



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC. CASE NO. 1020 OF 2014**

**DAVID WANYOIKE GATHUA.....PLAINTIFF**

**VERSUS**

**HOSEA IMBO OWINO.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 31<sup>st</sup> July 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from trespassing on, developing, building, constructing and or whatsoever dealing or interfering with the Plaintiff's parcel of land known as Plot No. 37 Kahawa West Phase II (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, David Wanyoike Gathua, sworn on 31<sup>st</sup> July 2014 in which he averred that he together with his brother called Richard Njoroge Waweru purchased the suit property from one Joyce Nduta Mwangi sometimes in the year 2006. He annexed the Sale Agreement dated 20<sup>th</sup> March 2006. He added that the suit property was allotted to the said Joyce Nduta Mwangi by the then Nairobi City Council vide an undated Letter of Allotment, a copy whereof he annexed. He added further that they have continued to pay rates for the suit property to the Nairobi County Government. He then stated that the Defendant/Respondent has in complete disregard of his proprietary rights over the suit property, trespassed therein and started developing the same. He further stated that he reported the trespass to the Kasarani Police Station where the Defendant/Respondent failed to produce any ownership documents over the suit property.

The Application is contested. The Defendant/Respondent, Hosea Imbo Awino, filed his Replying Affidavit sworn on 24<sup>th</sup> September 2014 in which he averred that he has been a resident of Kahawa West since 1985. He further averred that in the year 1992, the then City Council of Nairobi was allocating land to the residents of Kahawa West and that though he made an effort to benefit from the allocation, he was not successful. He further averred that come the year 2001, the then City Council of Nairobi once again returned to Kahawa West and repossessed the pieces of land that had been given out earlier and whose owners had failed to develop and gave them out to other people who could develop the same. He added that he was this time successful in being allocated the suit property vide a Letter of Allotment dated 21<sup>st</sup> September 2001, a copy of which he annexed. He stated further that he paid the Stand Premium of Kshs. 5,800/- and Ground Rent of Kshs. 1,400/- as required and annexed copies of the receipts issued to him by

the then City Council of Nairobi. He further stated that he paid an additional Kshs. 10,000/- for a Beacon Certificate (a copy of which was produced) and Kshs. 300/- being application for beacon certificate fees. He annexed receipts to this effect. He further added that he paid a further additional sum of Kshs. 15,000/- being survey fees. He annexed a copy of the receipt. It was his averment that he has all the requisite documents to show that he is indeed the owner of the suit property, a fact that is well known to the Plaintiff/Applicant who sold to him the land he used to develop the suit property. He refuted the Letter of Allotment produced by the Plaintiff/Applicant on the grounds that his Letter of Allotment came first in time and supersedes the one produced by the Plaintiff/Applicant. On those grounds, he sought for this Application to be dismissed.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. 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.”***

Has the Plaintiff/Applicant 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.”***

Does the Plaintiff/Applicant 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 Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. In his assertion that he is entitled to the suit property, the Plaintiff/Applicant has produced to this court a Sale Agreement dated 20<sup>th</sup> March 2006 between him and his brother Richard Njoroge Waweru as the purchaser and one Joyce Nduta as the vendor. It was his averment that the said Joyce Nduta was the allottee of the suit property which was allocated to her vide an undated Letter of Allotment, a copy of which he produced. He drew the attention of the court to the right top corner of the said undated Letter of Allotment where there was a note to the effect that the suit property had been transferred to him and his said brother. He also produced to this court copies of receipts evidencing payments for ground rent and plot transfer fee all in his name. However, the Defendant/Respondent also claims to be the owner of the suit property and in support of that averment similarly produced a copy of his Letter of Allotment dated 21<sup>st</sup> September 2001 together with a Beacon Certificate and various receipts, all evidencing payments made to the then City Council of Nairobi. It is plain to see that the affidavit evidence before this court at this juncture is conflicting. It is difficult at this juncture to make a finding on the conflicting Letters of Allotment being relied on by the Plaintiff on the one hand and the Defendant on the other hand. Both parties have produced copies of

receipts issued by the then City Council of Nairobi, all relating to the suit property but in the names of the Plaintiff and the Defendant. In these circumstances, the court is not able to determine which party is indeed the owner of the suit property. That being the case, I find that the Plaintiff/Applicant has not succeeded in making a prima facie case with a probability of success at the main trial.

Since the Plaintiff/Applicant has 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.”***

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

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2017.**

**MARY M. GITUMBI**

**JUDGE**