



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 70 OF 2018

JOHN MATISI SHAMOLA.....PLAINTIFF

-VS-

1. ALI HAJI

2. DOMINIC OMONDI ODUOR.....DEFENDANTS

RULING

1. The Application under consideration is the Notice of Motion dated 29th March 2018 in which the Plaintiff is seeking the following orders:

1. Spent

2. Spent

3. Spent

4. THAT pending the hearing and determination of this suit this Honourable Court be pleased to order permanent injunction restraining the Defendants/Respondents their servants and/or agents from further demolishing structures, trespassing, evicting or in any other manner interfering with the Plaintiff/Applicant's quiet enjoyment of property known as Plot No. 205B being part of larger Plot No 3532 Original Number 2921/1 of Section 1 Mainland North, Mombasa, under Shanzu Wayani Corporation Society.

5. THAT the costs of this Application be provided for.

2. The Application is based on the grounds in the face of the Motion and supported by the Affidavit of John Matisi Shamola, the Plaintiff sworn on 29th March 2018. Briefly, the Plaintiff avers that in the year 2007, he purchased the Suit Property from one Jackson Arwari Nyamumba and upon completion of the full purchase price, he was issued with a Transfer Clearance Certificate by the Shanzu Multipurpose Co-operative Society Limited and that he has been paying the requisite payments to the said Co-operative Society among them survey and legal fees. The Plaintiff states that immediately upon purchase of the plot he took possession and erected a temporary structure and thereafter a permanent structure and together with his wife established a school known as Shanzu Josma Junior School which they run on the Suit Property. The Plaintiff further states that sometime in 2017, the 1st Defendant started interfering with the Plaintiff's possession of the property prompting the Plaintiff to lodge a complaint vide a letter dated 30/6/17 to the Ministry of Lands and Housing, Mombasa County. That in the wee hours of 24/3/18, the Defendants together with their agents or servants numbering about 25 without any colour of right, reason or excuse invaded and demolished the building on the suit property and the Plaintiff reported the matter to Bamburi Police Station following which a number of people, including the 1st Defendant were arrested. The Plaintiff further states that they also reported the matter to the County Government of Mombasa to allow him carry out construction and repairs of the damaged property and was allowed to continue with the construction pending official communication. The Plaintiff avers that it has cost him about Kshs.250,000 to carry out the repairs and the over 250 pupils have been affected by the unlawful and untimely demolition and they continue to suffer. He contends that the Defendants action is unlawful.

3. There was no opposition to the Application. The Defendants were duly served with the Application but did not file any response. When the Application came up for hearing on 24th April 2018, Mr. Gitonga learned Counsel for the Plaintiff relied on the grounds on the face of the motion and the contents of the supporting Affidavit.

4. I have carefully considered the Application herein. This being a Giella –v- Cassman Brown Application, the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage; and that, in the event of doubt, the balance of

convenience lies with the Plaintiff.

5. The Plaintiff has exhibited a copy of a sale agreement showing that he purchased the Suit Property. The Plaintiff has also exhibited photographs showing the developments which have been allegedly demolished by Defendants. The Defendants did not file a response to the Application and therefore the court cannot anticipate their claim or interest in the Suit Property. A determination of the Defendants' interest, if any, in the suit property will have to await full hearing upon the Defendants' filing of their defence, if any, in the suit. However, on the material before the court at this stage the Application will have to be determined on the evidence as disclosed by the Plaintiff's Affidavit.

6. The Plaintiff has demonstrated that he is the owner of the Suit Property having purchased it from one Jackson Arwari Nyamumba. He has furnished copies of sale agreement, transfer and receipts and a copy of a business permit and photographs showing that he has been running a school on the suit property. The same are marked "JMS" 1, 2, 3A, 3B, 4, 6 and 7 annexed to the Affidavit in support of the motion.

7. Without prejudice to any claims or interest that the Defendants may put forth in their defence to the suit, I find that the Plaintiff has a prima facie case with a probability of success. A *prima facie* case does not mean a case that must succeed at the trial. As regards irreparable damage, the sudden disruption of the school will not be sufficiently remediable by an order of compensation in damages. In addition, the effect of the refusal to the order for injunction in this case is that innocent children will suffer. I find such loss to be irreparable damage to the Plaintiff and the pupils in that school. The balance of convenience, if I had any doubt in the matter, lies with the Plaintiff as the purchaser of the property.

8. Accordingly, I find merit in the Application and grant the order of Interlocutory Injunction in terms of prayer (4) of the Motion dated 29th March 2018. Costs in the cause.

Ruling dated, signed and delivered at Mombasa this 12th day of July 2018.

C. YANO

JUDGE