



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC. CASE NO. 1099 OF 2013**

**VICTORIA WANJIKU THUO..... PLAINTIFF**

**VERSUS**

**BONIFACE CHEGE..... DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 16<sup>th</sup> September 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from entering, remaining in or constructing on Plot No. 163 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, Victoria Wanjiku Thuo, sworn on 16<sup>th</sup> September 2013 in which she averred that she purchased the suit property from one Kenneth Ndumbi Njoroge. She annexed a copy of the Sale Agreement dated 4<sup>th</sup> April 2011 and a copy of Mr. Njoroge’s Letter of Allotment dated 19<sup>th</sup> October 1997. She confirmed that upon payment of the entire purchase price of Kshs. 650,000/- to the said Mr. Njoroge, she took possession of the suit property and constructed a temporary structure thereon. She further averred that she left a person called Mr. Kiarie to take care of the suit property as she proceeded to her place of work in Dubai. She further averred that upon her return to the country in August 2013, she went to see the suit property and was surprised to find the same with a perimeter wall constructed and her temporary structure had been demolished. She further averred that the Defendant/Respondent came forward claiming that the suit property was his Plot No. 162. She added that a Surveyor from the then City Council of Nairobi identified the suit property on the ground and confirmed that it belonged to her. She further averred that this notwithstanding, the Defendant/Respondent continued to construct on the suit property. On those grounds, she sought for this Application to be allowed.

The Application is contested. The Defendant/Respondent, Boniface Chege, filed his Replying Affidavit sworn on 3<sup>rd</sup> October 2013 in which he averred that he is the rightful owner of Plot No. 162 Kahawa West Phase II. He added that the said Plot No. 162 was allocated to him by the then Nairobi City Council on 21<sup>st</sup> September 2001. He produced a copy of the Letter of Allotment to this court. He further averred that he paid the Stand Premium and Ground Rent as required by the then Nairobi City Council on 7<sup>th</sup> May 2013. He further added that the Surveyor from the Nairobi County Government showed him the physical location of Plot No. 162 and pointed out the boundaries of the same to him. He annexed a Survey Plan and pointed out that Plot Nos. 162 and 163 are distinct, separate but adjacent plots and that on the ground,

he has occupied Plot No. 162 and not the suit property as alleged by the Plaintiff/Applicant. He further averred that the Plaintiff did not annex any Report from her Surveyor to demonstrate that the plot occupied by him is the suit property. He averred further that the Plaintiff/Applicant was shown the wrong plot by the said Mr. Kenneth Ndumbi Njoroge. On those grounds, he requested the court to dismiss this Application.

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. The Plaintiff/Applicant has sought to convince this court that she is the owner of the suit property. As proof of that assertion, the Plaintiff/Applicant produced two documents as evidence of her ownership. The first is a Letter of Allotment dated 17<sup>th</sup> October 1997 in the name of Kenneth Ndumbi Njoroge while the second document was a Sale Agreement dated 4<sup>th</sup> April 2011 between her and Kenneth Ndumbi Njoroge. It is her assertion that she bought the suit property from Kenneth Ndumbi Njoroge, the allottee thereof. The Defendant/Respondent has however asserted strenuously that the plot he has occupied and is constructing upon is not the suit property but rather is Plot No. 162 which belongs to him. In support of his assertion of ownership of Plot No. 162, he produced a copy of his Letter of Allotment dated 1<sup>st</sup> September 2001 and a Survey Plan indicating the position of the two plots. The main question that arises is the exact physical location of the suit property on the ground. The Plaintiff/Applicant has made the claim that the plot occupied by the Defendant is the suit property. She asserted that a Surveyor from the Nairobi City Council visited the site and was able to point out on the ground the physical location of the suit property and that it is the plot occupied by the Defendant. However, there is no report or affidavit on the court record from that Surveyor which the court can rely on to make a finding on the issue of the actual physical location of the suit property. As matters stand therefore, this court is not in a position to make any definitive findings on where exactly the suit property is located. On that account, I find that the Plaintiff/Applicant has failed to establish that she has 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 19<sup>TH</sup>**

**DAY OF MAY 2017.**

**MARY M. GITUMBI**

**JUDGE**