



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC CIVIL SUIT NO 1181 OF 2013**

**CEPHER ONDIEKI ROGENA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JANE NJOROGE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

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

**RULING**

The application before this court is the Notice of Motion dated **2<sup>nd</sup> October 2015** brought under **Order 40 Rule 1,2,and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking for Orders; that pending the hearing and determination of this suit, this court does grant a temporary injunction to restrain the 1<sup>st</sup> defendant, her servants, agents, or anyone claiming under her on her behalf from selling, disposing, transferring, leasing, charging or in any manner entering into the said land, remaining and utilizing the said land, in any manner whatsoever in **PLOT NO.D6 KAYOLE** (suit property) pending hearing and determination of this suit.

This application is premised on the grounds stated on the face of the application and the supporting affidavit deposited by **Cepher Ondieki Rogena**, who stated that he was allocated the suit property when it was advertised in the Daily Nation of **21<sup>st</sup> June 2010**, and he was immediately allowed to pay Ksh 5000/=.He was subsequently issued with a card that showed that he now owned the property. He avers that he has developed the plot at a consideration of Ksh 3 Million and resides there with his family. He was later issued with a Notice that asked him to surrender the said plot as it was erroneously allocated to him. He now seeks that the orders sought be granted to safeguard his property pending the hearing and determination of this suit.

This application has been opposed. The 2<sup>nd</sup> Respondent through its Director, Housing Department swore a Replying Affidavit on **5<sup>th</sup> December 2013** stating that the suit property was originally allotted to the 1<sup>st</sup> Respondent in 1987 and issued with a plot card. That the 1<sup>st</sup> Respondent had been paying the requisite fees for the suit property up to December 2009, but postings were not properly updated on the financial ledgers at the Housing Development Department and in March 2012, when the 1<sup>st</sup> Respondent came to pay for the suit property she was informed that the property had been repossessed and reallocated to another person who was the Plaintiff. The 1<sup>st</sup> Respondent lodged a complaint on the repossession of her property and on investigating the complaint the 2<sup>nd</sup> Respondent discovered that the suit property had erroneously been repossessed and re allocated to the Plaintiff .She averred that she wrote him a letter dated 14<sup>th</sup> September 2012 notifying him of the cancellation of his plot card and asked him to contact the 2<sup>nd</sup> Respondent to be allocated an alternative plot as compensation. She proceeded to cancel the plot card issued to the plaintiff and restored the 1<sup>st</sup> Respondent as the owner of the suit property. That since the

allocation of the suit property was erroneous on the plaintiff the only remedy was to allocate him an alternative plot. She further averred that the Plaintiff constructed illegal structures on the suit property using forged documentation and without Proper approval by the 2<sup>nd</sup> Respondent. That the plaintiff should not have constructed on the suit property after he was notified of the erroneous allocation of the suit property but the plaintiff without heeding to the contents of the letter dated 14<sup>th</sup> September 2012 she was forced to write to the plaintiff an enforcement notice on 14<sup>th</sup> November 2012 and asked to stop the construction. The plaintiff did not heed to the enforcement notice which forced the 2<sup>nd</sup> Respondents agents to demolish the said structures as a routine to bring down illegal structures and not on the issue of ownership. She confirmed that the plaintiff's structures had already been demolished. She wants this application dismissed and the orders earlier granted by the court be vacated.

The 1<sup>st</sup> Respondent deposed and filed her Replying Affidavit on **16<sup>th</sup> January 2014** stating that she was the registered owner of the suit property having been allocated by the 2<sup>nd</sup> Respondent on 27<sup>th</sup> March 1987. That she has been paying the requisite fees until December 2009, but the postings had not been updated on the financial ledgers at the Housing Department of the Defunct City Council of Nairobi now Nairobi City Council. That when she went to pay her fees in March 2012, she discovered that her property had been repossessed and reallocated to the plaintiff wherein she lodged a complaint and after investigations, it was discovered that the suit property had been allocated to the plaintiff erroneously. That she later received a letter dated **14<sup>th</sup> September 2012**, the 2<sup>nd</sup> Defendant restoring her to the suit property therefore the injunction issued is bad in law as they are meant to deny her the right to develop her property.

In a rejoinder, the plaintiff filed a supplementary affidavit on 4<sup>th</sup> February 2014 stating that the 1<sup>st</sup> Respondent failed to pay the requisite rates as per the rules required by the 2<sup>nd</sup> Respondent and that was the reason the suit property was repossessed and finally allocated to him. That the repossession was duly advertised on the media [newspaper] which was expected to have also notified the 1<sup>st</sup> Respondent. That the 1<sup>st</sup> Respondent cannot reposes the suit property two years after it had been repossessed by the 2<sup>nd</sup> Respondent and that there is no evidence that revocation of the plaintiff ownership and subsequent allocation of the 1<sup>st</sup> Respondent was done as there are no minutes reflecting the same.

