



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

Civil Case 157 of 2008

JAMES PETER MAINA MURUIKIPLAINTIFF

VERSUS

MOSES MAINA NGUGI1ST DEFENDANT

KAHAWA SUKARI LIMITED2ND DEFENDANT

RULING

The application filed in Court on 15th February 2007 seeks a temporary injunction to restrain the 1st defendant by himself or through his servants and or agents from constructing, trespassing alienating and/or in any way interfering with the plaintiff's **plot No. 3421** situate in Kahawa Sukari pending the hearing and final determination of the case.

In an amended Chamber Summons the applicant added two other prayers, namely that a mandatory injunction to compel the 1st defendant to vacate and remove his building materials from the plaintiff's said plot and an order compelling both defendants to restore the plaintiff's plot back to him.

Both the original and amended Chamber Summons are supported by the identical grounds stated there under; namely that the plaintiff/applicant is the proprietor of the **plot number 3421** situate in the Kahawa Sukari area and will suffer irreparable and substantial loss should the defendant/respondent be allowed to complete construction on it and that the application has a prima facie case with overwhelming chances of success and such other or further grounds to be adduced at the hearing hereon.

While the original application is supported by the affidavit of the applicant filed together there with the amended application is allegedly supported by the same affidavit which was filed together with the original affidavit; of which I may say something about hereinafter.

This affidavit refers to the amount of Kshs200,000/= the applicant paid to the 2nd respondent to purchase the suit plot for which he was issued with a receipt and allotment letter showing plot **No. 3421**.

That the directors of the 2nd respondent promised to issue the applicant with a title deed once the processing at the Lands Office was completed plus a lease which would be registered at the Thika Lands Registry in his names and those of his wife.

That the applicant fenced off the plot in 1995 after completion of payment and that he submitted his development plans to the 2nd respondent and the directors thereof approved it.

That on 4th December 2006 he went to inspect his plot and to his shock found the 1st respondent had trespassed and was constructing thereon.

That he went to the offices of the 2nd respondent where he found one director called **Mbugua** who told him that an error had been made at their offices and the plot double allocated to one **Mr. Magero** who later sold it to the 1st respondent.

Then **Mr. Mbugua** gave to the applicant a letter clarifying that the suit plot belonged to him and not to the 1st respondent to whom they offered an alternative plot.

That at the same time **Mr. Mbugua** gave the applicant a second letter addressed to the 1st respondent to stop construction thereon and move out of the plot as it belonged to the applicant and that the 1st respondent had been offered an alternative plot.

That despite the fact that the 1st respondent was duly notified that the suit plot belonged to the applicant he nevertheless continued with construction up to the lintol stage by 9th December.

Then the applicant refers to Chief Magistrate's Court Milimani **Civil Case No. 13660 of 2006** and **HCCC No. 1349 of 2006** also filed at Milimani Commercial Court where similar applications were made as the present one but which have since been withdrawn.

That counsel for both parties as well as the parties went to view the alternative plot offered to the 1st respondent on 19th January 2007 and found that it was in a swamp, hence not suitable to him.

That from here they proceeded to the suit plot and in spite of the applicant's lawyer explanation to the 1st respondent that he had been ordered to stop construction on the plot until the matter is resolved, the said 1st respondent defied this explanation and urged his workers to continue and complete the construction; and that all efforts made to stop such constructions have been fruitless, hence this application.

The 1st respondent filed and relied on the replying affidavit in which he states that the applicant's application is in fact against the 2nd respondent as he has no privity of contract with him, the said applicant.

He states that he purchased the plot from one **Charles Magero**, who had already bought it from the 2nd respondent. According to the annexure No. 7 to his affidavit, the said **Magero** had bought the plot from the 2nd respondent in 1997.

In Court on 5th November 2007 counsel for both parties submitted on the application and mainly relied on either supporting or replying affidavit.

The 2nd respondent agrees a mistake or error occurred in their offices in allocating this plot to the applicant because the same had already been allocated to **Charles Magero**, the first allottee of it.

That allottee has sold the same to the 1st respondent who has paid a colossal sum of Kshs1,200,000/= for it. He has no privity of contract with the applicant.

And as has been conceded to, he is already in possession of the plot put up a house on it which he says has cost him over Kshs.4 million.

Without the privity of contract between the applicant and the 1st respondent I am unable to say the former has established a prima facie case against the latter with the probability of success.

Neither can I say he will suffer substantial or irreparable loss, given that all he has spent on the plot as per

paragraph 2 of his supporting affidavit is the Kshs200,000/= he has paid to the 2nd respondent which can easily be recovered in damages.

Even on a balance of convenience the 1st respondent who is already in possession of the suit plot and has spent some money in purchasing it and putting up a building thereon would be at a greater disadvantage than the applicant if this application for injunction is granted – see ***Giella v. Cassman Brown & Company Limited [1973]EA 358.***

And just to remind the 2nd respondent while it had already allocated **plot number 3421** to **Charles Magero**, the same was no longer available or under its control for allocation to the applicant.

Perhaps one other issue I wish to comment on is that of amending a Chamber Summons.

While the law does not allow an amendment of an affidavit to support an amended Chamber Summons, there should be an independent affidavit to support the amended Chamber Summons even if it is in similar terms as that which supports the original Chamber Application, and it is not advisable to only refer to the original affidavit as supporting the amended Chamber Application.

See ***Kinyua v. Nganga [2004] E.A. (HCK) 105.***

That there have been many other cases in other Courts with similar applications to the present one does not affect the present case and application unless one is specifically brought out.

In light of the foregoing, this application is **dismissed with costs** to be paid by the 2nd respondent to the applicant.

Delivered and signed at Nairobi this 22nd day of February 2008.

D. K. S. AGANYANYA

JUDGE APPEAL