



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1327 OF 2016

FRANCIS MAINA WAKABA.....PLAINTIFF/APPLICANT

=VERSUS=

GABRIEL GATHIARI.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 27th October 2016. It is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Cap 21 and all enabling provisions of the law.

2. It seeks order:-

(1) Spent

(2) Spent

(3) That a temporary injunction be granted restraining the defendant whether by himself, his servants and/or agents from entering onto for purpose of carrying on any or any further construction, selling, alienating, transferring, disposing of, subdividing or otherwise howsoever, interfering with Komarock-Dandora Phase 1 Nairobi, Plot No 130 pending the hearing and final determination of this suit..

(4) That costs of this application be provided for.

3. The grounds are on the face of the application and are;

(a) The plaintiff is the owner of Plot No-130 having purchased the same from the then Nairobi City Council allottee, one Francis Mwaura.

(b) The depositing of the stones and erection was neither with my knowledge or consent.

(c) The defendant threatens to continue with the construction.

(d) It is just and mete that the orders being sought be granted.

4. The application is supported by the affidavit of Francis Maina Wakaba, the plaintiff/affidavit herein sworn on the 27th October 2016.

5. The defendant/respondent was duly served with copies of plaint and summons to enter appearance. He was also served with the Notice of Motion dated 27th October 2016. There is an affidavit of service filed by Daniel Wachira, process server, it is sworn on the 30th June 2017 and filed in court on 7th July 2017. Despite being served, the defendant/respondent neglected to enter appearance and/or file defence. He also did not file any response to the notice of motion dated 27th October 2016.

6. On the 30th November 2017, the court directed that the said notice of motion be disposed of by way of written submissions. The plaintiff/applicant filed his written submissions on 1st March 2018.

7. It is the plaintiff's/applicant's case that he bought the plot from one Francis Mwaura, who was the original allottee. He has annexed a letter of allotment of Francis Mwaura and a sale agreement. He has continued paying the rates levied by the Nairobi City County. He has annexed some receipts. He has also annexed photographs showing the foundation made by the defendant/respondent as well as building materials, strewn over and around the foundation.

8. The plaintiff's/applicant's case has not been controverted. The defendant's/respondent has not filed any response to the notice of motion dated 27th October 2016.

9. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the written submissions of counsel. The issues for determination are:-

(i) Whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.

(ii) Who should bear costs?

10. At this juncture it is necessary to briefly examine the legal principles governing the application 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.**

11. In the case of **Mrao Limited vs First American Bank of Kenya Limited and 2 Others [2003] KLR 125** the Court of Appeal in determining what amounts to a 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”

12. I am satisfied that the plaintiff/applicant herein has established a prima facie case with a probability of success at the trial. I also find that he has demonstrated that he will suffer irreparably if the orders are not granted. It is necessary to preserve the suit property pending the hearing and determination of the suit herein.

13. In conclusion, I find merit in this application and/or grant the orders ought namely:-

(a) That a temporary injunction be and is hereby issued restraining the defendant/respondent whether by himself, his servants and/or agents from entering onto, for purposes of carrying on any or any further construction, selling, alienating, transferring, disposing of, sub-dividing or otherwise howsoever interfering with plot number 130, Komarock-Dandora Phase 1, Nairobi, pending the hearing and determination of this suit.

(b) That the costs of the application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 27TH day of NOVEMBER 2018

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate Plaintiff

.....Advocate Defendant

.....Court Assistant