



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 412 OF 2010

ANDREW GATU GACHIA..... PLAINTIFF

VERSUS

MANDUNGU HOLDINGS CO. LIMITED.....1ST DEFENDANT

DIANA MUTHONI.....2ND DEFENDANT

KIAMBU DANDORA FARMERS CO. LIMITED.....3RD DEFENDANT

STEPHEN MUTHII MURIITHI.....4TH DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff seeks the following outstanding orders in his application by way of a Notice of Motion dated 24th April 2013:

1. That the Court do issue a temporary injunction restraining the 4th Defendant from stopping, blocking and/or preventing the Plaintiff from taking possession of the suit property, that is Land Reference Number Nairobi/Block 107/1121, pending the hearing and final determination of the suit herein.
2. An injunction order be issued compelling the 4th Defendant to move out of the Plaintiff's property pending the hearing and determination of this suit.
3. The Court does issue a mandatory injunction ejecting and/or evicting the 4th Respondent from the suit property.
4. The Court does issue an order against the 4th Defendant to bring down the erected perimeter wall surrounding the suit property.
5. That Officer Commanding Station (OCS) Buruburu Police Station, under which jurisdiction the suit property is situate, do oversee and provide personnel to assist the plaintiff in effectuating orders No. 2, 3, 4 and 5 above.

The application is premised on grounds that the Plaintiff is the legal owner of Land Parcel known as Nairobi/Block 107/1121 vide a Certificate of Lease issued to him dated the 5/10/2006. The Plaintiff avers that the 4th Defendant has erected a perimeter wall on the suit property and therefore interfered with his peaceful possession and enjoyment of the suit property. Further, that this action is in blatant disregard of the Judgment dated 13/9/2012 and delivered on 22/11/2010 and the Decree dated 20/9/12 issued in **ELC No. 2329 of 2007** with respect to the said property.

The Plaintiff contends that in view of the said Judgment, orders of injunction and eviction ought to issue against the 4th Defendant without waiting for the parties' rights to be finally established at the end of the trial, as he will suffer irreparable loss and damage which cannot be redressed by way of damages. The Plaintiff avers that he has a strong with overwhelming chances of success since he is the holder of a title free of any encumbrances, and that the 4th Defendant has no answer to his claim herein.

The Plaintiff swore an Affidavit on 24/4/2013 in support of the application in which he reiterated that he is the legal and registered owner of the property, having purchased the same on 23/1/2006 from one Francis Kagunda Mwangi for a sum of Kenya Shillings One Million Three Hundred and Fifty Thousand only (Kshs.1,350,000/=). The Plaintiff deponed that he carried out official search which revealed that Francis Kagunda Mwangi is owner of the said property. He further deponed that that the said Francis Kagunda Mwangi had on 4/10/2005 charged the said suit property to Equity Bank for a sum of Kshs.500,000/- but that the same was discharged on 5/10/2006.

It was the Plaintiff's disposition that on 29/11/2007 he learnt that officers from the City Council of Nairobi had trespassed onto his property, and pulled down his chain link fence which action culminated in the filing suit for declaration of ownership and for trespass being **ELC No. 2329 of 2007, Andrew Gatu Gichia –Vs- City Council of Nairobi**. Subsequently, that on 22/11/2010 judgment was delivered in his favour declaring him the legal and registered owner of the suit property. The Plaintiff deponed that after the judgment was delivered, he learnt that the Defendants herein had trespassed and laid claim over the suit property prompting him to institute the present suit. However, that in the meantime, in March 2012, he noted that a perimeter wall had been erected around his suit property, and on inquiry he was informed that it had been erected by the 4th Defendant.

The Plaintiff stated that he has never sold the property to the 4th Defendant, and therefore the move by the 4th Defendant is illegal and an infringement of his right to private property under Article 40 of the Constitution. Further that he is an indefeasible title holder and that the 4th Defendant has no claim or interest thereon, and therefore his invasion is unlawful and unjustifiable. The Plaintiff annexed a copy of the Transfer of Lease dated 12/9/2006; a Certificate of Lease dated 5/10/2006 issued in his name with respect to Nairobi/Block 107/1121, and a certificate of official search confirming the same; copies of the proceedings, judgment and the decree in **ELC No. 2329 of 2007**; and photographs of the suit property in support of his application.

The Defendants' Response

The 4th Defendant swore a Replying Affidavit on 16/5/2013 in response to the Plaintiff's application, wherein he deponed that he is the registered proprietor of the property known as **Nairobi/Umoja/Block 107/1/1121** and not **Nairobi/Block/107/1121** that the Plaintiff claims. The 4th Defendant averred that he purchased the same from M/s Praise Place Limited at a consideration of Kenya Shillings 2.5 Million, after conducting a formal search on 18/1/2010 which revealed that the property was in the proprietorship of the said vendor. Thereafter, a transfer was executed and title to the property registered in his favour.

The 4th Defendant denied knowledge of the Plaintiff or having any dealings with the Plaintiff's property as alleged. The deponent also denied entering into any connivance or fraud when purchasing his property, and stated that he purchased the same strictly on basis of confirmation by the Commissioner of Lands on its status. The deponent further stated that upon receipt of service of the application, he conducted a formal search on title Nairobi/Umoja/Block 107/1/1121 which revealed that as of 6/9/2011 he was the registered proprietor of the said property. The 4th Defendant deponed that he is in possession of the said property and denied encroachment onto the Plaintiff's property as alleged. He deponed further that he obtained approvals from the City Council to commence construction of the perimeter wall around his property.

