



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 62/2017

**JOSEPH MUTUA ZAKAYO.....APPLICANT
/PLAINTIFF**

-VERSUS-

**THE COUNTY GOVERNMENT OF MAKUENI & 8 OTHERS.....1ST DEFENDANT
/RESPONDENT**

RULING

1. There is before me a notice application expressed to be brought under **section 1A, 1B, 3A and 63 (e)** of the Civil Procedure Act and **order 40 Rule 19 and 2** of the Civil Procedure Rules and all other enabling provisions of the law for an order that pending the hearing and determination of this suit a temporary order of injunction do issue restraining the defendants from trespassing, entering remaining in possession, changing the ownership records at the respective land ministries and or in any way interfering with the plaintiff's occupation, possession, ownership of all that property known as **Plot No. 290 Emali Town**.
2. The application is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of **Joseph Mutua Zakayo**, the Plaintiff/Applicant herein. The application is dated **08/04/2016 and** was filed in court on even date.
3. The application is opposed by the **1st to the 6th** Defendants/Respondents vide their replying affidavit dated **06/05/2016** and filed in court on **07/06/2016** as well as their grounds of opposition dated **06/05/2016** and filed in court on the same day. The **8th** Defendant/Respondent has also opposed the application vide the replying affidavit sworn by **Brian Ikol, its Deputy Director Legal Affairs and Enforcements** the same being dated **23/06/2016** and was filed in court on **24/06/2016**.
4. The **9th** Defendant/Respondent entered appearance on **12/05/2016** through **Kang'oli and Company Advocates** vide notice of appointment of dated **11/05/2016**. He did not file a replying affidavit for reasons which shall become clear later in this ruling.
5. On **22/06/2016**, **Nelly Nduku Mutuku**, the interested party/Applicant filed a notice of motion application dated the same date seeking for amongst other prayers, that the court be pleased to grant leave and/or add her as a necessary party to this suit, that the court be pleased to grant an interim order preserving and/or stopping any further developments on the suit property being **UNS.B.C.R plot 290 Emali** by the plaintiff, or his servants, agents, employers and or any other person pending the hearing and determination of the application and that the court be pleased to grant orders preserving and/or stopping any further development on the suit property being **UNS B.C.R plot 290 Emali** by plaintiff, his servants, agents employees and/or any other person pending the hearing and other determination of this matter

with costs being provided for.

6. The application is predicated on file grounds on its face and is supported by the affidavit of **Nelly Nduku Mutua**, the interested party/Applicant herein.

7. On the **28/06/2016** the interested party/Applicant was granted leave to enjoin or added as a necessary party to this suit in terms of prayer 2 of her notice of motion application **22/06/2016**. The court directed that the interested party's/Applicants prayers be canvassed together with the Plaintiff/Applicants application dated **08/04/2016**. Parties were directed to canvass the two applications by way of written submissions and thereof have done so. I will to proceed to evaluate the submissions and thereafter make my finding.

8. On the question of whether or not to grant the injunction the plaintiff/Applicant cited the three principles enunciated in ***Giella vs Cassman Brown Co. Limited (1973) EA358***. These are whether there is a prima facie case with a probability of success, whether or not the plaintiff will suffer irreparable injury if the injunction is not granted and in whose favor the balance of convenience tilts. Regarding the first principle, the plaintiff's /Applicants counsel submitted that the Applicant has been in occupation of the suit premises since 1998 and that he was purchaser for value without notice. He went on to submit that the County Government Makueni and its officers have not disputed the allotment letter issued to the Applicant. He said that the County Government and its officers have been receiving rates and offer payments due to them from that applicant. It was also his submissions that the assertion by the 8th defendant/Respondent that the plot records do not appear anywhere in their records is an admission of failure on their part since the 8th defendant/Respondent is mandated to develop, maintain and have in its possession all records and such other documents relating to land at the national and county levels. He also submitted that the absence of a perfected title conferring ownership rights to the plaintiff/Applicant over the suit property cannot be advanced as reason enough not to protect his interests in the suit property and added that the 8th Defendant's/Respondents assertion that the Applicant has no certificate of title capable of protection by this court is therefore misplaced and made out of ignorance. He referred the court to the case of ***Naftali Ruth Kinyua Vs Patrick Thuita Gachure and another [2015] eKLR***.

9. On whether or not the applicant will suffer irreparable loss if the injunction is not granted, the applicant's counsel submitted that having lived in the suit plot since 1995 which he has been in actual occupation, use and possession, he will suffer irreparable damage taking into account that he had commenced construction of more permanent structures whose building plans were approved by the first Defendant/Respondent.

