



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 408 OF 2016**

**FREDRICK MUTHAMA NZIOKA..... 1<sup>ST</sup> PLAINTIFF**

**JULIA NDUNGE NZIOKA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PETER W. MATHENGE T/A JOMAN TIMBER YARD &**

**HARDWARE (KWA MATHENGE..... DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 24<sup>th</sup> April 2016 in which the Plaintiffs/Applicants seek for orders of temporary injunction restraining the Defendant/Respondent from trespassing, alienating, entering, occupying, dealing and or interfering in any way with the parcel of land known as Plot Number 3, Kasina Housing Scheme Society situated in Mlolongo along Mombasa Road (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit. The Plaintiffs/Applicants also seek an order compelling the Defendant/Respondent to remove the pieces of timber on the suit property and demolish the constructed structure thereon.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff/Applicant, Fredrick Muthama Nzioka, sworn on 24<sup>th</sup> April 2016 in which he averred that he purchased the suit property together with the 2<sup>nd</sup> Plaintiff who is his wife for a sum of Kshs. 810,000/- from one Loyford Kibaara, then a member of Kasina Housing Scheme Society. He annexed a copy of the Sale Agreement dated 15<sup>th</sup> August 2005. He added that upon payment of Kshs. 10,000/- to Kasina Housing Scheme Society they were issued with a Share Certificate Number 401 in the place of the seller, a copy of which he annexed. He further averred that the then Commissioner of Lands issued them with a Letter of Allotment dated 14<sup>th</sup> December 2007 for the suit property and that they fulfilled all the conditions therein inclusive of payment of stand premium, annual rent and rates. He annexed copies of the Letter of Allotment and receipts for land rent and rates. He further averred that they were in the process of procuring the Certificate of Title in both their names as joint owners of the suit property which was now known as Land Reference Number 11895/35. He annexed a copy of the Survey Plan thereof. He also averred that they are in the process of seeking approvals from the County Government of Machakos to develop the suit property. He pointed out that at the time of purchasing the suit property, it was vacant with no structures thereon but that sometime in mid-April 2016, they were astonished to find that the Defendant/Respondent had without their consent or permission taken possession thereof and started constructing a permanent structure thereon. He averred that the Defendant/Respondent refused to stop the trespass and proceeded to construct thereon. He averred further that the actions of the

Defendant/Respondent are illegal and are causing them irreparable damage and should be stopped by this court.

The Application is contested. The Defendant/Respondent, Peter Wahita Mathenge, filed his Replying Affidavit sworn on 5<sup>th</sup> May 2016 in which he averred that he owns Plot No. 1 Phase II C or new Plot No. 8 Phase II C, a subdivision of Land Reference No. 25062 Mavoko Land Development Company and not the suit property described by the Plaintiffs as Plot No. 3 Kasina Housing Scheme Society from L.R. No. 11895/35. He averred that he is a shareholder of Mavoko Land Development Company which is the registered owner of Land Reference No. 25062 within which lies his Plot No. 1 previously and now Plot No. 8 Phase II C. He averred that he purchased the plot from one Dennis Mukugi Kuria for a sum of Kshs. 5 million. He averred further that he paid a transfer fee of Kshs. 50,000/- to Mavoko Land Development Company Ltd upon which he was issued with a receipt, a copy of which he annexed. He added that Mr. Kuria surrendered his plot ownership certificate on which his name was cancelled and his name was inserted as the owner of the plot. He averred that he has invested the sum of Kshs. 15 million on the suit property. He also averred that Mavoko Land Development Company Ltd has sued Kasina Housing Scheme Society in **ELC No. 366 of 2009** in which Kasina is accused of invading into land owned by Mavoko Land Development Company Ltd being L.R. No. 25062 which matter is pending hearing and determination at the Machakos High Court. He pointed out that Kasina Housing Scheme Society has no title to L.R. No. 11895/35 within which the suit property is purported to be situated.