This application was canvassed by way of written submissions. The plaintiff in his submissions filed on **9<sup>th</sup> April 2014** submitted that he had proved the prima facie case as enshrined in the ***Giella –vs- Cassman Brown Limited*** Case. He also added that the 1<sup>st</sup> Respondent was in arrears and had notice of the 2<sup>nd</sup> Respondent's intention to sale the suit property to recover the arrears therefore she has no remedy as she had not developed the plot and even if she had taken to settle the arrears she had the period within which to do it and she took three years to bring about her claim and therefore the doctrine of estoppel comes about and therefore the Respondents cannot reverse this as the applicant had already developed the plot and if anything the 2<sup>nd</sup> Respondent can give the 1<sup>st</sup> Respondent another plot which will compensate her as well.

The 1<sup>st</sup> Respondent filed her written submissions on **24<sup>th</sup> June 2014**, where she submitted that the suit property was allocated to the plaintiff by mistake and despite being issued with the letter by the 2<sup>nd</sup> Respondent notifying him of the mistake, he went ahead and constructed structures on the suit property on **3<sup>rd</sup> October 2013** and added that the contents of the letter did not disclose any cause of action against her and that she should be awarded costs for being enjoined in the suit.

The 2<sup>nd</sup> Respondent filed its submissions on **16<sup>th</sup> July 2014**, stating that the application does not satisfy the conditions for the grant of injunction as set out in ***Giella –vs- Cassman Brown Limited***. Counsel further added that the 1<sup>st</sup> Respondent owned the suit property despite the erroneous allocation of the suit property to the plaintiff. That the enforcement notice given to the plaintiff had nothing to do with the ownership and that the documents relied upon by the plaintiff were forged. He concluded his submissions by stating that the orders sought cannot be issued against it as the dispute was against the plaintiff and the 1<sup>st</sup> Respondent.

I have read and carefully considered the pleadings, evidence, and submissions by the parties to this application. At this stage all that I am required to do is determine the application before me on the basis of the requirements stated in ***Giella Vs Cassman Brown & Co Ltd, (1973) EA 358*** as to the grant of a temporary injunction. These are; that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of an advert of seeking defaulters to pay their arrears failure to which their properties would be repossessed in which the suit property was listed among the properties that had been defaulted. There is also evidence that the Plaintiff paid a total of **Ksh 73,174/=** which payments were made to the 2<sup>nd</sup> Respondent. There is a copy of the Beacon Certificate and plans that have been approved by the City Council Development Department and the approval made on 10<sup>th</sup> July 2012. The 2<sup>nd</sup> Respondent on its part has acknowledged that they indeed repossessed the suit property from the 1<sup>st</sup> Respondent and sold it to the plaintiff and later discovered that there was an error in repossession of the suit property which prompted them to cancel the plot card that showed that the plaintiff was the owner of the suit property and that the documents relied by the plaintiff were forged documents. However I note that there is no evidence for the cancellation of the plaintiffs plot card by the 2<sup>nd</sup> Respondent. The issue of forged documents and not having evidence of the cancellation of the plaintiff's plot card are arguable issues that need to be determined at the main hearing.

The 1<sup>st</sup> Respondent has produced an allotment letter dated **27<sup>th</sup> March 1987**, but has not shown any evidence of the plot card. I therefore find that while the plaintiff's plot card has been cancelled the 1<sup>st</sup> Respondent has also not shown that she possesses a plot card to show ownership of the suit property. I find that the plaintiff has a *prima facie* case with a probability of success by showing the plot card that was subsequently cancelled by the 2<sup>nd</sup> Respondent.

This finding notwithstanding, this Court is alive to the fact that none of the parties herein have produced a title to the suit property. It is therefore in the interests of justice that the suit property be preserved pending the hearing and determination of the Plaintiff's suit. I therefore order as follows pursuant to the provisions of ***Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act:-***

1. ***That the status quo be maintained as follows with regard to the suit property known as plot D6-250 Kayole:-***
  - a. ***The Respondents are restrained jointly and severally and whether by themselves or by their servants, agents or otherwise howsoever from selling disposing, transferring, leasing, charging or in any other manner entering into the land, remaining ,utilizing the suit land in any manner pending the hearing and determination of the suit herein or until further orders.***
  - b. ***The 1<sup>st</sup> Respondent shall not interfere with the plaintiff's quiet possession and/or occupation of the suit property pending the hearing and determination of the suit herein or until further orders.***
2. ***The costs of the application shall be in the cause.***
3. ***The matter be set down for hearing expeditiously within the next 12 months failure to set the matter down for hearing, the status Quo Order shall lapse automatically after 12 months unless otherwise extended by the Order of the Court.***

It is so ordered.

Dated, Signed and delivered this **23rd** day of **March, 2015**

**L. GACHERU**

**JUDGE**

In the Presence of:-

M/s Kamau holding brief for Mr Okao for 1<sup>st</sup> Defendant

Mr Morara for 2<sup>nd</sup> Defendant

Mr Ngugi for Plaintiff/Applicant

**L. GACHERU**

**JUDGE**

**23/3/2015**