10. The counsel submitted that the balance of convenience tilts in favor of the Applicant who has been in occupation and use of the suit premises. He went on to submit that no document or other form of evidence has been brought before this court to by the interested party to show that the deceased ever owned the property in question or ever sought to claim it.

11. The counsel further asked the court to be guided by the doctrine, of lispensens inspection to restrain the respondents and the interested party from in any manner dealing with the suit property herein pending the hearing and determination of this suit.

12. Regarding prayers **3, 4** and **5** of the interested party's application dated **22/06/2016**, the Applicants counsel reiterated his submissions and added that the interested party has not filed any pleadings seeking ownership of the land and as such her claim is an afterthought and her prayers are not based on any pleadings. The counsel went on to submit that whereas the interested party's affidavit in support of her application shows that the suit property was allocated to her late husband in **1995**, the Plaintiff/Applicant has been in actual occupation and possession of the suit property in question for close to **20 years**. He further submitted that there exists not a single record from the county Government showing that the late **James M. Makenzi** ever owned the plot. He pointed out that it is more than **20 years** since the alleged allocation and yet neither the deceased nor the legal administrator ever took up possession of the suit property or sought to recover it and added that in any event, their purported claim is statutorily time barred. He went on to submit that the Plaintiff/Applicant paid conveyancing fees,

survey fees, land rent, standing premium stamp duty and approval fees totaling to Kshs. **10, 230** in **2002** towards issuance of certificate of title unlike the interest party who only paid Kshs. **13,800** and not **10,527** on **09/09/2015** towards the demand made by the commissioner in **1995**.

13. The submissions by the counsel for the **1st** to the **6th** Defendants/Respondents referred the court to **Peter Ndonya's** affidavit dated **06/05/2016** and filed in court on **07/05/2016** and surmised that two issues arose for determination. These are whether the Plaintiff's/Applicant's suit and application offends the provisions of section **13** and **16** of the Government Proceedings Act and whether the requirements stated in **Giella Vs Cassman Brown and Company Ltd[1973] EA358** have been met for the injunction sought to issue which the counsel proceeded to answer in the negative. The counsel submitted that the applicant has no title to the suit premises and hence he has no proprietary interest. The counsel pointed out the two letters of allotment that the Applicant relies upon did not confer title or proprietary interest over the suit premises. He said that such interest or title can only pass once the allottee has complied with the terms in the letter of allotment and is subsequently issued with documents of title. The counsel cited the case of **Lilian Waithera Gachuhi –Vs- David Shikuku Mzee [2003] eKLR** in support of his submissions. The counsel further submitted that the Applicant did not give information on how he acquired or even why he has two letters of allotment.

14. On the issue of irreparable harm, the counsel submitted that having quantified the loss occasioned when his structures were demolished, it shows that the Applicant has not satisfied this test. On the third condition of balance of convenience, the counsel submitted that since there are two conflicting letters of allotment, the balance of convenience tilts to this injunction not been granted.

15. On the issue of whether or not the suit and the application offends the provisions of sections **13** and **16** of the Government Proceedings Act, the counsel submitted that the Applicant did not issue statutory notice to the County Government of Makueni at all and hence he has failed.

16. He further submitted that under **order 29** rule **2(2) (d)** of Civil Procedure Rules and **Section 16** of the Government Proceedings Act, Injunctions cannot issue against the county Government of Makueni which is part of the Government of Kenya.

17. The interested party's Applicant's submissions were that even if the allotment to the Plaintiff/Applicant was valid and which they vehemently deny, the same was issued subsequent to the interested party's allotment and there is no document that was availed to show that the letter of allotment was cancelled to warrant a re-issuance of a subsequent allotment. The counsel referred the court to the case of **Vekaria Investment Limited Vs Kenya Airports Authority and 2 others [2014]eKLR**. The interested party/Applicant's Counsel further submitted that the principles of granting injunction enunciated in **Giella –Vs- Cassman Brown Case** have not been met by the Applicant. The counsel added if anything it is the interested party/Applicant who has established a *prima facie* case and that since she claims beneficial interest in the property, no amount of costs can compensate her for the loss of the property since it carries with it sentimental value that cannot be measured in monetary terms. The counsel added that should the court be satisfied that the applicant's case is made out, he should be ordered to make an undertaking as to damages equivalent to the current market value of the property.

