



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

**AT NAIROBI**

**ELC SUIT NO. 1258 OF 2014**

**JOHN NJENGA MUNENE.....PLAINTIFF**

**VERSUS**

**SIMON IRUNGU KARANJA.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before me is the plaintiff's Notice of Motion application dated 25<sup>th</sup> September, 2014 in which the plaintiff is seeking an order of injunction to restrain the 1<sup>st</sup> defendant from proceeding with construction of any nature or development on Plot No. 146, Kariobangi River Bank ("the suit property") pending the hearing an determination of this suit. The application has been brought on the grounds set out on the face thereof and on the affidavit of the plaintiff sworn on 25<sup>th</sup> September, 2014. The plaintiff's case is that he is the legitimate owner of the suit property and that the 1<sup>st</sup> defendant is a trespasser thereon. The plaintiff has contended that the suit property was allocated to him by the 2<sup>nd</sup> defendant through a letter of allotment dated 26<sup>th</sup> February, 1992 and that he accepted the allotment and complied with all the terms and conditions that were contained in the letter of allotment. The plaintiff has annexed to his affidavit as exhibits among others, copies of the letter of allotment dated 26<sup>th</sup> February, 1992 through which the suit property was allocated to him by the 2<sup>nd</sup> defendant, his acceptance letter dated 25<sup>th</sup> March, 1992, a receipt dated 1<sup>st</sup> April, 1992 for the payment he made on account of stand premium and annual rent, receipts dated 24<sup>th</sup> May, 2007 for the payment of survey fees and annual ground rent, a beacon certificate dated 25<sup>th</sup> May, 2007 that was issued to him by the 2<sup>nd</sup> defendant and a letter dated 23<sup>rd</sup> November, 2012 from the 2<sup>nd</sup> defendant confirming his ownership of the suit property.

The plaintiff has contended that sometimes in the month of November, 2012, the 1<sup>st</sup> defendant unlawfully and illegally entered onto the suit property and commenced construction of permanent structures thereon without his knowledge and or authority. The plaintiff has stated that he complained to the 2<sup>nd</sup> defendant about the said encroachment and the 2<sup>nd</sup> defendant issued an enforcement notice to the 1<sup>st</sup> defendant requiring him to stop further construction and also to remove the illegal structures he had put up on the suit property. A copy of the enforcement notice dated 17<sup>th</sup> December, 2012 and a reminder notice dated 26<sup>th</sup> June, 2013 have been exhibited. The plaintiff has contended that despite the said enforcement notices, the 1<sup>st</sup> defendant did not stop construction and the 2<sup>nd</sup> defendant refused to enforce the said notices against the 1<sup>st</sup> defendant. The plaintiff has contended that the 2<sup>nd</sup> defendant has never issued him

with any notice for the repossession of the suit property. The plaintiff has contended that unless restrained by the court, the 1<sup>st</sup> defendant would continue with construction on the suit property making it impossible for the plaintiff to recover the property from him.

The plaintiff's application is opposed by the 1<sup>st</sup> defendant and supported by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant filed a replying affidavit sworn on 27<sup>th</sup> October, 2014. In the affidavit, the 1<sup>st</sup> defendant has contended that he is the bonafide owner of the suit property. The 1<sup>st</sup> defendant has contended that on 15<sup>th</sup> August, 2006, he saw an advertisement of the property by the 2<sup>nd</sup> defendant and applied to be allotted the same. The 1<sup>st</sup> defendant has contended that his application was successful and he was allotted the suit property 22<sup>nd</sup> August, 2007. He thereafter fulfilled the terms and conditions which were contained in the letter of allotment of the same date. The 1<sup>st</sup> defendant has attached to his affidavit among others, copies of the letter of allotment dated 22<sup>nd</sup> August, 2007, receipts for the payments he made for stand premium, ground rent, survey fees and beacon certificate and the beacon certificate dated 22<sup>nd</sup> August, 2007.

The 1<sup>st</sup> defendant has contended that following that allotment, he presented building plans to the 2<sup>nd</sup> defendant for approval and the same were approved on 3<sup>rd</sup> October, 2010. The 1<sup>st</sup> defendant has contended that the enforcement notices which had been issued against him by the 2<sup>nd</sup> defendant were done away with after he presented his ownership documents and building approvals to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant has contended that after his building plans were approved as aforesaid, he constructed a permanent house on the suit property on which he is residing with his family. The 1<sup>st</sup> defendant has contended that the construction of the said house was completed and the house occupied by him in January 2014. The 1<sup>st</sup> defendant has contended that the suit property was allocated to him as a repossessed plot which repossession was pursuant to a public notice which the 2<sup>nd</sup> defendant had published in the Daily Nation Newspaper of 15<sup>th</sup> August, 2006.

