



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO 957 OF 2015**

DAVID MBUGUA NJENGA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

DORCAS WAITHERA WAURERA.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

EMMANUEL KAZUNGU MAHSA.....1<sup>ST</sup> DEFENDANT/RESPONDENT

NAIROBI CITY COUNTY.....2<sup>ND</sup> DEFENDANT/RESPONDENT

JORDAN ALBANUS KIOKO.....3<sup>RD</sup> DEFENDANT/RESPONDENT

**RULING**

1. This is the Amended Notice of Motion dated 20<sup>th</sup> January 2016. The same was amended pursuant to the order of the court made on 14<sup>th</sup> December 2015. It is brought under Order 40 Rules 1, 2, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A & B, 2, 3A and 63 (c) of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law.

2. It seeks order that :-

***(1) Spent***

***(2) This honourable court be pleased to grant temporary injunction restraining the defendants/respondents, their agents, servants, employees and/or representatives from, trespassing onto, erecting and or constructing illegal structures or alienating, demolishing, disposing of or otherwise interfering with the plaintiffs/applicant's building structures thereon, ownership, quiet and peaceful occupation and enjoyment of the suit plot known as PLOT NO. A 258 UMOJA INNERCORE, SECTOR II, also known as BLOCK 83/14/358 within Nairobi, pending the hearing and determination of the application and/or suit herein.***

***(3) The defendants/respondents are or their servants, agents and or representatives be and are hereby ordered to remove notice and or demolish any illegal structures entered on or around the suit plot known as PLOT NO. A 258 UMOJA INNERCORE, SECTOR II, also known as BLOCK 83/14/358, within NAIROBI, and be stopped forthwith from threatening in any way the plaintiffs/applicants with eviction, demolitions, disturbances and or violence in anyway and the order of this court be enforced with assistance of OCS BURUBURU POLICE STATION and DEPUTY COUNTY COMMISSIONER EMBAKASI respectively.***

***(4) Any construction on the suit premises known as PLOT NO. 258 UMOJA INNERCORE, SECTOR II, also known as BLOCK 83/14/358, within NAIROBI, be and is hereby stopped until the determination of the application/suit herein.***

***(5) An order that the demolition thereto, encroachment and putting up or building illegal structures thereto is illegal, unlawful and void and that the plaintiffs/applicants is hereby declared the rightful, legal occupant and registered or beneficial owners of PLOT NO. A 258 UMOJA INNERCORE, SECTOR II, also known as BLOCK 83/14/358, within NAIROBI and further that the illegal structures thereto be removed forthwith.***

***5(a) The alleged title deed issued to the 3<sup>rd</sup> defendant/respondent in respect of PLOT NO. A 258 UMOJA INNERCORE, SECTOR II, also known as BLOCK 83/14/358, within NAIROBI be and is hereby revoked and or cancelled and or audit be taken on how the title was acquired and or obtained.***

***5(b) The order of the court given on the 2<sup>nd</sup> October, 2015 in an application dated 2<sup>nd</sup> October, 2015 which has since elapsed be***

*and is hereby reinstated.*

**(6) The costs of this application be provided for.**

3. The grounds are on the face of the application and are listed as in paragraph a to h.
4. The application is supported by the affidavit of David Mbugua Njenga the 1<sup>st</sup> plaintiff/applicant herein sworn on the 20<sup>th</sup> January 2016.
5. The application is opposed. There are grounds of objection filed by the 1<sup>st</sup> defendant/respondent dated 11<sup>th</sup> November 2015 and a replying affidavit sworn on the 11<sup>th</sup> November 2015. There are also grounds of opposition filed on behalf of the 2<sup>nd</sup> defendant/respondent dated 16<sup>th</sup> October 2015. There is also a replying affidavit sworn by Jordan Albanus Kioko the 3<sup>rd</sup> defendant/respondent on the 12<sup>th</sup> February 2012.
6. On the 13<sup>th</sup> September 2016, it was agreed that the application be canvassed by way of written submissions.

**The plaintiff's/applicant's submissions**

7. It is their submissions that they bought plot No. A 258 Umoja Inner core Sector II also known as BLOCK 83/14/358 in Nairobi from one John Gateri on 2<sup>nd</sup> March 1995. That plaintiffs/applicants have been paying land rates to the 2<sup>nd</sup> defendant/respondent since they became beneficial owners. They complied with all the necessary requirements and were issued with a beacon certificate and approval of the building plan by the 2<sup>nd</sup> defendant/respondent. Further that they did not immediately embark on transfer procedure to effect the transfer in their favor in order to be issued with title. That the transaction between the 1<sup>st</sup> defendant/respondent and the 3<sup>rd</sup> defendant came later.

8. The 1<sup>st</sup> defendant/respondent has failed to demonstrate to court how he acquired the plot from the 2<sup>nd</sup> defendant/respondent. That even if there was a transfer between the 1<sup>st</sup> defendant/respondent and the 3<sup>rd</sup> defendant/respondent, it is trite law that where there are two equitable interests to the same property, the first in time prevails. The plaintiffs/applicants have a prima facie case with a probability of success to warrant the orders sought. They urge that the application be allowed.

**The 1<sup>st</sup> Defendant/Respondent's case**

9. The plaintiffs' case is misconceived for the reason that the amended notice of motion does not disclose any wrong that is attributed to the 1<sup>st</sup> defendant/respondent. It is the plaintiff's/applicant's case that the 3<sup>rd</sup> defendant/respondent is the one encroaching on the suit premises. The plaintiff/applicants have not sought any remedy against the 1<sup>st</sup> defendant/respondent hence their claim against him ought to be struck out with costs.

