

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 22 of 2003

MARY WAMBUI MARUNGO.....PLAINTIFF

VERSUS

ADAMSON MUKUNJA MWAURA.....1ST DEFENDANT

MARY WANJIKU MUCHEMI.....2ND DEFENDANT

RULING

This is an application made under the provisions of **Order XXXIX Rule 1(a) (b), 2 (1) (2) & 3(1) of the Civil Procedure Rules** by the plaintiff seeking the orders of this court to restrain the defendants by themselves, or their servants or agents from trespassing, occupying, cultivating, subdividing, surveying, transferring and or in any manner whatsoever interfering with parcels numbers Bahati/Bahati Block 1/418 & 419 and further parcels numbers Bahati/Bahati Block 1/2126, 2127, 2124 and 2130 pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Mary Wambui Marungo, the plaintiff herein. The application is opposed. The 1st defendant, Adamson Mukunja Mwaura has sworn a replying affidavit in opposition to the application.

At the hearing of the application, I heard the submissions made by Mr Mutonyi, learned counsel for the plaintiff and by Mr Waiganjo, learned counsel for the 1st defendant. Although the 2nd, 3rd, 4th and 5th defendants were served, they did not file any papers either opposing or supporting the application. Mr Mutonyi reiterated the contents of the application and supporting affidavit. He submitted that the plaintiff was the registered owner of parcel number Bahati/Bahati Block 1/418 while the 1st defendant was the registered owner of parcel number Bahati/Bahati Block 1/419. He submitted that in the year 2000, the 1st defendant trespassed into the plaintiff's parcel of land and took possession thereof. The dispute was referred to the District Land Registrar to determine the boundaries of the two parcels of land. The District Land Registrar determined that the 1st defendant had encroached into the plaintiff's parcel of land. At the time the District Land registrar rendered his decision, the 1st defendant had subdivided the said parcel of land and sold portions thereof to the 2nd - 5th defendants. The plaintiff prayed for orders of this court to restrain the defendants from disposing of the said parcels of land pending the hearing and determination of the suit. He submitted that the plaintiff had established a prima facie case and will suffer irreparable loss and damage which would not likely be compensated by an award of damages. He urged this court to allow the application for interlocutory injunction with costs.

Mr Waiganjo, learned counsel for the 1st defendant reiterated the contents of the replying affidavit sworn by the 1st defendant in opposition of the application. He submitted that the 1st defendant was the owner of the suit land which was being claimed by the plaintiff. He submitted that the plaintiff obtained a title to a parcel of land which was not in existence on the ground. The 1st defendant denies that he had encroached on any parcel of land belonging to the plaintiff. He submitted that the 1st defendant had lawfully subdivided his parcel of land and sold to the 2nd - 5th defendants. He submitted that the plaintiff had obtained title to the parcel of land she was claiming under suspicious circumstances as the said title was issued eight years after the titles to the parcels of land in the area had been issued. He submitted that it was the Land Registrar who was causing confusion on the ground by refusing to confirm whether or not parcel number Bahati/Bahati Block 1/418 existed on the ground or not. He urged this court to order that

the *status quo* on the ground be maintained pending the hearing and determination of this suit. He submitted that the plaintiff had not established a prima facie case as to entitle her to the order of injunction sought. He urged the court to dismiss the application with costs.

I have carefully read the pleadings filed by the parties in support of their positions in this case. I have also considered the rival arguments made by the learned counsel for the plaintiff and for the 1st defendant. The issue for determination by this court is whether the plaintiff had established a case so as to entitle this court to grant her the orders of interlocutory injunction sought. The principles to be considered by this court in deciding whether or not to grant the orders of temporary injunction are well settled. As was held in the case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A 358** an injunction would not be issued unless the applicant establishes that he has a prima facie case with a probability of success. He has also to prove that he would suffer irreparable injury which is not likely to be compensated by an award of damages. And where the court is in doubt, it will decide the application on a balance of convenience.

In the present case, the plaintiff claims that the defendants encroached into her parcel of land and have occupied the same. On the other hand, the 1st defendant has submitted that he has not trespassed onto the parcel of land belonging to the plaintiff. The 1st defendant has deponed that the plaintiff does not own any parcel of land on the ground. Having carefully evaluated the affidavit evidence in this case and the submissions made by learned counsels of the parties to this application, it is clear to this court that the defendants have been in occupation of the suit parcels of land during all the period that the plaintiff has claimed the same. The 1st defendant has even gone ahead and subdivided the land and thereafter sold it to the other defendants in this suit. The 1st defendant deponed that he had developed the said parcel of land by erecting thereon permanent buildings. This fact has not been disputed by the plaintiff who has however pleaded to this court to restrain the defendants from selling their parcels of land pending the hearing and determination of the suit.

In view of the admission by the plaintiff that she has not been in occupation of the suit parcels of land, and further in view of the uncontroverted evidence that the defendants are in occupation of the suit land, it is clearly evident that the plaintiff has not established a prima facie case. This court can not therefore grant her the orders of injunction when it is clear that it is defendants who are in occupation of the suit parcels of land. A temporary injunction is meant to preserve the *status quo* pending the hearing and determination of a suit. In this case the *status quo* is that it is the defendants who are in occupation of the suit land.

The plaintiff has therefore failed to established a prima facie case. It would be unnecessary for this court to consider the other principles enunciated in the **Giella vs Cassman Brown Case (Supra)**. The upshot of the above reasons is that the plaintiff's application for interlocutory injunction lacks merit and is dismissed with costs to the 1st defendant.

DATED at Nakuru this 9th day of August, 2006

L. KIMARU

JUDGE