



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. E077 OF 2020**

**MARTIN MUTHII KANGARA..... PLAINTIFF**

**=VERSUS=**

**JOHN NJARIA MUTUNGA.....1<sup>ST</sup> DEFENDANT**

**PENINAH KARITA NJARIA .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff brought this suit through a plaint dated 19/08/2020. He sought the following verbatim orders against the defendants:

*a) A permanent injunction be issued restraining the defendants whether by themselves, agents, servants, employees or otherwise however from entering, depositing materials, occupying, erecting structures, or in any way dealing with or interfering of all that parcel of land known as Nairobi Block 136/1994.*

*b) Costs of this suit.*

*c) Interest on (a), (b) and (c) at court rates, and*

*d) Any other remedy that the court may deem fit to grant.*

2. Contemporaneous with the plaint, the plaintiff bought a notice of motion of even date, seeking an interlocutory injunctive order restraining the defendants against interfering with, entering into, depositing materials on, occupying, erecting structures on, or in any manner dealing with or disturbing the *status quo* relating to Land Parcel Number **Nairobi Block 136/1994 (the suit Property)**. The said application is the subject of this ruling.

3. Attached to the application was an unsworn/uncommissioned and undated document drawn in the name of the plaintiff and expressed as signed by the plaintiff on unknown date, titled "Supporting Affidavit." Subsequently, the plaintiff filed a supplementary affidavit sworn on 17/2/2021. Because the purported supporting affidavit was neither sworn/ commissioned nor dated, it cannot be said to constitute sworn evidence. I will therefore not place any reliance on the unsworn/ uncommissioned and undated and purported supporting affidavit. Reliance will only be placed on the supplementary affidavit sworn on 17/2/2021 and the plaintiff's pleadings on record.

4. The case of the plaintiff was that he was the lawful and beneficial owner of the suit property, having purchased it from one Teresia Otiso of ID Card Number 0943590. Teresia Otiso had acquired the suit property from Embakasi Ranching Company Limited (**the Company**) in 2006. He (the plaintiff) was in possession of the suit property. He had the original ownership certificate issued by the company, together with receipts and a letter dated 23/7/2020 by Walter Kigera on behalf of the company, confirming that he was the rightful owner of the suit property. The plaintiff further contended that the certificate of lease held by the 2nd defendant was a product of fraud because the company had not issued any lease relating to the suit property. He urged the court to grant the interlocutory injunctive relief.

5. The defendants opposed the application through a replying affidavit sworn on 21/10/2020 by John Njaria Mutunga (**the 1st defendant**). He deposed that the 2nd defendant was his wife and she was the registered proprietor of the suit property. He added that the 2nd defendant acquired the suit property as a lease from Embakasi Ranching Company Limited by virtue of being a shareholder of the company and an allottee of the suit property. He further deposed that the plaintiff had not demonstrated that he indeed purchased the suit property from one Teresia Otiso because he had not exhibited any documentary evidence of a land purchase contract. Further, he deposed that Walter Kigera ceased to be a director of the company on 19/4/2019 and had no mandate to author the letter dated 23/7/2020 on behalf of the company. Lastly, he deposed that the suit property was a surveyed and registered parcel of land and was not the the same as plot number V14669 which the plaintiff was claiming.

6. The application was canvassed through written submissions. Mr Nyamu, learned counsel for the applicant, submitted that the key issue

falling for determination was whether or not the plaintiff/applicant had satisfied the legal requirements for the grant of interlocutory injunctive orders as established in the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358**. Counsel submitted that the plaintiff had demonstrated that he was the owner of the suit property having purchased the same from Teresia Otiso, and that he had exhibited ownership certificate, purchase receipts, and a letter from Embakasi Ranching Company Limited relating to the suit property. Counsel further submitted that the plaintiff had satisfied the criteria upon which injunctive relief is granted. Citing the case of **Kibutiri vs Kenya Shell Nairobi High Court Civil Case No.3398 of 1980(1981) KLR**, counsel urged the court to grant the interim injunctive relief.