The 4th Defendant stated that he is not a party and neither has he been sued in **ELC No. 2339 of 2007, Andrew Gichia vs. City Council of Nairobi**. Therefore, that the judgment and orders obtained therein

do not apply to the present case and does not bind and apply to his proprietorship over LR. Nairobi/Umoja/Block 107/1/1121. Further, that the issues in the said case are not issues in the present case, proprietorship of LR. Nairobi/Umoja/Block 107/1/1121 was not part of the issues before court. The 4th Defendant reiterated that the properties in consideration are different and thus there is no order sought to impugn his title. The 4th Defendant annexed a copy of his title in respect to Nairobi/Block 107/1/1121; copies of the sale agreement and the certificate of official search; a copy of the duly registered Transfer; and a copy of the approved plans.

The 1st -3rd Defendants did not file any responses to the Plaintiff's Notice of Motion.

The Submissions

The Court issued directions that the parties do file and exchange submissions, which were complied by the Plaintiff only. L. Kwamboka, Advocate for the Plaintiff filed submissions dated 11/9/2013 wherein she reiterated that this Court had found the Plaintiff to be legal owner of Nairobi Block 107/1121 in **ELC No. 2329 of 2007**, and therefore estopping any person, including the 4th Defendant, from claiming ownership. Counsel submitted that the Plaintiff's property Nairobi Block 107/1121 is one and the same as the 4th Defendant's property title Nairobi/Block/107/1/112, and therefore the Defendant is unlawfully in occupation of the Plaintiff's property. Counsel submitted that the Defendant's title document is suspect for reasons that the date the title was issued is on 21/4/2010 is the same date it was charged to Equity Bank to secure a Loan of 2 Million. It was counsel's submission that it is standard procedure for a valuation, among other processes, to be carried out before a charge which would not in any circumstance take a day. Further that, the sale agreement relied on by the 4th Defendant is undated.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary and mandatory orders of injunction. I will therefore proceed to determine the Plaintiff's Notice of Motion 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, and also to determine if the Plaintiff has in addition shown any special circumstances to entitle him to the mandatory injunctions sought as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction 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 answer is whether the Plaintiff has established a *prima facie* case.

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** 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.”

The Plaintiff avers to be the registered owner of the property known as **Nairobi/Block 107/1121** having acquired it by purchase, and has availed title documents to prove ownership. It is also a fact that the Plaintiff did successfully sue the City Council of Nairobi and obtained a permanent order of Injunction against the said Council.

The 4th Defendant on his part avers that he is the registered owner of **Nairobi/Block 107/1/1121** which is distinct from **Nairobi/Block 107/1121**. The 4th Defendant also avers that he acquired the said property through purchase and availed title documents to show ownership. The Plaintiff contends that it is his property that the 4th Defendant has encroached upon, and commenced developments on, an allegation denied by the 4th Defendant who maintains that he is carrying out developments on his property and not the Plaintiff's as alleged.

From the foregoing, it is evident there is a dispute as to the whether the suit properties are in fact on the same physical location or whether they are one and the same but for which separate titles have been issued to different parties. I have perused the Plaintiff's Certificate of Lease, which is in respect of Nairobi/Block 107/1121 measuring 0.1961 Ha. The Lessor is the City Council of Nairobi and the same was opened on 24/11/2004 and issued to the Plaintiff on 5/10/2006. The 4th Defendant's Certificate of Lease is in respect to Nairobi/Block 107/1/1121 also measuring 0.1961 Ha. The Lessor is the City Council of Nairobi and the same was opened on 15/1/1998 and issued to the 4th Defendant on 21/4/2010.

The Plaintiff urges this Court to issue the orders sought in view of the judgment he obtained in **ELC No. 2329 of 2007- Andrew Gatu Gichia -Vs- City Council of Nairobi**. The permanent orders of injunction obtained by the Plaintiff are not in contention. It is however noteworthy that the said orders were issued as against the City Council of Nairobi. The 4th Defendant was not a party to the suit and cannot therefore be bound by the said order as it is trite that a Court order does not bind a non-party. See **Earnest Orwa Mwai vs. Abdul S. Hashid & Another Civil Appeal No. 39 of 1995.**

That said, it is without doubt that both parties have title documents in respect to their properties, and section 27 (b) of the Registered Land Act (now repealed) under which both the Plaintiff's and 4th Defendant's titles are registered, vest in them the leasehold interest described in their Certificates of Leases, together with all implied and expressed rights and privileges. This is a case that can therefore only be decided on the basis of a balance of convenience, and it is imperative in this regard that the suit properties be preserved to facilitate the expeditious and just disposal of the suit filed herein.

The question as to whether the Plaintiff has met the threshold for the grant of mandatory orders of injunction is therefore also moot. It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. As explained in the foregoing this is a case that involves contested issues of fact as well as of law, that can only be resolved after examination of evidence and legal arguments at full trial.

I accordingly order as follows pursuant to the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act:

1. That pending the hearing and determination of the suit filed herein or until further orders, the *status quo* to be maintained by the parties herein shall be as follows:
 - a. Both the Plaintiff and the 4th Defendant by themselves or through their representatives, agents or servants are restrained from selling, transferring, leasing, charging or in any other manner alienating or disposing of the land parcels known as **Nairobi/Block 107/1/1121** and/or **Nairobi/Block/107/1121**, and from undertaking any further construction and/or developments on the said land parcels.
 - b. The Plaintiff either by himself or through his representatives, agents or servants is restrained from interfering with the possession and occupation by the 4th Defendant of land parcels known as **Nairobi /Block 107/1/1121** and/or **Nairobi/Block/107/1121**, and from demolishing or in any manner interfering with the structures constructed thereon by the 4th Defendant as at the date of this ruling.

2. The Plaintiff's Notice of Motion dated 24th April 2013 is accordingly hereby dispensed with.
3. The costs of the said Notice of Motion shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____March____, 2014.

P. NYAMWEYA

JUDGE