

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Case 125 of 2011

PRISCILA WAIRIMU WAHOME (*suing through WAKINI WAKONYU KARIUKI holder of power of attorney registered as P/A No. 32/1 at Lands Titles Registry Nairobi*)

versus

SIMEON GICHANA..... DEFENDANT

RULING

In the application dated 30th May, 2011 and filed along with the suit, **Priscilla Wairima Wahome** “*the plaintiff*” prays for an order of injunction against **Simeon Gichana** “*the defendant*” to restrain him from interfering with the plaintiff’s quiet possession of all that piece or parcel of land known as plot No. 122/Business Noon Kopir Trading Centre “*the suit premises*” pending the hearing and determination of this suit.

The application is expressed to be brought under order 40 rules 1(a), 2(1), 3(1), 4(1) and 4 of the Civil Procedure rules and section 1A and 1B of the Civil Procedure Act. The grounds in support thereof are that the plaintiff is the owner as allottee of the suit premises since 1993 when she bought it from the original allottee. However the defendant had trespassed on the same and had started illegally to construct permanent structures thereon. The County Council of Olkejuado in which the suit premises are situate had confirmed the plaintiff as the rightful owner of the suit premises. In the premises, unless restrained, the defendant would continue with the illegal construction.

The application first came *ex-parte* on 31st May, 2011 before **Kihara Kariuki ,J** when a temporary injunction was issued to last until 14th June, 2011. Subsequent thereto on 7th June 2011, the judge extended the injunction order to the next hearing date.

Upon being served, the defendant filed a replying affidavit in which he deponed that the application was incompetent, bad in law and an abuse of the court process. He was the lawful and *bonafide* owner of all that business/commercial plot known as Plot No. 560, Noon Kopir Trading Centre which he bought from **Kopkaton Ole Karani** in 2003. The same was transferred to him on 8th December, 2003 but in 2005 intruders attempted to encroach on it and he reported the matter to Olkejuado County Council “*the council*” which intervened and sent packing the intruders. Following validation exercise undertaken by the council, on 18th June, 2009, he was shown his plot on the ground by the council’s surveyor. He then submitted building/development plans of the plot to the council and the council duly approved them. Based on the approval aforesaid, he applied and obtained a loan for purposes of developing his plot. He commenced such development in 2008. In or about 2009, May, the plaintiff started laying a baseless claim on the plot but her claim was considered by the council which directed that he continues to develop his plot and that the plaintiff would be shown an alternative site. He had since substantially developed the plot by putting up a storey commercial cum residential building, currently valued at Kshs. 8,930,000/= . He had all along paid council rates and other levies on account of the plot. The plot too is connected with the water and electricity. It appears that the plaintiff was seeking orders of injunction against him regarding the suit premises whereas his plot was not the suit premises. Again he had developed his plot 560 but not the suit premises. It is also evident that the council which had recently issued a letter to the plaintiff authorizing her to move into the defendants plot is not a party to these proceedings. He further depones that he is in possession and occupation of his developed plot No. 560 and issuing orders of

injunction in the circumstances will amount to his eviction therefrom which will be unjust. In any event the plaintiff had not demonstrated a *prima facie* case against him with a probability of success, nor has she demonstrated the loss she will suffer if orders sought are not granted, and that such loss cannot be compensated by way of damages.

Whether or not to grant an injunction is a question of discretion, it is also an equitable remedy and that the applicant must demonstrate that he has a *prima facie* case with a probability of success, it will not issue unless the applicant might otherwise suffer irreparable injury that cannot be compensated with an award of damages. Barring the foregoing and in the event that the court is in doubt, then it will decide the application on the balance of convenience. See **Giella vs Cassman Brown & Co Ltd [1973] E.A. 358**.

It is common ground that both the plaintiff and defendant own and are entitled to possession of the suit premises and plot No. 560 respectively.

It is not clear whether the two plots are one and the same on the ground. My suspicion from the documentation in the file is that, that might be the position. It is then a question of double allotment. In which event the dispute can only be resolved by the County Council of Ole-kejuado. However, the council has not been enjoined in these proceedings. The council has given both parties documents to support and in verification of their ownership of their respective plots. None of the parties are claiming that those documents are fraudulent. Since the council is in the centre of this fiasco, it is only it that can remedy the situation. Since it has not been sued and each party is relying on contradictory documents from the said council, we can only treat such documentation as hearsay. Further and in the premises, no party should hold such documents to be superior to those held by the opposing party. As correctly submitted by counsel for the defendant, the council having not been sued by the plaintiff, the evidence from it on issues in controversy if any, can only be taken at the trial if any of the parties choose to call the council as a witness .

Accordingly, I am not satisfied that the plaintiff has demonstrated that she has a valid suit with a probability of success at the trial. Further, the dispute revolves around a plot. Such plot can be valued and a price tag placed on it. So that the plaintiff cannot claim that the loss or injury she will suffer or incur for want of injunction cannot be compensated for by an award of damages.

The defendant has demonstrated *inter alia* that he has developed the plot, subsequently by putting up a storey commercial cum residential building, the greater part of which is complete and ready for occupation. Indeed he has already connected both water and electricity to the said property, which comprises several commercial and residential units. He took a loan to undertake the said developments. All these facts have not been discounted by the plaintiff. An injunction in the circumstances will do much harm to the defendant as opposed to the plaintiff who does not even occupy the suit premises. What I am actually saying is that the balance of convenience tilts in favour of the defendant.

On the whole, the plaintiff's application lacks merit and is accordingly dismissed with costs to the defendant.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of JULY 2012

ASIKE - MAKHANDIA
JUDGE