



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 166 OF 2016

PAUL KARIUKI KIRAGU.....PLAINTIFF

VERSUS

ANN GICHOHI.....DEFENDANT

RULING

Coming up before me for determination is a Notice of Motion dated 24th February 2016 and filed on 25th February 2016 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from entering into, encroaching, trespassing, alienating or in any manner whatsoever interfering with the Plaintiff's possession and ownership of plot number R 426B Ruai, Nairobi County (hereinafter referred to as the "suit property"). He also seeks that the OCS Ruai police station be ordered to maintain peace and order in observance of the temporary injunction issued by this court.

The Application is premised on the supporting affidavit of the Plaintiff/Applicant, Paul Kariuki Kiragu, sworn on 24th February 2016 in which he averred that he is the owner of the suit property having purchased it in the year 1982 from the Embakasi Ranching Company Ltd. As evidence of his ownership, he produced a Provisional Letter of Allocation issued by the Embakasi Ranching Company Limited as well as several receipts all in his name. He averred that he has been paying all the necessary charges and rates up to and including the year 2014. He averred further that in the year 2013, the Defendant illegally trespassed into the suit property and started building structures thereon. He further averred that despite summons by the chief, the Defendant has refused to present himself. On those grounds he sought for his application to be allowed.

The application is contested by the Defendant/Respondent who filed her replying affidavit sworn on 14th March 2016 in which she averred that the plaintiff is not the lawful allotted of the suit property but instead she is the lawful allottee of the same by virtue of being the holder of a non-member certificate of plots ownership numbers 014625 and 0146264 plots numbers V8987 and V8988. It was her further averment that her said two plots adjoin each other and she produced copies of the certificates of plot ownership. It was her evidence that she has been in possession of the above plots since they were allotted to her and she has developed them. It was also her further averment that she lost the original documents for the plots hence the reason for annexures AG/1 and 2 which were certified by the Embakasi Ranching Company Ltd as two copies of the originals. She complained of harassment by the plaintiff and the chief over her seat plots. She also complained that the plaintiff trespassed into the suit property and destroyed

her developments thereon and that she made a report to the police at Ruai Police Station. On those grounds, she requested the court to dismiss this application.

The issue arising for determination is whether or not to grant the prayer of a temporary injunction. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“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.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, the Plaintiff/Applicant claims ownership of the suit property. In support of his claim, he annexed various documents for perusal by the court. The most important of those documents is a Provisional Letter of Allocation issued by the Embakasi Ranching Company Limited and dated 28th November 1982. He also annexed a copy of a letter dated 22nd January 2013 from the same company confirming that the suit property belongs to him. However, the Defendant/Respondent lays claim to the same plot of land and has equally produced what she calls her ownership documents. She claims that the plots of land she is in possession of are V8987 and V8988. She produced copies two Non-Member Certificate of Ownership for those two plots both dated 28th January 2009. Essentially, both the Plaintiff and the Defendant claim the same plot of land but contend that they have different plot numbers. At this stage of this suit, the court is not in a position to ascertain whether the suit property is R426B or V8987 and V8988. That being the position, the Plaintiff/Applicant has not succeeded in demonstrating that he has a prima facie case with a probability of success at the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973

EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

In light of the foregoing, I hereby dismiss this application. Each party shall bear their costs.

SIGNED AND DATED BY HON. LADY JUSTICE MARY M. GITUMBI

AT NAIROBI THIS 12TH DAY OF APRIL 2018.

MARY M. GITUMBI

JUDGE

DELIVERED BY HON. MR. JUSTICE SAMSON OKONGO THIS 19TH DAY OF APRIL 2018.

SAMSON OKONGO

PRESIDING JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court clerk