10. The 1<sup>st</sup> defendant/respondent relies on the case of **Giella Vs Cassman Brown** and states that the plaintiffs/applicants have not shown that they have prima facie against the 1<sup>st</sup> defendant/respondent. He has also relied on the case of **Mrao Ltd vs First American Bank Ltd & 2 Others [2003] eKLR**. That the material presented by the plaintiffs/applicants would not lead this court to conclude that there exist a right that the 1<sup>st</sup> defendant/respondent has infringed. They urge the court to dismiss the application with costs.

**The 2<sup>nd</sup> Defendant/Respondent's Submissions**

11. The plaintiff/applicants have no legal or beneficial interest in the suit property. The 3<sup>rd</sup> defendant/respondent is the duly registered owner of the suit property therefore the plaintiff/applicants lack *locus standi* to institute this suit against the 2<sup>nd</sup> defendant/respondent. They have relied on Section 26 of the Land Registration Act, 2012. The plaintiffs/applicants are guilty of trespass.

12. The plaintiffs/applicants were not allocated the suit property. The plaintiffs/applicants have been in illegal occupation of the property without the 2<sup>nd</sup> defendant's knowledge and/or consent. They have also relied on the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358 and Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. That damages would be adequate compensation. The balance of convenience tilts in favour of the defendants.

13. The plaintiffs/applicants are not entitled to the orders sought. They pray that the application be dismissed with costs.

**The 3<sup>rd</sup> Defendant/Respondent's Submissions.**

14. The plaintiffs/applicants application does not meet the threshold for grant of temporary injunction. They have also put forward the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. They have failed to prove ownership of the suit property. They have also put forward the case of **Mrao Ltd vs First American Bank Kenya Ltd & 2 Others**.

The plaintiffs/applicants have not demonstrated how they will suffer irreparable damage. The balance of convenience tilts in favour of the 3<sup>rd</sup> defendant/respondent who has proven that he is the registered owner of the suit property. It would cause him great injustice if the plaintiffs' application is allowed as he has invested colossal amounts of money in developing the suit property he purchased as an innocent purchaser for value. They have put forward the case of **Mary Syevutha Peter vs Abdulrahim Kassim Jaffer & 2 Others [2012] e KLR**. He prays that the plaintiffs' application be dismissed with costs.

15. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the grounds of opposition, the

replying affidavits together with the annexures. I have considered the written submissions of counsel and the authorities cited.

16. The issues for determination are:-

***(i) Whether the plaintiffs/applicants' application meet the threshold for grant of temporary injunctions.***

***(ii) Who should bear costs?***

17. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Limited [2003] KLR 125**. The court of appeal in determining what amounts to prima facie case stated:-

***“A prima facie 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”***

18. It is the plaintiffs/applicant's case that they bought the suit property from one John Gateri on 2<sup>nd</sup> March 1995. There is a sale agreement dated 2<sup>nd</sup> May 1995. They have also annexed two letters from the Nairobi City Council confirming that John Gateri the original allottee had paid for the plot in full. There is an assignment between City Council of Nairobi and John Gateri to the plaintiffs/applicants. They have also annexed various receipts from the City Council of Nairobi showing that they were paying rates for the suit property. A beacon certificate dated 16<sup>th</sup> June 2009 is also annexed. It is not clear why they did not take steps to effect transfer in their favour.

19. The 1<sup>st</sup> defendant/respondent on his part states that he became the allottee of the suit property on 11<sup>th</sup> November 1994, he signed an agreement for lease dated 29<sup>th</sup> November 1999 (in the said agreement it is stated that the parcel of land had not been surveyed). It is not until 15<sup>th</sup> September 2014 that he is issued with the certificate of lease. I have considered the above facts and find that his could have been a case of double allocation. This will come to light during the hearing where evidence will be presented.

20. In the case of **Njenga vs Njenga [1991] KLR 401 Bosire J** (as he then was) held that:

***“an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.”***

I am persuaded by the facts presented by the plaintiffs/applicants that there is need to preserve the suit property pending the hearing and determination of the suit.

21. In the case of **Kenleb Cons Limited vs Gatitu Services Station Limited & Another [1990] KLR 557 Bosire J** (as he then was) held that:

***“to succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction”***

I am satisfied that the plaintiffs/applicants deserve this kind of protection. I find that they have established a prima facie case with a probability of success at the trial.

22. I also find that the plaintiffs/applicants have demonstrated that they will suffer irreparably if the orders are not granted. The 3<sup>rd</sup> defendant/respondent has conceded that he is undertaking developments on the suit property. The plaintiffs/applicants risk losing the suit property if these orders are not granted. I am guided by the case of **Ooko vs Barclays Bank of Kenya Limited (2002) KLR 394**.

23. I am also of the view that the balance of convenience tilts in favour of the plaintiffs/applicants.

24. I find that it is necessary to preserve the suit property pending the hearing and determination of the suit herein.

25. In conclusion, I find that this application is merited and I grant the sought orders namely:-

***(a) That a temporary injunction do hereby issue restraining the defendants/respondents, their agents, servants, employees and or representatives from trespassing onto, erecting and/or construction illegal structures or alienating, demolishing, disposing of or otherwise interfering with the plaintiffs'/applicants' building structures thereon on plot known as PLOT NO. A 258 UMOJA INNERCORE SECTOR II also known as BLOCK 83/14/358 within NAIROBI pending the hearing and determination of the suit herein.***

***(b) That any construction on the suit premises known as PLOT NO. A 258 UMOJA INNERCORE, SECTOR II also known as BLOCK 83/14/358 within Nairobi be and is hereby stopped until the hearing and determination of the suit herein.***

***(c) That costs of this application do abide the outcome of the main suit.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 16th day of October 2018**

**L. KOMINGOI**

**JUDGE**