



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 1101 OF 2013**

**AVID DEVELOPERS LIMITED .....PLAINTIFF**

**VERSUS**

**BLUE HORIZON PROPERTIES LIMITED.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 16<sup>th</sup> September 2013 in which the Plaintiff/Applicant seeks for orders of a temporary injunction restraining the Defendant from trespassing, selling, charging, leasing out, erecting structures or in any way interfering with the land parcel known as Land Reference No. 20150 Mavoko, Machakos (herein after referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for orders that the costs of this Application be borne by the Defendant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of James Mwangi Kamau, sworn on 16<sup>th</sup> September 2013 in which he averred that he is a Director of the Plaintiff. He further averred that the Plaintiff/Applicant is the registered proprietor of the suit property having purchased the same from Gum Chem (K) Ltd for valuable consideration vides a Transfer dated 12<sup>th</sup> November 2010. He further averred that the Plaintiff was issued with a Grant No. I.R. 64049 dated 1<sup>st</sup> January 1993 a copy of which he produced. He further averred that the Plaintiff has recently discovered that the Defendant has been claiming to own the Suit Property, has put beacons on the land and is attempting to sell the same to unsuspecting third parties. He further stated that the Plaintiff caused a notice to be advertised in the Daily Nation and the Standard newspapers warning members of the public to beware of unscrupulous persons attempting to illegally sell or deal with the suit property. He further stated that his Advocates had received a letter from the firm of Okao & Co. Advocates on behalf of the Defendant threatening to take legal action against the Plaintiff and claiming ownership of the suit property. He further averred that in light of the foregoing, the suit property was in real danger of being wasted, damaged or dealt with in a manner likely to cause irreparable damage to the Plaintiff if the court does not intervene.

The Application is contested. Mr. Abdulkarim Saleh Muhsin, a director of the Defendant, filed his Replying Affidavit sworn on 25<sup>th</sup> September 2013 in which he averred that he is a stranger to the Plaintiff’s allegations of having purchased the suit property from Gum Chem (K) Ltd and stated that the Defendant is the genuine and registered proprietor of the suit property. To support this assertion, he attached a copy of the letter of allotment and official receipt of payment. He also produced a copy of their

title deed to the suit property. He further stated that the suit property is vacant and they intend to develop the same but noticed that the Plaintiff has illegally and without justification started digging trenches upon the property. He further stated that they have lodged a protest to that activity on the suit property through their advocates and to the relevant authorities and prayed that this Application be dismissed.

In response thereto, the Plaintiff filed the Supplementary Affidavit of James Mwangi Kamau sworn on 19<sup>th</sup> December 2013 in which he averred that the Plaintiff is the one in possession of the suit property. He further averred that prior to purchasing the suit property, the Plaintiff/Applicant carried out due diligence and confirmed that the same was at the time owned by Gum Chem (K) Ltd. He further averred that Gum Chem (K) Ltd applied for and was granted the suit property in 1992 vide a letter of allotment dated 4<sup>th</sup> January 1993 a copy of which he produced. He further averred that Gum Chem (K) Ltd complied with all the requirements in the said letter of allotment and was subsequently issued with a title deed to the suit property a copy of which has already been produced to this court. He further confirmed having lodged a complaint with the Directorate of Criminal Investigations and that investigations are ongoing. He further confirmed that a recent search on the suit property disclosed that the Plaintiff/Applicant is still the registered proprietor of the suit property. He further stated that given the above, it is evident that the Plaintiff/Applicant is the duly registered proprietor of the suit property and the true owner of the same.

Both the Plaintiff and the Defendant filed their written submissions.

In determining whether or not to give the Plaintiff/Applicant the orders sought of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of **Giella versus Cassman Brown (1973) EA 358** as follows:

**“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 be normally 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.”**

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

**“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

In its attempt to prove its ownership of the suit property, the Plaintiff/Applicant has produced a title deed as well as documents demonstrating the history leading up to its acquisition thereof. This included the letter of allotment issued to the previous owner thereof namely Gum Chem (K) Ltd and receipts evidencing payment to the Ministry of Lands. The Plaintiff also produced a recent search on the suit property which indicates that the Plaintiff/Applicant is the registered proprietor of the suit property. On the other hand, however, the Defendant/Respondent has also claimed to be the duly registered proprietor of the suit property and in support of that assertion has equally produced a copy of his title deed together with a letter of allotment. The question that arises therefore is which of the two parties has a superior title to the suit property. Unfortunately, this is not an issue that can be determined at this interlocutory stage of the proceedings and has to await the full trial of this suit based on tested evidence adduced thereat. To that extent therefore, I am not able to make a finding on the issue of the ownership of the suit property at this stage and therefore find that the Plaintiff/Applicant has failed to make a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of

**Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”**

In light of the foregoing, I hereby dismiss this Application and direct the Plaintiff to set down the suit for hearing at the earliest possible time for a full determination on the issues herein. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY 2014**

**MARY M. GITUMBI**

**JUDGE**