



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.1154 OF 2003

JAMES MUIRURI CHEGE PLAINTIFF

VERSUS

EVANGELINE MAKENA1ST DEFENDANT

FRANCIS KIRIMA M'IKUNYUA..... 2ND DEFENDANT

RULING

This was an Application by Chamber Summons, made by virtue of section 3A and 63(c) and (e) of the Civil Procedure Act, Order XXXIX Rule 1 and 2 and Order V, Rule 17 of the Civil Procedure rules, and filed on 11th November, 2003. The Applicant was praying for: (i) a temporary injunction restraining the Defendants by themselves, their servants, agents and/or any person claiming through the Defendants from entering into, remaining on, constructing or in any manner whatsoever interfering with the parcel of land L.R. No.26508, pending the hearing and determination of this Application and the main suit. The Applicant also prayed that the costs of this Application be provided for.

The Application was grounded on the Affidavit of James Muiruri Chege, sworn and filed on 11th November, 2003. He asserts that he acquired this land through a letter of allotment dated 18th December, 2001 and issued by the Commissioner of Lands. The parcel, formerly known as plot 35, is situated at Kasarani, in Nairobi. The Applicant did make the statutory payments of Kshs.17,600/=, by Bankers cheque No.010018 and was issued with receipt No.F141922 dated 17th July, 2002. Subsequently a grant of title was issued in the Applicant's name. On 6th September 2002. The Applicant asserts that he had to travel on official duty to North Eastern Province, and returned in October 2003, when he visited the Lands Office for the purpose of collecting the original grant.

He did not get the original grant, as the file could not be traced, and he has kept on following up on this matter without success. He asserts that the Lands Office had released a copy of the grant to his agent, but with the clear indication that only the Applicant himself would be given the original grant. He asserts that he had constructed a boundary fence around the Kasarani plot on 23rd October, 2003, but the following day the second Defendant demolished the fence and was putting up his own. When the Applicant took up the matter with the police, the second Defendant now produced an allotment letter in his own name, dated 18th December, 2001. The Applicant asserts that he was physically threatened by the second Defendant with others accompanying the second Defendant, on 7th November, 2003.

The applicant states that he has prepared a building plan for the plot in question, but he is unable to proceed with the works because of the trespass by the Defendants. He avers that since his plot file cannot be traced in the Lands Office, and the Defendants are in possession of an allotment letter similar to his own, there must have been a conspiracy to defraud the Applicant and deprive him of his property rights. The Applicant prays that the Defendants be restrained from acts of trespass upon the suit property.

This matter first came before the Honourable Justice Nyamu on 11th November, 2003, when he issued a temporary injunction restraining the Defendant by themselves, their servants, agents and/or any person, claiming through the Defendants from entering into, remaining on, constructing on or in any manner whatsoever interfering with all that parcel of land known as L.R.26508 for 14 days or until he hearing of the Application interpartes. To the extracted Order, signed by the Senior Principal Deputy Registrar on 13th November, 2003 was attached a Penal Notice in the following terms:

“If any person served with this Order does not comply with the Orders made therein he shall be liable to prosecution in Criminal Proceedings for contempt of Court and be committed to civil jail for six months and/or fined”.

Mr. Gichigi for the Plaintiff/Applicant submitted that, since the Applicant was the title holder for the suit property, the Respondents would have no basis of claim upon the same property. A search had been conducted by counsel, and this did not confirm the alleged letter of allotment held by the Defendants as genuine. He noted that the Defendants had failed to turn up in Court, even after service upon them of the hearing notice.

Counsel argued the case for an injunction against the Defendants on the authority of *Giella v. Cassman Brown & O., Ltd* {1973} E.A. 358, and *Buna Agencies Ltd v. Monier International (K) Ltd & Another*, Civil Case No.270 of 1997. In the *Giella* Case, the main East African authority on this subject, the court said (Spry, V-P):

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie, case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience” (p.360).

The Principle was applied by Mr. Justice Mbiti in the *Monier International* Case, when he remarked:

“On the nature of the injury which is likely to be suffered by the Applicant herein, it is clear that as the owner of the dominant land he is entitled to have access to his land for development. If he is blocked, he will definitely lose the use of his land, which is a loss which cannot be adequately compensated by damages. An injunction is therefore necessary in such circumstances, more especially where those blocking him are merely licensees”

Counsel argued that he court has good groups for granting an injunction to the Applicant, because the Applicant would suffer irreparable injury, which cannot be compensated in damages. He stated that already, the Applicant had development plans for the suit property, but it would be most difficult to quantify accurately the level of the income that was likely to accrue from the property. On a balance of convenience, it was urged, the decision of the court should favour the Plaintiff/Applicant.

The Plaintiff’s case speaks for itself, and there is nothing coming close to a matching case, on questions of merit or any other criterion of assessment, coming from the Defendants. Accordingly I find in favour of the Plaintiff/Applicant, and order as follows:-

(a) An Injunction is granted, to remain in force throughout until the main suit is heard and determined, restraining the Defendants by themselves, their servants, agents and/or any person claiming through the Defendants from entering into, remaining on, constructing on or in any manner whatsoever interfering with all that parcel of land known as L.R. No.26508.

(b) The costs this application shall be borne by the Defendants.

Dated and delivered at Nairobi this 16th day of December 2003

J.B. OJWANG

AG. JUDGE

Coram: Ojwang, Ag. J.

Court Clerk Mutea

For the Plaintiff/Applicant: Mr. Gichigi, Instructed by M/s

Gichigi Burugu & Co., Advocates.

Defendants unrepresented.