

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1 of 2001

PATRICK MWAURA KAMANUPLAINTIFF

V E R S U S

JAMES NJUGUNA KIRIMADEFENDANT

R U L I N G

The submissions by counsel are on injunction application filed on 6th January, 2010 by way of notice of motion under **section 3 and 3A** of the **Civil Procedure Act**. That was the same day the plaint was filed. Yet the application that came for hearing on 10th June, 2010 was the motion dated 29th March, 2010 which sought the reinstatement of the interim orders of injunction and the extension of the same until the hearing and determination of the application dated 6th January, 2010. As the confusion is mutual and because the resolution of the application will take care of the subsequent application, the court will determine the earlier application.

The Plaintiff is the registered proprietor of land parcel No. Ruiru/Kiu Block 10/555 since 25th July, 2009 and has Title Deed (“PMK-1”). It would appear not to be in dispute that the Defendant is in occupation and is developing permanent structures thereon. The Defendant is saying that he was a member of Mahiira Housing Company Ltd in which he bought plot No. 341 of the company’s L.R. No. 10901/36. This was in 1986 and 1987. He paid full purchase and survey fees and was issued with Plot Certificate. “JNK1” and “JNK 11” are copies of the documents. He did not bother with the plot until November, 2009 when he begun to develop it. This is when the Plaintiff came to claim ownership and produced the Title Deed. He says that he found out the plot had been registered in the name of the Plaintiff. His case in counterclaim is that the Plaintiff and the company fraudulently got his plot to be registered in the name of the Plaintiff to his detriment. This was done by, among other things, the company giving the Plaintiff a Clearance Certificate. He sought a declaration that the transfer of the land to the Plaintiff was fraudulent and unlawful and that he is the rightful owner of the same. He also sought an order directing the District Land Registrar to cancel the registration and to rectify the Register to reflect him as the lawful owner.

The Plaintiff’s suit was for vacant possession, permanent and mandatory injunctions, and general damages for trespass.

The application dated 6th January, 2010 sought a mandatory injunction to compel the Defendant to render vacant possession of the suit property and to remove any structures he has erected thereon pending the hearing and determination of the suit. He also sought a temporary injunction against the Defendant and all those acting under him restraining them from further interfering with, making constructions upon or entering on the suit land until the suit is heard and finalized.

I have considered the affidavits sworn by the respective parties and the submissions by Mr. Njenga for the Plaintiff and Mr. Gatumuta for the Defendant.

The Plaintiff is the registered proprietor of the suit property. Under **section 27 (a) and 28** of the **Registered Land Act (Cap. 300)**, this registration vests in him absolute and indefeasible claim to the property. Compared to the claim by the Defendant, the Plaintiff has a better claim and, I find, he has established a *prima facie* case with a probability of success in terms of **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**.

When the Defendant went to the land in November, 2009 to begin construction, the Plaintiff had a registered claim. The activities of the Defendant would *prima facie* be those of a trespasser which have to be restrained. This is because a registered proprietor of land is entitled to its exclusive possession, occupation, use and quiet enjoyment. My preliminary finding is that any stay, occupation or construction constitute acts of continuing trespass. These have to be restrained. The Plaintiff, I find, has made a case for interlocutory injunction, as the balance of convenience should tilt in favour of a registered proprietor.

Regarding an interlocutory mandatory injunction, it is noted that its effect is usually to resolve all the issues in dispute at this stage when the Defendant has not had the benefit of having his case determined at a full trial. This is why a mandatory injunction at this stage is usually granted with reluctance and in every special circumstance (**Agip (K) Ltd –Vs- Maheshchandra Himatlal Vora and Others [2000] 2 EA 285**). The evidence required to support an interlocutory mandatory injunction is unusually strong, when compared to an interlocutory

prohibitory injunction. The Defendant is saying that he bought the plot from the company, it was surveyed and he was given the necessary documents. He says that the company then colluded with the Plaintiff and registered it as present. The merit of these claims will be subjected to inquiry at trial. I do not find that in the premises there is a case for an interlocutory injunction.

The result is that the Plaintiff's application dated 6th January, 2010 is allowed in terms of prayer two (2) of the motion. He will have costs of the application.

DATED AND DELIVERED AT NAIROBI

THIS 19TH DAY OF OCTOBER 2010

A. O. MUCHELULE
J U D G E