7. In response, Ms Mwanja, learned counsel for the respondents/ defendants, submitted that the respondents had established that the 2nd respondent was the registered proprietor of the suit property, having acquired the same by way of a lease from the National Government by virtue of being a member of Embakasi Ranching Company Limited. Counsel further submitted that the plaintiff/applicant had not established a *prima facie* case with a probability of success. Counsel added that the applicant had failed to demonstrate that he was likely to suffer irreparable damage that would not be compensated by an award of damages. Lastly, counsel argued that the balance of convenience tilted in favour of the defendants. Counsel relied on the case of **Daudi Ledama Morindat vs Mary Christine Karie and others (2017)eKLR** and on the case of **Elizabeth Muthoni Hussein v Vikesh Jinit Shah(2018) eKLR** and urged the court to dismiss the application.

8. I have considered the application together with the defendants' response. I have also considered the relevant legal framework and jurisprudence on the key question falling for determination in the application. The single question falling for determination is whether the applicant has satisfied the criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctive relief. The said criteria was outlined in the case of **Giella v Cassman Brown & Co Ltd (1973) EA 358**. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, he is required to demonstrate that if the injunctive relief is not granted, he would stand to suffer irreparable damage that may not be adequately indemnified through an award of damages. Third, should there be doubt on both or either of the above two requirements, the court is required to determine the application based on the balance of convenience. Lastly, at the stage of disposing the application for interlocutory injunctive relief, the court does not make conclusive or definitive pronouncements on the substantive issues in the cause.

9. In the application under consideration, the applicant claims to be the beneficial owner of the suit property, having bought it from one Teresia Otiso who had acquired it from Embakasi Ranching Company Limited. He has exhibited what he claims to be documents of ownership issued by the company. He claims to be in possession of the suit property. He does not have a registered title to the suit property. He contends that the certificate of lease held by the 2nd defendant dated 30/5/2019 was obtained fraudulently because the company has not processed any lease relating to the suit property. He has, however, not made the company a party to this suit. Similarly, he has not made Teresia Otiso a party to this suit. Further, he has not made the Land Registrar a party to the suit. Lastly, he has not given particulars of the alleged fraud on part of the defendants.

10. On their part, the defendants who are husband and wife, contend that the 2nd defendant is the registered proprietor of the suit property, having obtained registration by virtue of being a shareholder of Embakasi Ranching Company Limited. They have exhibited a certificate of lease issued on 30/5/2019.

11. The interest in the suit property is leasehold. The party conveying the leasehold interest is Embakasi Ranching Company Limited. The 2nd defendant is the registered proprietor of the suit property. The plaintiff claims an equitable interest in the suit property. The position of Embakasi Ranching Company is unclear at this point. In the circumstances, the court has doubt on the plaintiff's satisfaction of the first limb of the requirements in **Giella v Cassman Brown & Co Ltd (1973) EA 358**. It is therefore the view of the court that this application should be disposed on the balance of convenience and the justice of the case. In my view, the balance of convenience and the justice of this case would be to preserve the suit property for a limited period of twelve months, during which period the plaintiff is expected to prosecute his claim and procure a determination of the suit. I will therefore decline to grant the plaintiff the injunctive orders which he seeks against the defendants. I will instead dispose the application dated 19/8/2020 in the following terms:-

**a) The status quo relating to Title Number Nairobi Block 136/1994 shall be maintained for a period of twelve (12) months, meaning that no registration shall be effected on the parcel register and no developments shall be undertaken on the land for the said period.**

**b) The plaintiff shall prosecute this suit and procure a determination within 12 months.**

**c) Each party shall within 30 days file, and serve a single bound, paginated and indexed bundle of pleadings, witness statements and documentary evidence to facilitate prompt trial.**

**d) Costs of the application dated 19/8/2020 shall be in the cause.**

**e) Mention before the Deputy Registrar at Milimani ELC on a date to be set at the time of rendering this ruling**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF SEPTEMBER 2021**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr B M Musyoki for the Defendants

Court Assistant: Lucy Muthoni

**NOTE:**

*The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually from Thika.*

**B M EBOSO**

**JUDGE**