



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 18 OF 2020**

**JAMES MACHARIA MWANGI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SALAT ALI OMAR.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 15<sup>th</sup> June 2020 in which the Applicant seeks the following orders:

i. ....spent

ii. That pending the hearing and determination of this suit the Honorable Court do issue an injunction against the 1<sup>st</sup> Defendant/Respondent his servants and/or employees from interfering with Uns Residential plot F Nanyuki.

iii. That the cost of this application be provided for.

2. The application was supported on the grounds on the face of it as well as on the affidavit sworn by the Applicant James Macharia Mwangi on the 15<sup>th</sup> June 2020.

3. The said application was opposed by the 1<sup>st</sup> Respondent's replying affidavit dated the 30<sup>th</sup> June 2020 to the effect that it was incompetent, an abuse of the Court process and that it did not meet the legal requirements for grant of the orders sought.

4. On the 30<sup>th</sup> July 2020, the Court gave directions for the application to be disposed of by way of written submissions to which directives, none of the parties complied. I shall thus rely on the supporting affidavit to the application and the replying affidavit respectively, filed by both parties.

5. The Applicant's case is to the effect that he was allocated the suit land being UNS Residential plot F Nanyuki in the year 1996 where he had engaged a surveyor to pick the ground and identify its location.

6. That in the year 2002, he had leased out the plot to one David Maina Wangui. That on 12<sup>th</sup> March 2013, the Municipal Council of Nanyuki had issued an enforcement notice to the said David Maina where the matter had subsequently ended up in Court vide Nanyuki CM's Case No. 740 of 2013 which case was concluded in 2017 and David Maina was acquitted.

7. That on the 25<sup>th</sup> and 26<sup>th</sup> May 2020 he had received a report of strange happenings on his plot wherein he had reported the matter at Nanyuki CID who had then commenced an inquiry. That it was while the inquiry was ongoing, that the 1<sup>st</sup> Defendant/Respondent proceeded to trespass on the said suit land, without any color of right where he had started to erect structures.

8. That pursuant these acts of trespass, he had filed the present suit seeking interim orders of injunction to restrain the 1<sup>st</sup> Respondent from further construction and/or completion of the said building until the suit was heard and determined.

9. The Respondent's replying affidavit in opposition to the application was to the effect that he was not in occupation of the Applicant's suit land. That he was the registered lessee of a parcel of land known as Nanyuki Municipality Block XI/394 (formerly known as Uns residential plot No.8 Nanyuki Municipality) which plot he had been allotted in 1992, had taken possession of the same and had constructed temporary

structures in 1998 and had had exclusive occupation and possession of the said parcel of land since then.

10. That in the year 2013, one Maina Wangui had trespassed on his land wherein the matter had been reported to the police and Maina Wangui had been arrested and charged.

11. In the year 2016 the District Surveyor had visited Uns Residential plot F and Uns residential plots No.8 Nanyuki Municipality wherein a report dated the 23<sup>rd</sup> March 2016 had been prepared and which report had clearly indicated that these were two distinct parcels of land.

12. That he had now built permanent structures on the suit land where he also cultivated maize and beans.

#### **Determination.**

13. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

14. In the present case there is no dispute, going by annexed documents that UNS Residential plot 'F' Nanyuki was allocated to the Applicant in the year 1996 whereas the Respondent herein is the registered lessee of parcel of land known as Nanyuki Municipality Block XI/394 (formerly known as Uns residential plot No.8 Nanyuki Municipality) which plot he had been allotted in 1992. There is further no dispute going by the Laikipia District Surveyor's report dated the 23<sup>rd</sup> March 2016, that the two suit lands were distinct parcels of land having been reflected on different ground situation as per their respective PDP' s.

15. In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the Court of appeal explained what constitutes a prima facie case in the following terms:

*“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.”*

16. Applying the above principles to the present case and whilst relying on the documents adduced in evidence in support thereof, it appears to me that the plot that constitutes the suit premises is different from the 1<sup>st</sup> Respondent's plot and therefore it would be difficult at this stage to find that the 1<sup>st</sup> Respondent has trespassed and started construction on the Applicant's plot.

17. The 1<sup>st</sup> Respondent has denied having trespassed on the Applicant's suit land and claims that he is the registered lessee of a parcel of land known as Nanyuki Municipality Block XI/394 (formerly known as Uns residential plot No.8 Nanyuki Municipality) which plot he had been allotted in 1992, took possession of the same and had constructed temporary structures in 1998, thereafter being in exclusive occupation and possession of the said parcel of land since then.

18. On the face of it, there is no way this Court can establish the location of the suit premises vis a vis the 1<sup>st</sup> Respondent's claim that he is occupying a different plot. The Applicant has neither established the fact that the suit plot and the 1<sup>st</sup> Respondent's plot are one and the same parcels of land to which he is the registered proprietor and to which the 1<sup>st</sup> Respondent has trespassed upon. The Court cannot therefore grant orders in vain.

19. I find that the Applicant has not established a prima facie case, I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the Court can give an injunction unless the Court was entertaining a doubt as to whether or not a prima facie case had been established.

20. The Court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed 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”.*

21. I have thus balanced all the factors and circumstances in the instant application. As I understand it, the orders sought by the Applicant is that the Honorable Court do issue an injunction against the 1<sup>st</sup> Defendant/Respondent his servants and/or employees from interfering with Uns Residential plot F Nanyuki.

22. However having found that a prima facie case was not established, I believe that there being an existing state of affair in situ which the Court must keep an eye on, I do hereby and pursuant to Court's practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) See also **Mugah –v- Kunga [1988] KLR 748**, make an order for status quo to be maintained until determination of the case.

23. Parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

24. The application dated 15<sup>th</sup> June 2020 is disallowed but costs shall be in the cause.

**Dated and delivered at Nakuru this 30<sup>th</sup> day of November 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**