



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO.874 OF 2016**

**JOSIAH KARIUKI KARIMI.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**NAIROBI CITY COUNTY.....DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 26th July 2016 brought under Order 40 rule 1 (b), 2, 3 and 9, Order 8 Rule 2 and 20 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks order:-

***(1) Spent***

***(2) Spent***

***(3) That the defendant by itself, its servants, agents and/or employees be hereby restrained by way of interim injunction from interfering with and/or issuing letters of allotment and agreements for lease to third parties or any other document in respect of Plot NO. S438 (CNN 347), 426A (CCN 92) and 403 (CCN 281) Umoja II Zone 8 respectively pending the hearing and determination of the suit.***

***(4) That costs be provided for.***

3. The grounds are on the face of the application and are set out in paragraphs 1 to 3.

4. The application is supported by the affidavit of Josiah Kariuki Karimi the plaintiff/applicant sworn on the 26<sup>th</sup> July 2016 and a supplementary affidavit sworn on the 16<sup>th</sup> October 2017.

5. The application is opposed. There is a replying affidavit by Abiud Ochola Assistant Director Site & Service Schemes with the defendant sworn on the 11<sup>th</sup> May 2017.

6. On the 21<sup>st</sup> November 2016, the court directed that the application be canvassed by way of written submissions.

7. It is the plaintiff's/applicants submissions that he purchased the suit plot numbers 438, 436 and 403 Umoja II, Zone 8 from Andrew Kamau Mwangi, Gerald K Wabacha and David Kangei Njoroge respectively. That the sale was sanctioned and sale agreement prepared by officials of the defendant/respondent. He has made payments for the plots to the defendant/respondent, which payments were received and receipts issued.

8. The defendant/respondent has not filed defence to the plaintiff's suit. He has established a prima facie case with probability of success at the trial. They have relied on the case of **Giella vs Cassman Brown & Company Ltd [1973] EA 358**. He urges the court to allow the application.

9. It is the defendant's/respondent's submits that the suit plots do not belong to the plaintiff/applicant. Mr. Abiud Achola the Assistant Director Site & Service Schemes of the defendant/respondent attached a copy of the report emanating from the defendants/respondents Lands Survey and GIS Department which stated that plot No. 438 (CCN 347) and 403 (CCN 281) as presented by the plaintiff/applicant were different from these in the defendant's/respondent's records.

That as per the records held by the defendant/respondent the plot belong to Margaret Muthoni Mwange, Harrison Ngure Maina and Susan Wanjiru Muriuki respectively.

10. They have also relied on the case of **Giella vs Cassman Brown and Company Ltd [1973] EA 358, Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125.**

The plaintiff's/applicant's ownership documents of the suit plot has been challenged the defendant/respondent as not being genuine. The plaintiff/applicant has not demonstrated that he will suffer irreparable harm if these orders are not granted. The balance of convenience tilts in favour of the defendant/respondent as any grant of interlocutory injunction at this stage would adversely affect the bonafide proprietor of the plots whose names appear on the defendant's/respondent's record. The plaintiff/applicant's application has not met the threshold for grant of interlocutory injunction and ought to be dismissed with costs to the defendant/respondent.

11. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the replying affidavit and the annexures. I have considered the written submissions of counsel and the authorities cited.

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?***

12. 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 application to satisfy the court that it should grant an injunction. The principles were set out in the present setting of **Giella vs Cassman Brown & Company Limited [1973] EA 358; in the case of Mrao Limited vs First American Bank of Kenya Limited & 2 others [2003] KLR 124** the Court of appeal stated what amount to a prima facie case.

13. It is the plaintiff's/applicant's case that he purchased the suit plots from Andrew Kamau Mwaganu, Gerald Kamau Wabacha and David Kangei Njoroge. He has annexed copies of allotment letters to the original allottees. He has also annexed copies of receipt for transfer fees and other charges. I have also seen sale agreements in respect of the sold plots and clearance certificate for payment of rates issued by the defendant/respondent.

14. The defendant/respondent on its part states that the documents presented by the plaintiff/applicant are not genuine. I find that this is an issue that will have to be decided at the trial once evidence is adduced. 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 plaintiff/applicant that there is need to preserve the suit properties pending the hearing and determination of the suit.

15. In the case of **Kenleb Cons Ltd V New Gatitu Service Station Ltd & Another 1990 KLR 557** where it was held that:-

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

16. I am satisfied that the plaintiff/applicant deserves this kind of protection, I find that he has established a prima facie case with a probability of success at the trial.

17. I also find that the plaintiff/applicant has demonstrated that he will suffer irreparably if these orders are not granted. The suit plots may be allocated to other people. I am guided by the case of **Ooko vs Barclays Bank of Kenya Limited [2002] KLR 394.**

18. I am of the view what the balance of convenience tilts in favour of the plaintiff/applicant. I find that it is necessary to preserve the suit plots pending the hearing and determination of this suit.

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

***(a) That an order of temporary injunction do hereby issue restraining the defendant/respondent by itself, its servants, agents and/or employees from interfering with and/or issuing letters of allotment and agreements for lease to third parties or any other document in respect of plot numbers 438 (CCN347) 426A (CCN92) and 403 (CCN 281) UMOJA II, ZONE 8 respectively pending the hearing and determination of this suit.***

***(b) 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 18<sup>TH</sup> day of DECEMBER 2018**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant