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

Environmental & Land Case 217 of 2009

BONIFACE MUSYOKA MUNAVU…..….APPLICANT/PLAINTIFF

VERSUS

STANLEY KAMAU…….RESPONDENT/DEFENDANT

RULING

The plaintiff/Applicant moved to this court, by way of plaint dated 11th day of May 2009 and filed the same date. The salient features of the same are as follows:-

-The plaintiff was allotted plot number 155 at Tassia estate Embakassi Nairobi on the 30th day of January 2003 by the Kwandege Self Help Group, the original proprietor.

-The same plot was allotted to the plaintiff by NSSF on the 17th day of February 2006 after the NSSF acquired the root title from the self help group whereby the land was now designated as L.R. NO. 2190/155 .

- The defendant through himself authorized agents, servants assignees and or personal representatives have laid claim to the said plot and on 6th day of May damaged the plaintiffs fixtures on the suit plot. this prompting the proceedings herein. In consequence thereof the plaintiff seeks "*a permanent injunction to restrain the defendant, his duly authorized agents, servants, employees, assigns and or personal representatives from alienating, taking possession of, wasting, damaging, purporting to sell, transfer or deal in any other manner with all that property known as land Reference number 21/90/155 and all the fixtures thereon situate at Tassia Estate, Emabakssi Nairobi.*

(b) Costs of suit.

(c) Interest on item (b) above.

On the basis of that pleading, the plaintiff/applicant has anchored an interim application brought by way of chamber summons dated and filed the same date. Brought under order XXXIX rules 1(a) 2,2A , 3(1) and 3(2) of the CPR and section 3, 3A, 63 (c) 63 (e) of the CPA cap 21 laws of Kenya and all other enabling provisions of the law. The order sought read as follows;-

(2) That the respondent/defendant, his duly authorized agents, servants, assignees and/or personal representatives be restrained by an order of temporary injunction from wrongfully and illegally alienating, taking possession, wasting damages, purporting to sell or transfer by unlawful private treaty

or public auction and or dealing in any other manner with all that property known as land Reference number 21/90/155 situate at Tassia Estate Embakasi, Nairobi pending the hearing and determination of this application, suit and/or any other further court order or directions.

(3) That the Respondent/defendant be condemned to bear the costs of this application"

The grounds in support of the application are contained in the body of the application, supporting affidavit, annextures and written skeleton arguments. The sum total of the same are as follows:-

- The Applicant was allotted the suit plot in the first instance by the fore mentioned self help group, which allocation was later on confirmed by the root title holder NSSF as demonstrated by BMM1 A,B, BMM2.

- Upon confirmation that he was the lawful title holder, he commenced construction but then the defendant through himself and agents came and demolished his structures valued at Kshs. 901,500 as shown by annexture BMM3A, B.

- They are within the ambit of the ingredients for granting an injunctive relief as established by the case of **GIELLA VERSUS CASSMAN BROWN.**

- It is this applicant's stand that the property allegedly claimed by the defendant through a 3rd party is plot number 434 which is completely different from the applicants plot.

- They take issue with the replying affidavit as the same was filed before notice of appointment was filed herein.

- The exhibits relied upon by the respondent stand faulted as they have not been properly commissioned.

In opposition to the application, the Respondent relies on the replying affidavit and written skeleton arguments dated 24th day of June 2009 and filed the same date. The sum total of the same is as follows:-

- As per content of the replying affidavit, the Respondent has asserted that he purchased plot No. 21190/434 from one Dorothy Wambua.

- That the plots issued by Kwandege self help group were taken back by the NSSF and issued under a tenancy purchase scheme and him defendant has demonstrated through documentation proof that he is the tenant purchaser of plot number 434 and has no claim to plot 155 and the two plots have no relation at all.

- There is no legal basis for granting of an injunctive relief herein.

- Concede that the replying affidavit was filed a day before the filing of the notice of appointment, but both were accepted by the opposite party without any complaints and as such they are properly on record and should be relied upon.

- The exhibits to the replying affidavit are in order.

- The agreements relied upon are all signed and their authenticity is not in question.

On case law the court, was referred to the case **of WEETABIX VERSUS HEALTH TWO THOUSAND LIMITED NAIROBI MILIMANI COURT HCCC NO. 283 OF 2006,** decided by F.Azangalal J on the 26th day of June 2006. On an application for interlocutory injunctive relief at page 2 line 12 from the top the learned judge set out the provisions of Rule 9 and 10 of the oaths and statutory declarations Act cap 15 laws of Kenya thus:-

"*9. All exhibits to affidavits shall be securely sealed there to under the seal of the commissioner and shall be marked with serial letters of identification.*

10 The forms of Jurat and identification of exhibits shall be those set out in the third schedule" According the non complying exhibits were struck out.