18. Regarding the applicants submissions of **23/08/2016** the interested party's counsel submitted that she was never served with summons to enter appearance or file defence and therefore the allegation that no defence has been filed is moot since pleadings in this matter have not closed. The counsel went on to say being a party enjoined in the matter, the interested party cannot file a plaint but can legally file a defence and a counterclaim and she is not time barred from doing so. The counsel went on to submit that no proof was availed to substantiated the allegation of occupation by the applicant for **20 years** as he has alleged and added that the suit is not for adverse possession and being a licensee of the government by virtue of an allotment letter, the physical occupation of the parcel is immaterial given that he was only issued with his two allotment letters in **1998** and **2002**.

19. The applicant filed supplementary submissions on **02/12/2016** in answer to the **1st** to **6th** Respondents submissions to the grounds of opposition dated **06/05/2016** as well as the interested party's replying

affidavit which was filed on **07/09/2016**. Regarding the **1st** to **6th** Respondents submissions that proceedings herein are defective on the grounds that no statutory notice was issued pursuant to the Government Proceedings Act before commencement of the proceedings against the 1st Respondent and its officers, the applicants counsel submitted that it was misconception of the law and referred the court to the case of **James Muigai Thungu Vs t County Governemnt of Trans Nzoia and two others [2015]eKLR**. The counsel went on to submit to reiterate his earlier submissions that the applicant has been living in the suit property for close of **20 years** now and wondered why the respondent decided to demolish his structures instead of bringing a claim against him for trespass.

20. I have read the two applications as well as the submissions that were filed. I will start by dealing with the issue of whether or not the suit offends the mandatory provisions of Government Proceedings Act. On this score, I am on agreement with the Applicants counsel that there is no provisions in the County Governments Act that prohibits the court from issuing injunctive orders against the **1st** to **6th** Respondents. This issue was settled by **Obaga J in James Mungai Thungu's** case that was referred to me by the applicant. I am alive to fact that I have not been asked to determine whether it was necessary to sue the **2nd** to the **5th** respondents. The four are servants and agents of the first Respondent. I will say no more on this issue. Be that as it may, I hold that the Applicant's suit and application documents do not offend the mandatory provisions of the Government Proceedings Act Chapter 40 of the Law of Kenya.

21. From the above, the next issue that I will deal with is whether or not a temporary order of injunction should issue against the Respondent as sought by the Applicant or an interim order preserving and or stopping any further development on the suit property by the applicant as sought by the interested party/Applicant. I propose to start with the interested party's/Applicant's application. The interested party states that she could not file her pleading since she is yet to be served with summons by the Applicant as was ordered by the court on the **28/06/2016**. On the other hand, the Applicant argues that the prayers sought by the interested party party/applicant cannot be granted in the absence of a plaint or counterclaim. In this instance what the interested party ought to have filed is defence to the plaint and a counterclaim. What was the interested party expected to do in the absence of service of summons by the Applicant. In my view, she could have filed her defence and counterclaim under protest so as to lay the basis for her notice of motion application. As such, I hold that prayers 2 and 3 of her application are incapable of being granted in the absence of a defence and counterclaim. I will dismiss the two prayers with orders that each party bears its own costs.

22. I will now turn to the application by the Applicant. Has he fulfilled the principles of granting and injunction has enunciated in the **Giella Vs Cassman Brown case**? On the issue of whether or not he made out a prima facie case with a probability of success, the applicant contends that he has been in actual occupation of the suit property for close to 20 years and that the **1st** to **6th** Respondents have accepted rate payments from him. The **1st** to **6th** Respondents admit that their Electronic Register shows the applicant's name while their manual records shows the name of the **9th** Defendant who is the late husband of the interested party. As to who is the actual owner of the suit property, this can only be interrogated during the hearing of the main suit. I am however convinced that the Applicant has a *prima facie* case with a probability of success. On the issue of whether or not the Applicant will suffer irreparable harm if the orders sought are not granted, I do note that the Applicant has quantified the loss that he has suffered so far and to this extent, I am in agreement with the Respondents that it cannot be said that the loss that the Applicant says he will suffer cannot be compensated by way of damages. On the issue of balance of convenience it is clear that there being an acknowledgment that the Applicants name appears in the Electronic Records, the balance of convenience tilts in his favor and buttresses his argument of being in actual possession of the suit property for close to 20 years.

23. Arising from the above, I am satisfied that the Applicants application has merits But in any view certain conditions require to be imposed upon the applicant. In the circumstances, I will grant prayer 3 of the Applicant/Applications dates **08/04/2016** on condition that he does not carry out further development to the suit property pending the hearing and determination of the suit herein. It is so ordered.

Signed, Dated and Delivered this 27th day of April, 2017

MBOGO C.G

JUDGE

Ruling read, delivered and dated in open court in the absence of the parties and their counsel who all had notice of today's date.

Mr. Kwemboi court assistant.

MBOGO C.G

JUDGE