 15/07/2007, Ruaraka Sabuni Development Co. Ltd certified that the Plaintiff was the owner of plot number LR 8480/1 Site No. 2050. The deponent also says that for one reason or another he was not able to develop his plot and that when he eventually visited the plot on or about 22/06/2009, he was shocked to find the Defendant squatting on the plot and carrying out construction thereon.

4. The application is opposed. The Replying Affidavit is sworn by the Defendant, Geoffrey Maina Wanjau on 28/07/2009. The Defendant denies that it has commenced any construction works on the suit land. He says that any construction he has undertaken is on his own plot, being plot number 2051, which plot the Defendant says he bought from Ruaraka Housing Co. Ltd. The Defendant says he bought plot 2051 for Kshs.13,000/= as per the payment receipt dated 13/03/1988 annexed to the Replying Affidavit and marked "GMW 1". The Defendant also says that there is another suit pending before the courts, namely **Milimani CMCC No. 7843 of 2008 – Ruaraka Sabuni Development Co. Ltd. –vs- Geoffrey Maina Wanjau** in which the Plaintiff's application for injunction therein was dismissed.
5. The deponent also says that if there is any dispute at all between the Plaintiff and the Defendant herein, an allegation that is denied by the Defendant, then such a dispute is a mere boundary dispute that ought not to have been brought before this Honourable Court. The Defendant wants the Plaintiff's application dismissed with costs.
6. The parties agreed to proceed with the application by way of written submissions. The Plaintiff's submissions are dated 4/11/2009 and filed in court on 5/11/2009. The Plaintiff's case is that the Defendant is a trespasser on the suit land. The Plaintiff also submits that the Defendant's contention that he was allocated plot No. 2051 by **Ruaraka Housing Company Limited** cannot possibly be true because the two companies are separate and distinct legal entities. The Plaintiff submits that on the basis of the above, the Plaintiff has established that he has a prima facie case with a probability of success.
7. The Defendants submissions, dated 18/11/2009 were filed in court on the same date. The Defendant objects to the Plaintiff's application on a number of grounds. First, the Defendant says that the application is fatally defective on grounds that the prayers in the plaint are at variance with the relief's sought in the application. The Defendant says that the prayers for temporary injunction in the application are inconsistent with the prayer for a permanent injunction sought in the plaint. Counsel for the Defendant relied on the persuasive authority by Emukule, J in Meru **HCCC No. 55 of 2009 – John Kubai Meringa –vs- Frederick Ntongai Meringa**. In the case, the Plaintiff, by his plaint, sought a permanent injunction against the Defendant to restrain the Defendant from interfering with the Plaintiff's occupation and quiet enjoyment of the property in dispute. In the Chamber Summons that was filed contemporaneously with the plaint, the Plaintiff in the case sought an order of temporary injunction against the Defendant, his agents, servants, assigns, guard or anybody howsoever acting on his behalf or behest from entering, intermeddling or in any manner dealing with the miraa on the disputed premises. The court considered the Defendant's objection to the Plaintiff's application in light of the provisions of Order 6 Rule 6(1) of the Civil Procedure Rules which bars a party in any pleadings from making new claims that are inconsistent with a previous pleading of his in the same suit and that he can only do so upon amendment of the principal pleading. The learned Judge thus found that since Order 39 Rule 1 of the Civil Procedure Rules only provides for the grant of a temporary injunction and not a permanent injunction, a prayer for a temporary injunction in an application would be inconsistent with a prayer for a permanent injunction in the plaint unless there is an amendment of the plaint to remove the inconsistency.

8. In the instant case, the Plaintiff's prayer in the plaint is for, inter alia,

“(a) A permanent injunction against the Defendant by himself, his servants, agents and/or employees restraining by them (sic) from ingressing, trespassing, carrying on any construction or erecting structures, carrying out any operations and/or such nature of things whatsoever on the Plaintiff's parcel of land known as Plot No. 2050 being a portion of parcel No. L.R. No. 8480/1.”

9. On the other hand, prayer 2 of the Plaintiff's Chamber Summons application which application was filed contemporaneously with the plaint on 8/07/2009 seeks an order of **interim injunction** against the Defendant in dealing with the suit land until the suit is heard and determined.

10. In the case of **Winstone –vs- Winstone [1959] 3 All ER 580**, a case that was cited by Emukule J in the **Meringa case** (above) Winn J said the following with regard to provisions in the Supreme Court of Judicature 1873 that are similar to the current Order 39 Rule 1 of the Civil Procedure Rules:-

“In my view these words are to be construed and understood as limited to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made.”

11. Though the **Meringa case** is only of persuasive authority, I think that the law as stated therein is correct. I am therefore persuaded by submissions made on behalf of the Defendant that the Plaintiff's Chamber Summons is in breach of both Order 6 Rule 6(1) and Order 39 Rule 1 of the Civil Procedure Rules. In the circumstances, the Plaintiff's Chamber Summons application dated 8/07/2009 would fail on that ground of breach.

12. The second objection to the Plaintiff's application is that the Plaintiff has not satisfied the conditions for the granting of an injunction as set out in **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**, namely that the Plaintiff has not demonstrated that he has a prima facie case with a probability of success, that he has not shown that he will suffer irreparable injury which cannot be adequately compensated by an award of damages if the injunction sought is not granted. Counsel for the Defendant also argues that even if the court were to decide the case on a balance of convenience, the scales of convenience would tilt in favour of the Defendant. The Defendant submits that though the Plaintiff alleges encroachment on the suit land, the Plaintiff has not denied that the Defendant owns plot No. 2051. Further that the documents produced in support of the Plaintiff's case do not exhibit any connection between them, especially the photographs of the alleged construction and the proposed subdivision plan. Counsel for the Defendant says that without the surveyor's plan, the Plaintiff's contentions of encroachment cannot stand.

13. I have now carefully considered the application as filed and the objections raised against it. Apart from the fact that the Plaintiff's application infringes both Order 6 Rule 6(1) and Order 39 Rule 1 of the Civil Procedure Rules, I am not satisfied that the Plaintiff has established a prima facie case with a probability of success. A prima facie case was defined by Bosire JA in **Mrao Limited –vs- First Amercian Bank of Kenya Ltd & Others [2003] KLR 125** at page 137 in the following words:-

“--- a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. I have sifted through the material that has been placed before this court by the Plaintiff but that material falls short of showing that there exists a right which has apparently been infringed by the Defendant herein. I have seen the photographs annexed to the supporting affidavit. These photographs do not show who took them, when they

were taken and what properties they relate to. In any event, I find that there is another suit pending before the court in which Ruaraka Sabuni Development Company Ltd had sought injunctive orders against the Defendant herein. That application for injunction was dismissed. There is therefore no justification for reaching a different conclusion in this matter.

15. In the result, the Plaintiff's application dated 8/07/2009 be and is hereby dismissed. Costs of the application shall be paid to the Defendant.
16. Orders accordingly.

Dated and delivered at Nairobi this 12th day of March, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

No appearance for the Plaintiff/Applicant

Mr. Kibanya for Muriithi (present) For the Defendant/Respondent

Weche – court clerk