The case of **REPUBLIC VERSUS BUSIA SENIOR RESIDENT MAGISTRATE COURT RESPONDENT, DAVID HENRY MUCHALULE HENRY SHISIA MATALANGA APPLICANTS, AND COAST BROAD WAY COMPANY LIMITED INTERESTED PARTY** decided by Seregon J on the 10th day of March 2004. It was contended that the motion subject of the ruling had been filed before the firm of Advocates, filed a notice of appointment. At page 4 of the said ruling, the learned judge quoted with approval the provisions of order III rule 1 and 8 of the CPR thus:-

"*Order III rule 1 Any application to or appearance or act in any court, required or authorized by the law to be made or done by a party in such court, may, except where otherwise expressly provided by any law, for the time being in force; be made or done by a party in person or by his recognized agent or by an advocate duly appointed to act on his behalf……*

8 where a party having sued or defended in person appoints an advocate to act in the cause or matter on his behalf, he shall give notice of appointment……

Upon construction of the above provisions the learned judge ruled that:-

"*It is apparent that the above provision of the law makes it mandatory for an advocate to file a notice of appointment as evidence of authority to appear or act on behalf of a party"*

I have come to the conclusion therefore, that the failure on the part of the firm of Ngure Mbugua and company advocates to file a notice of appointment renders whatever had been filed before the notice of appointment was lodged to be in competent"

The case of **MAKENA ASANYO VERSUS KENYA AGRICULTURAL RESEARCH INSTITUTE KISII HCCC NO. 151 OF 2003** decided on the 24th day of February 2004, by Kabiru BAUNI J as he then was, on an objection raised to the affidavits because they had not been endorsed with the name of the drawer- as required by section 34 and 35 of the Advocates Act. The objection was upheld because:-

"The deponent did not say how many letters or receipts are in the bundle. If one is missing the court, has no way to know that. He should have clearly indicated them. He should have stamped and sealed them. His explanation that they are many pages is not borne out. At page 2, the learned judge noted with approval Onyango Otieno J as he then was (now JA) in the case of **WEST KENYA SUGAR COMPANY LIMITED VERSUS PANACHAND JIURAJ SHAH AND ANOTHER HCCC NO. 907 OF 1999 (MILIMANI)** Thus: *"If a mere paper is sealed and signed, one cannot ascertain the same exhibits referred to in the affidavit are the same exhibits. The commissioner of oaths did see and certify to be correct in the affidavit. It is clear that the sealing and signing of the annextures or improper and the preliminary objection would succeed to that extent"*

The case of **JOHNSON MBUGUA MUGO AND 2 OTHERS VERSUS DOMINIC KINUTHIA MUGO AND ANOTHER NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 30 OF 2003** decided by Kasango J on the 9th day of December 2004. The point of objection arose because the counsel had filed a notice of motion subsequent to the filing of the notice of appointment. The learned judge after due consideration of the relevant case law and provisions of law ruled at page 3 line 14 from the bottom that:-

"*……counsel for the liquidator was wrong to have filed the notice of appointment before sanction of the court"*

The case of **GIELLA VERSUS CASSMON BROWN (1973) EA 358** where it was held inter alia that:-

(iv) An applicant must show a prima facie case with a probability of success.

(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(vi) When the court, is in doubt, it will decide the application on the balance of convenience"

The Respondent on the other hand cited the case of **JULIUS MWORIA ROBERT RINGERA VERSUS I.C.D.C. NAIROBI CA NO.115 OF 1988** decided by the CA, 1988 on an application for an injunction pending hearing of an appeal, he was not party to alleging on humanitarian grounds, the CA ruled that:-

"*This court, is governed by rules of law and there is no power to make the order sought on alleged humanitarian grounds"*

The case of **ESSO KENYA LIMITED VERSUS MARK MAKWA OKIYA KISUMU CA NO. 69 OF 1991.** At page 1 line 3 from the bottom, the law lords of the CA quoted with approval Halisbury laws of England 4th Edition volume 24 paragraph 953 thus:-

"*An application for an injunction in aid of a plaintiff alleged right, the court, will usually wish to consider whether the case is so clear and free from objection on equitable grounds, that it ought to interfere to preserve property without waiting for the right upon a variety of circumstances and it is impossible to lay down any general rule on the subject by which the court, ought in all cases to be regulated, but in no case will the court, grant an interlocutory injunction as of course"* then at page 4 line 6 from the top the CA went on to hold:-

"The Respondent having pleaded breach of the agreement and prayed for damages, the court, ought to have denied his injunction and the order of reinstatement because his claim could have been quantified and be compensated by way pf damages as one of the considerations enumerated in **GIELLA VERSUS CASSMON BROWN AND COMPANY LIMITED 91973) EA 358**.

On the courts', assessment of the facts herein, it is clear that the rival arguments have been presented on both the technical front and the merit front. The technical front arises because of the arguments advanced by the applicant against the paper in opposition filed by the respondent namely:-

(i). That since the replying affidavit was filed before the notice of appointment was filed, the said replying affidavit thus stands faulted.

(ii). That the annextures are not properly commissioned.

