



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO 486 OF 2012

ELIZABETH KIRIA KIMANI.....PLAINTIFF

VERSUS

JAMES WAIMIRI.....DEFENDANT

RULING

The application for this courts determination is the Notice of Motion dated 14th February 2014 brought under **Section 3,3A and 63 (e) of the Civil Procedure Act and Order 40 Rules 1, 2 & 8 and Order 51 Rule 1 &3 of the Civil Procedure Rules** seeking for orders that the defendant be ordered to forthwith deposit in court or in joint names of the advocates for the parties herein all the rents collected from the premises situated on the suit premises being **Title No. Nairobi /Block 119/131** being Ksh 30,000/=per month or such other amount of rent collected every month pending the hearing and determination of this suit.

This application is premised on the grounds stated on the face of the application and on the supporting affidavit of the plaintiff who stated that she was the owner of **LR No Nairobi/Block 119/131**, an that the defendant had encroached onto her suit property and has put up some rental houses. She averred that she believe that the defendant was collecting rent of about **Ksh 30,000 per month**, denying her the opportunity to earn a living from her investment. She further stated that she has sought permanent injunction and mesne profit from the defendant and when the suit was scheduled for hearing on 23rd October 2013, the court was not sitting and subsequently the defendant made an application seeking to enjoin some parties which application has not been prosecuted. She believes that the defendant is out to derail the suit because he is not in a hurry to finalise this suit. She also fears that at the conclusion of this suit the defendant may not be in a position to pay mesne profit.

This application is opposed. The defendant filed his Replying Affidavit on 3rd April 2014 stating that there is a dispute of ownership of **Nairobi/Block119/131 and Nairobi/Block119/134** and that the physical location of the two plots are in dispute. That the defendant should not be denied the benefit of his investment. He further added that the plaintiff had not demonstrated that the defendant actually derives rent from the structures.

Parties filed their respective submissions which this court has considered together with the authorities relied upon by the parties

The principles which guide the court in dealing with such application are well settled and are clearly spelt out in celebrated case of **Giella -vs- Cassman Brown Ltd [1973] AE 358**, where the applicant must first show that he has a prima facie case with the probability of success upon trial .Secondly, he must show that in the event that he is denied an injunction and he were to succeed in the main suit, that damage

could not adequately compensate him for any loss which he would have suffered. Thirdly that if the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience.

The applicant has exhibited a lease certificate that was issued on 8th September 1988, and an official search certificate dated 5th August 2011 showing the plaintiff as the legal owner of the suit property. A closer look at the pleadings in this file, this court notes that the defendant has exhibited a sale agreement between him and one Peter Gikaru Nai on 9th May, 2009 and was issued with a Certificate of Lease on 2nd November, 2009 and an official search dated 16th August 2009 showing the defendant as the lawful owner of the suit property. None of the parties has produced a surveyor's map to show the location of this suit property. There is no question that the issue of ownership of the Suit Property is hotly contested by the two parties to this suit. This issue remains one that cannot be determined at this juncture as it is quite clear that each side has produced title deeds to the Suit Property. This court cannot therefore determine at this interlocutory stage, which of the two competing claims should be upheld. To that extent therefore, I find that the Plaintiff/Applicant has not established a prima facie case with high chances of success at the main trial so that she can seek this court to have the defendant deposit the rent collected.

For the above reasons, the Court finds that the Plaintiff's notice of Motion dated 14th February, 2014 is not merited. The same is hereby dismissed. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this 8th day of **October** 2014

L. GACHERU

JUDGE

In the Presence of:-

Wairimu holding brief for M/s Kamau for the Defendant/Respondent

M/s Mwaruka holding brief Kirimi for Plaintiff/Applicant

Kamau: Court Clerk

L. GACHERU

JUDGE