



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 463 OF 2013**

**PETERSON KAMAU MAINA**

**(Suing as the Administrator ad litem**

**Of the Estate of Gibson Maina Muriuki ..... PLAINTIFF**

**VERSUS**

**MAHIIRA HOUSING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**DANIEL KIMANI NGUGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff is seeking temporary injunction orders from this court against the 2<sup>nd</sup> Defendant to restrain him from disposing with the and/or interfering with the Plaintiff's possession of the suit property herein, namely land parcel No. Ruiru Kiu Block 10 (Mahiira)/300 (formerly plot No. 58 contained in L.R. No. 10901/36). These prayers are in a Notice of Motion filed herein by the Plaintiff dated 20<sup>th</sup> May 2013 and as amended on 10<sup>th</sup> June 2013. The Notice of Motion is supported by affidavits sworn by the Plaintiff on 16<sup>th</sup> April 2013, 20<sup>th</sup> May 2013 and 10<sup>th</sup> June 2013.

The Plaintiff is the administrator of the estate of Gibson Maina Kariuki (Deceased), and he provided a copy of the limited grant of letters of administration ad litem issued by this court on 26<sup>th</sup> March 2013. He claims that the deceased who was his father, was a shareholder of the 1<sup>st</sup> Defendant company. Further, that his father was in that capacity entitled to plot 58 out of a subdivision of LR. No. 10901/36, and was issued with a plot certificate by the 1<sup>st</sup> Defendant with respect to the said plot in 1987. The Plaintiff attached a copy of the said plot certificate issued to the Deceased on 21/2/87.

The Plaintiff further stated that the Deceased fulfilled all the conditions as to the grant of title including payments for the processing of the title deed, and he attached correspondence between the Deceased and 1<sup>st</sup> Defendant in this respect. However, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have fraudulently caused a title to the suit property to be issued in the name of the 2<sup>nd</sup> Defendant, and that there is real danger that the 2<sup>nd</sup> Defendant may transfer the suit property to a third party in order to defeat the rights of the Plaintiff.

The Plaintiff further stated that the 1<sup>st</sup> Defendant conspired with the 2<sup>nd</sup> Defendant to switch the Deceased's plot, so that they can give the Deceased's estate a plot which is less in value than the one they are entitled to, and have been in occupation of. He annexed a bundle of official maps and maps by the 1<sup>st</sup> Defendant before the titles were issued, which he stated clearly show that plot No. 58 corresponds to the suit property herein.

The 1<sup>st</sup> Defendant opposed the Notice of Motion in affidavits sworn by its Director/Treasurer, Peter Githuka on 30<sup>th</sup> April 2013, 7<sup>th</sup> May 2013 and 4<sup>th</sup> June 2013 . The deponent initially stated that that the Plaintiff had not complied with a resolution of the 1<sup>st</sup> Defendant company made at a meeting held on 5<sup>th</sup> November 1986, that if a purchaser has a debt with the company on the purchase of a plot for 8 years he loses his or her claim to the said plot. It was therefore initially the position by the 1<sup>st</sup> Defendant that the Plaintiff had no claim to L.R No. 10901/36 and L.R. No 10901/37, which belonged to the 1<sup>st</sup> Defendant. It was also stated by the Deponent that after perusal of the records it was found that there was a title deed issued to the 2<sup>nd</sup> Defendant with respect to the property known as land parcel No. Ruiru Kiu Block 10 (Mahiira)/300 to whom ownership and possession had passed. A copy of the said title was attached.

The deponent subsequently in the affidavit sworn on 4<sup>th</sup> June 2013 stated that the Plaintiff has been issued with a title in his name to the property known as Title Number L.R. No. RUIRU KIU BLOCK 10 (MAHIIRA) 1129, and has been advised to collect their said title but have not done so. The deponent attached a copy of the said title. It was further stated that a court has no jurisdiction to interfere with the internal management of companies acting within their powers, and that the 1<sup>st</sup> Defendant has not done anything fraudulent, illegal or wrong.

The 2<sup>nd</sup> Defendant, despite being served with the Plaintiff's Notice of Motion and hearing notice, did not enter an appearance nor respond to the said Notice of Motion.

The parties were directed to file written submissions, which they relied upon for the ruling herein. The Plaintiff's counsel in submissions dated 10<sup>th</sup> June 2013 argued that plot No. 58 was the one which after registration and issuance of title became Ruiru Kiu Block 10 Mahiira/300. Further, that the Plaintiff had established that the deceased was the owner of plot 58 and had made payments for it, and that the 1<sup>st</sup> Defendant had also not disputed the authenticity of the plot certificate and other documents produced by the Plaintiff in relation to plot 58.

The counsel further submitted that damages cannot adequately compensate the Plaintiff as each parcel of land is unique in character, and that the balance of convenience tilts in his favour as the land has been in his possession. Lastly, the counsel submitted that the suit property should be preserved and the Plaintiff given a chance to be heard, and cited various judicial decisions in this regard.

The 1<sup>st</sup> Defendant's counsel filed submissions dated 17<sup>th</sup> June 2013 and argued that the tests set out in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** for the grant of an injunction had not been met. Further, that the Plaintiff has not shown a *prima facie* case as the 2<sup>nd</sup> Defendant has a title deed to the suit property and the Plaintiff does not, and the counsel cited various judicial decisions in this regard. The counsel also argued relying on the decision in **Pioneer General Assurance Society Ltd & Another vs Aulfikarali Nimji Javer & Others, Nairobi High Court Case No. 120 of 1999** that the 1<sup>st</sup> Defendant had acted within its Memorandum and Articles of Association and their acts were *intra vires*.

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of a plot certificate dated 23<sup>rd</sup> August 2005 issued to him by the 3<sup>rd</sup> Defendant with respect to the suit property as his evidence of ownership. The 1<sup>st</sup> Defendant have on the other hand brought evidence of a title deed issued to the 2<sup>nd</sup> Defendant with respect to L.R No. Ruiru Kiu Block 10 Mahiira/300 which they claim to be the suit property, and which is not disputed by the Plaintiff.

I therefore find that the Plaintiff has not established a *prima facie* case, and I am in this respect guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation a party who has been issued with a good title takes precedence over other equitable rights to the title. While I appreciate that the issue of whether the 2<sup>nd</sup> Defendant's title is good title will have to be determined after full trial, it is my opinion that the existence of the said title is sufficient to deny the Plaintiff the injunction sought. Likewise, the issue raised as to whether the resolutions and decisions made by the 1<sup>st</sup> Defendant were *intra vires* or whether they were fraudulent, can only be determined after the court has had the benefit of examining further evidence at full trial.

In addition, the 1<sup>st</sup> Defendant also brought evidence of another title issued to the Plaintiff with respect to another parcel of land namely L.R. No. Ruiru Kiu Block 10 (Mahiira) 1129 as his allocation. I have perused the said title and note that it was issued on 10<sup>th</sup> April 2013 before the Plaintiff filed the suit herein on 17<sup>th</sup> April 2013. I am unable to find in these circumstances that the Plaintiff will suffer irreparable damage if the injunction sought is not granted.

The Plaintiff's Notice of Motion dated 20<sup>th</sup> May 2013 is accordingly denied, and the costs of the said motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_9<sup>th</sup>\_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**