Whereas the merit front arises because the respondent has argued that since the applicants interest is in plot 153 whereas that of the respondent is 434 and as such issuance of an injunctive will not serve any purpose.

The first to be dealt with is the technical aspect. It is indeed conceded by the respondent that there is no dispute that the replying affidavit was filed on 19th, whereas the notice of appointment was filed on 20th May 2009. This being the case and as observed by the learned judges, in the case law, cited, herein, since the respondent was represented by counsel locus standi could only be attained through the appointed counsel filing a notice of appointment first before, filing any processes on behalf of his client. This being the case, and as observed in the case law cited the replying affidavit has been faulted and the same stands to be struck out. This alone is sufficient to dispose off the replying affidavit. However since the issue of the regularity of the exhibits is raised, it is only proper that the same be ruled upon even for purposes of jurisprudence only. This court, has perused the exhibits marked SKG1,2 and 3 and finds that the same is

indeed stamped and marked but the signature of the commissioner is missing. Lack of signature of the commissioner makes them non compliant with the provision of rule 9 and 10 of the oaths and statutory declarations Act, cap 15 laws of Kenya. This defect is fatal as shown by the case law, cited save that the fatality affects only the paragraphs, to which the exhibits are attached. These have to suffer the consequences of being struck out namely paragraph 5,6,8 and 9. Once struck out, the replying affidavit would have been left abare skeleton, had it been faulted by reason of it having been filed before the filing of the notice of appointment.

The question to be determined is whether the plaintiff/applicant has a clean bill of success on the one hand, on the other hand whether the respondent is remediless. The court, has revisited order 50 rule 16 CPR and finds that the respondent has locus standi to participate in these interim proceedings by reason of the presence of the notice of appointment already on record. By virtue of order L rule 16 (3) the court is at liberty to allow the respondents counsel to oppose the application on points of law only. Since the respondents counsel has already made representations in writing before the technical issues arose, it means that only points of law raised by them will be considered in the disposal of the application.

Turning to the merits, it is clear that all that the applicant is seeking from the court, is an injunctive relief. As mentioned by both sides, all that is required to be demonstrated are the ingredients established in the **GIELLA VERSUS CASSMAN BROWN CASE (SUPRA)** namely demonstrations that there is prima facie case with a probability of success. When this ingredient is applied to the facts herein, it is clear that the applicant has a prima facie case since the respondent has no claim over the plot 155 that the applicant seeks to protect. It therefore follows that this being the case, it is necessary for the site believed to be where plot 155 is located to be protected. This will be in the best interests of both sides because should both proceed to construct on the site and then it turns out that it is not the correct site for plot 155 then the plaintiff would have incurred unnecessary, costs. Likewise if the protective measure is not given, and it turns out that the site is not the correct site for plot 434 then the respondent would have incurred unnecessary losses. For this reason the court finds that this is a proper case for the granting of an injunction.

(2) As regards the second, damages are payable and may be adequate compensation. However since the dispute has arisen at the early stages of the construction, it is better to mitigate losses to both sides. For this nothing in this ingredient, which prevents the court, from taking steps to assist parties mitigate losses.

(3) As for the 3rd ingredients the balance of convenience also tilts in favour of the applicant. That the site be preserved pending hearing and determination of the matte or further orders. In view of the facts presented by both sides, there seems to be dispute as regards the location of the two plots on the site. This being the case a preservative order is inevitable though case law has to be taken to ensure that the same is not used by the victor as both a shield and sword at the same time.

For the reasons given in the assessment, the court, proceeds to make the following orders:-

1. The respondent replying affidavit sworn by one Stanley Kamau Gaiciru on the 19th May 2009 be and is hereby struck out for the reason that:-

(a) It was filed before counsel representing the respondent filed a notice of appoint merit.

(b) Secondly the paragraph to which the exhibits were attached are struck out namely paragraph 5,6,8 and 9 by reason of the fact that, though stamped and marked, the same was not endorsed or signed by the commissioning advocate. As such the same offends the provisions of rule 9 and 10 of the oaths and statutory declarations Act cap 15 laws of Kenya.

2. The striking out of the replying affidavit does not leave the respondent remediless as order L rule 16 (3) allows the court, to allow the defaulting party to address the court, on points of law only. Since herein objections were raised after arguments had already been presented in writing, the court, had no alternative but to consider only points of law raised in those representations which was duly done.

3. Prayer 2 of the application dated 11th May 2009 and filed the same date is allowed in the manner sought pending further orders of the court, on the following conditions.

(a) The applicant takes measures to establish with the help of a surveyor and the holder of the root title the exact location of plot 155 and 434 on the ground.

(b) The findings of the surveyor are filed in court within 90 days from the date of the reading of the ruling herein.

(c) That neither the applicant nor the respondent is permitted to carry out any constructions on the same during the pendence of the filing of the said report.

4. In default of number 3 above the injunctive order shall stand discharged.

5. The applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009

R.N. NAMBUYE

JUDGE