



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 229 OF 2017

WILFRED BIKERI ONDUSO.....PLAINTIFF

VERSUS

JAMES KARIUKI GACHERU.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

RULING

1. Before court for determination is the plaintiff's Notice of Motion dated 28/3/2017 through which the plaintiff seeks the following orders:

ii. THAT this honourable court be pleased to issue a temporary injunction restraining and prohibiting the respondents/defendant either by themselves, their servants, employees and agents or anybody claiming under them, from encroaching, erecting structures, transferring, alienating and/or dealing with the suit property known as Plot No. 295 Ex-Muorota Scheme owned by the plaintiff, pending the hearing and determination of this application.

iii. THAT this honourable court be pleased to issue a permanent injunction restraining and prohibiting the Respondents/Defendants either by themselves, their servants, employees and agents or anybody claiming under them from encroaching, erecting structures, transferring, alienating and/or dealing with the suit properties known as plot No. 295 Ex-Muorota Scheme owned by the plaintiff, pending the hearing and determination of this suit.

iv. THAT the Officer Commanding Dandora Police Station has to ensure compliance with this Honourable Court's order.

Both defendants oppose the application.

2. The plaintiff's case is that he is the allottee of unsurveyed plot designated as Plot No. N295 Ex – Muorota Scheme, Dandora. He contends that he is in possession of the Plot and he has been paying "land rates" to the 2nd defendant. He contends that the 1st defendant, with the knowledge of the 2nd defendant, has trespassed onto his plot and is erecting permanent structures on the said plot. It is for this reason that he seeks the orders itemized above.

3. The case of the 1st defendant is that he is the legitimate owner of the Plot where he built the structures in the year 2009. He further contends that his plot is No. N529 and not N295.

4. The issue for determination in this application is whether the applicant has satisfied the criteria spelt out in **Giella vs Cassman Brown & Co. Limited (1973) EA 358** for grant of an interim injunction. In summary, the applicant was required to demonstrate a prima facie case with a probability of success; demonstrate that if a temporary injunction is not issued, he would suffer irreparable damage incapable of remedy by way of an award of damages. Lastly, he was to demonstrate to the court that the balance of convenience would, in the event of doubt about the first and second limbs of the **Giella vs Cassman Brown (supra)** criteria, tilt in his favour.

5. I have examined the ownership document presented by the plaintiff in support of his claim. This is a Letter of Temporary Allocation dated 25/11/2011 from the District Commissioner of Njiru District. The defendant has similarly presented a Letter of Temporary Allocation dated 23/5/1992 from the District Officer of Embakasi Division. The two letters of temporary allocation are in respect of Plot No. N295 and N529 respectively. The question that remains unanswered is whether the two numbers refer to one and the same plot on the ground. Both parties contend to have developed the properties and have annexed pictures of varying structures.

6. Taking the foregoing into account, I am not satisfied that the applicant has presented sufficient material to demonstrate a prima facie case and warrant issuance of the injunctive orders sought against the 1st defendant. I will, however, issue an order preserving the Plot/Plots designated as N295 and N529 to the extent that there will be disposition or further development on the Plot/Plots pending the hearing and final determination of this suit by the appropriate court.

7. Lastly, this is a matter over which the Chief Magistrate Court at Milimani Commercial Courts has jurisdiction. Consequently, I direct that this case be transferred to the Chief Magistrate Court at Milimani. The preservatory order made herein shall lapse upon determination or earlier termination of the suit herein.

Dated, signed and delivered at Nairobi on this 2nd day of February 2018.

B M EBOSO

JUDGE

In the presence of:-

Ochaka Advocate for the Plaintiff/Applicant

No appearance for the Defendants

Halima - Court clerk