In response thereto, the 1<sup>st</sup> Plaintiff/Applicant filed his Further Affidavit sworn on 12<sup>th</sup> May 2016 in which he averred that the Defendant/Respondent has not denied that he has trespassed on the suit property, that he merely gives an account of how he acquired Plot No. 1 Phase II C whose acquisition documents he disputes and further that he denies being a member and shareholder of Kasina Housing Scheme Society. He denied that any timber business was ever carried out on the suit property as alleged by the Defendant/Respondent and that immediately they became aware of the Defendant/Respondent's trespass on the suit property, they confronted him. He further stated that **ELC No. 366 of 2009** does not concern them at all as the suit property lies within L.R. No. 11895/35 which is not the subject matter of that suit.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiffs/Applicants and further whether to issue an order compelling the Defendant/Respondent to demolish the constructed structure on the suit property and remove the pieces of timber placed thereon. 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.”*

Have the Plaintiffs/Applicants 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.”*

Do the Plaintiffs/Applicants 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 point out to 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, I turn to assessing whether or not the Plaintiffs/Applicants have met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiffs have established a prima facie case with a probability of success at the main trial. The Plaintiffs/Applicants have sought to convince this court that they are the owners of a parcel of land they have named Plot Number 3, Kasina Housing Scheme Society situated in Mlolongo along Mombasa Road. It is their further averment that this parcel of land lies within Land Reference Number 11895/35 registered in the name of Kasina Housing Scheme Society. They allege that the plot was bought by them in vacant possession and that the Defendant/Respondent has only recently invaded the same and put up a timber business and a permanent structure from which he is conducting his business. The Plaintiffs/Applicants aver that the process of issuance of the Certificate of Title is at an advanced stage but is yet to be finalized. They admit that they do not hold a Certificate of Title for the suit property but produced a copy of a Letter of Allotment to support their claim of ownership of the same. The Defendant/Respondent has on his part come up to state that the suit property is in fact not Plot Number 3 Kasina Housing Scheme Society but is in actual fact their plot known as Plot No. 1 Phase II C or new Plot No. 8 Phase II C, a subdivision of Land Reference No. 25062 Mavoko Land Development Company Ltd. It is his averment that the plot he occupies lies within L.R. No. 25062 registered in the name of Mavoko Land Development Company Ltd. He denies being a trespasser as alleged by the Plaintiffs/Applicants. This scenario is one in which it is very difficult for the court at this stage of the proceedings to be able to authoritatively determine which claim as between the Plaintiffs and the Defendant is valid. This is a classic case of having to rely on contradictory affidavit evidence to make a judgment call. The matter is confounded by the lack of duly issued title documents to the any of the contestants herein. The onus is on the Plaintiffs to prove that they do indeed have a “genuine and arguable” case to be able to establish that they have a prima facie case with a probability of success at the main trial. For me, this threshold has not been met by the Plaintiffs/Applicants.

Since the Plaintiffs/Applicants have 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.”***

The other prayer sought by the Plaintiffs/Applicants is to issue an order compelling the Defendant/Respondent to remove the structure erected on the suit property and to remove the timber pieces deposited thereon. This is essentially a prayer for a mandatory injunction. The leading authority on this issue is the case of **Locabail International versus Agro Export (1986) 1 ALLER 901** wherein it

was stated at follows:

*“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”*

Further, in **Homes Limited versus Shandahu (1971) 1Ch. 34**, the following was stated:

*“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.”*

As I have already indicated earlier, the case presented by the Plaintiffs/Applicants fails to meet the threshold for the grant of a temporary injunction. The same applies to the prayer for a mandatory injunction. This case is hardly plain or obvious as to warrant an issuance of an order of mandatory injunction. I did note earlier that I cannot sanction the eviction of the Defendant/Respondent from the suit property at this interlocutory stage. I hold the view that this suit should go to full trial and have the court make a final determination on whether or not to evict the Defendant/Respondent out of the suit property. I therefore decline to issue the mandatory injunction sought after by the Applicant.

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2017.**

**MARY M. GITUMBI**

**JUDGE**