**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Suit 1175 of 2005**

**ADAM THUMI…….. PLAINTIFF**

**VERSUS**

**MAINA KIRIRO……...…… DEFENDANT**

**RULING**

This Ruling is made in the Chamber Summons application dated 22nd September 2005 brought under Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In it the Plaintiff seeks an interim injunction restraining the Defendant/Respondent, by himself, his servants or agents from alienating, wasting and/or in any other way interfering with the Plaintiff's quiet enjoyment of the Plot known as Ngong Township/1/41 pending the hearing and determination of this suit.

The application is supported by the Applicants' affidavit of 22nd September 2005 wherein he has sworn that he is registered as lessee for a term of 99 years of the suit premises. He has annexed, marked "AT-1" a copy of the relevant certificate of lease dated 24th July 2002. I have perused the said annexture and have noted that indeed it bears the Applicant's name and certifies that he is registered as proprietor of the Leasehold known as Ngong Township/Block 1/41 with the OleKejuado County Council appearing as Lessor.

It was submitted on behalf of the Applicant that the Applicant is entitled to protection by way of an injunction against the Respondents' acts of trespass and destruction of the Defendant's fence surrounding the suit premises. The Applicant says that the Respondent has on a previous occasion demolished the same and that he is fearful the second fence now standing on the plot may suffer the same fate. He also fears, that with the Respondent's threats hanging over him he will not be able to carry out his intended developments on the land.

The Respondent denies the allegations of trespass and/or damage to the Applicant's fence and clearly demonstrates both in his pleadings and submissions by Counsel that he is opposed to the Applicant's fencing of the plot. Indeed the Respondent's entire defence to the Plaintiff's claim is that the Plaintiff's ownership of the plot in question is questionable and any development thereon would interfere with the Respondent's enjoyment of his own property which is adjacent to the suit plot. Indeed the Respondent has filed a counterclaim in which he hopes to address his grievances and obtain appropriate relief.

I find that both Counsel herein went outside the legal sphere of the application in that they dwelt more with the validity of the Applicant's title than the question whether the application meets the relevant legal criteria for the granting of an injunction. The validity or otherwise of the Applicant's title is an issue for the main hearing and should not concern the Court at this stage. I have chosen therefore to limit myself to

addressing whether or not the application as it is meets the essentials for the granting of injunctions as set out in the leading case of GEILLA –vs- CASSMAN BROWN [1973] E.A. 358, VIZ:

1) The Applicant must establish a prima facie case with a probability of success,

2) The Applicant must demonstrate that he stands to suffer irreparable damages not capable of compensation in damages

3) On the balance of convenience Applicant must show he is entitled to the injunctive orders.

Prima facie, the Applicant is the registered proprietor as lessee of the plot in question, which nonetheless the Respondent claims to have been allotted to the Applicant without due regard to the Applicant's enjoyment of rights attaching to his own property.

I am of the view that being a holder of a title to the suit premises the Applicant is entitled to the protection under the law pending the determination of the dispute between the parties but within the laid down legal principles. That he demonstrated a superior interest to the suit premises than has been shown by the Respondent is not in doubt. The Respondent is, admittedly, owner of an adjacent plot and does not lay a claim of ownership of the suit plot. His only problem is that the same ought not to have been allotted to the Applicant, which complaint, ought, in my view, to be as against the allotting authority. An Applicant need only show that he has a prima facie case with a probability NOT a guarantee of success. It is not disputed that the Applicant has paid the stand premium and outstanding land rent as well as other sums necessary for the transfer of the suit land. From the copies of receipts annexed to his Further Affidavit the amounts paid total about Shs 53,000/=. In his supporting affidavit he says he expended Shs 4,760/= in purchasing fencing materials. Beyond that, the Applicant does not claim to have incurred any other monetary expenses towards the acquisition or development of the plot. I would not consider the stated losses to be of such a nature as would not be capable of compensation in damages should the temporary injunction not be granted.

In my considered view, the balance of convenience weighs in favour of the Respondents whose economic value and the enjoyment of his already existing property would be curtailed by the developments proposed by the Applicant and who would be faced with the burden of pulling down any structures put up by Applicant in the event that counterclaim succeeds.

I find that much as the Applicant has demonstrated a prima facie case with a probability of success, he has not proven to my satisfaction that he risks to suffer irreparable loss. Having found that the balance of convenience tilts in favour of the Respondent, I am not inclined to exercise my discretion in favour of the Applicant. I disallow the application and dismiss the same. Costs will be in the cause.

**Dated and Delivered at Nairobi this 25th day of November 2005. M.G. Mugo**

**Judge**

**In the presence of:**

**Mrs. Kinuthia for Plaintiff/Applicant**

**Mr. Kiarie h/b for Kihara for Respondent**