The 2<sup>nd</sup> defendant responded to the application through a replying affidavit sworn on 18<sup>th</sup> November, 2014 by Stephen Gathuita Mwangi who was its Chief Officer, Lands Department. The 2<sup>nd</sup> defendant has contended that according to its records, the suit property belongs to the plaintiff, who was allotted the same through a letter of allotment dated 26<sup>th</sup> February, 1992. The 2<sup>nd</sup> defendant has contended that it is a stranger to the documents which have been submitted to court by the 1<sup>st</sup> defendant in proof of his title to the suit property. The 2<sup>nd</sup> defendant has denied that the suit property was repossessed and re-allocated to the 1<sup>st</sup> defendant.

The application was argued by way of written submissions. The plaintiff, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant filed their submissions on 3<sup>rd</sup> December, 2014, 17<sup>th</sup> December, 2014 and 19<sup>th</sup> January, 2015 respectively. I have considered the application together with the affidavits filed in support and in opposition thereto. I have also considered the submissions filed by the parties and the authorities cited in support thereof. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In the case of, Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358, that was cited by the plaintiff, it was held that an applicant for interlocutory injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the Court of Appeal stated as follows:

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair*

*and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."*

I am satisfied from the material before me that the plaintiff has met the threshold for granting the orders sought. The plaintiff has claimed that he is the bonafide owner of the suit property and that the 1<sup>st</sup> defendant has entered the suit property and commenced construction of permanent structure thereon without his permission. The plaintiff has placed before the court sufficient evidence in support of his claim over the suit property. The plaintiff has exhibited a letter of allotment dated 26<sup>th</sup> February, 1992. The plaintiff has also placed evidence before the court showing that he accepted the said allotment and complied with the conditions which were set out in the letter of allotment. The plaintiff's claim over the suit property has been supported by the 2<sup>nd</sup> defendant who has confirmed that according to its records, the suit property is owned by the plaintiff. The 1<sup>st</sup> defendant on the other hand has claimed that he acquired the suit property from the 2<sup>nd</sup> defendant on 22<sup>nd</sup> August, 2007. The 2<sup>nd</sup> defendant has claimed that the suit property was allocated to him after it had been repossessed from the plaintiff who had failed to pay ground rent and rates to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant has exhibited his letter of allotment and a general notice that was placed in the Daily Nation Newspaper of 15<sup>th</sup> August 2006 by the 2<sup>nd</sup> defendant calling upon those who had been allocated land in certain areas of Nairobi and who had not paid plot dues such as stand premium, ground rent, survey fees to settle the same within 30 days or risk their allotments being cancelled. There is no evidence placed before the court showing that the suit property is one of the plots which was repossessed by the 2<sup>nd</sup> defendant pursuant to the said notice of 15<sup>th</sup> August, 2006. I have noted that the 1<sup>st</sup> defendant was purportedly allotted the suit property on 22<sup>nd</sup> August, 2007 almost one year after the said notice. There is also no evidence that the 1<sup>st</sup> defendant formally accepted the allotment. I have also noted that although the letter of allotment provided that the stand premium, ground rent and survey fees be paid within 30 days, the 1<sup>st</sup> defendant did not make the payment until 19<sup>th</sup> August, 2010, about three years after the allotment. The 2<sup>nd</sup> defendant has denied the 1<sup>st</sup> defendant's claim that the suit property was repossessed by the 2<sup>nd</sup> defendant and that the same was re-allocated to the 1<sup>st</sup> defendant. Considering the rival claims over the suit property by the plaintiff and the 1<sup>st</sup> defendant in light of the evidence before the court at this stage of the proceedings, I am of the view that the plaintiff has a stronger claim over the suit property which should be protected by this court pending the hearing of the suit. The plaintiff has established a prima facie case of trespass against the 1<sup>st</sup> defendant. On the issue of irreparable damage, the plaintiff has stated that unless restrained by the court, the 1<sup>st</sup> defendant would proceed with construction unabated thereby making it impossible for him to recover the property. The plaintiff has also contended that he is unlikely to get a similar plot in the same locality as the suit property. I am satisfied from the foregoing that the plaintiff would suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted. In the case of Aikman vs. Muchoki [1984]KLR 353 that was cited by the plaintiff, the Court of Appeal held that damages is not an adequate remedy in cases of trespass. The court stated that a wrong doer cannot keep what he has unlawfully taken just because he can pay for it.

In the final analysis and for the foregoing reasons, it is my finding that the plaintiff's application dated 25<sup>th</sup> September, 2014 is well founded. The application is allowed in terms of prayer 2 thereof. The costs of the application shall be in the cause.

**Delivered and Signed at Nairobi this 29<sup>th</sup> day of September 2017**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Chege h/b for Kimondo for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Kajuju Court Assistant