



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

**AT MILIMANI**

**ELC CASE NO. 314 of 2013**

**BARNABAS N. WAIHUINI.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**NYAGATUGU GATHAMA**

**TRADING CO.LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

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

**RULING:**

The Plaintiff/Applicant herein *Barnabas Nderitu Waihuini* has brought this application dated 1<sup>st</sup> March 2013 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants under *Order 40 Rule 1 of the Civil Procedure Rules* and *Section 3A and Section 63(e) of the Civil Procedure Act* for orders that:-

- i. **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents by themselves jointly and severally , their agents , servants or those coming under them be restrained from alienating or constructing /obstructing the Plaintiff or in any way interfering with plot No. 24325/A Dandora Infills situated at Dandora Nairobi until the hearing and determination of this suit .**
- ii. **That cost of this application be provided for.**

The application was premised on the following grounds and also on the annexed affidavit of *Barnabas Nderitu*.

- i. **That the Plaintiff/Applicant is the rightful allottee/owner of plot No 24325/A Dandora Infills which was allocated to him, by the 2<sup>nd</sup> Defendant.**
- ii. **That the 1<sup>st</sup> Defendant through the instructions of the 2<sup>nd</sup> Defendant is in the process of demolishing the Plaintiffs structure which has been erected on the said piece of land.**
- iii. **That the 1<sup>st</sup> Defendant has already started interfering with the Plaintiff's property by erecting a fence around the plot causing unnecessary interference to a property he knows very well does not belong to him.**
- iv. **That it is only just and fair that an injunction be issued against the Defendants/Respondents**

**restraining them from continuing to interfere with Plot No. 24325/A belonging to the Plaintiff.**

The Plaintiff/Applicant in his sworn Affidavit averred that on 18<sup>th</sup> January, 1994 he applied to Nairobi City Council and was allotted Plot No. 24325/A Dandora infills situated at Dandora, Nairobi and was issued with an allotment letter marked BNW1. He further stated that he has been in possession and occupation of the said plot since then without any interference from any other person. The Plaintiff further averred that he took possession of the said property and has been paying the required rates to the 2<sup>nd</sup> Defendant/Respondent as per BNW2. That in January, 2013 he went to the said parcel of land and found out that the 1<sup>st</sup> Defendant had fenced the plot alleging that the said plot had been allocated to it. Then on 5/2/013, the Plaintiff/Applicant wrote a letter to the 2<sup>nd</sup> Defendant complaining of the interference of his parcel of land as evidenced by BNW3. The Plaintiff then discovered that the 1<sup>st</sup> Defendant had already paid rates on the plaintiff's parcel of Land. Further that the 1<sup>st</sup> Defendant is colluding with 2<sup>nd</sup> Defendant to defraud the plaintiff of his legally acquired property.

He also averred that he is currently constructing a permanent structure on the said property and he fears that the 1<sup>st</sup> Defendant is colluding with the 2<sup>nd</sup> Defendant and they might go ahead and demolish the structure terming it illegal as per annexure BNW5. Therefore if the defendants are not restrained, the Plaintiff will suffer irredeemable damages if the same structure is demolished as he has spent quite substantial amount of money in putting up the same.

The 1<sup>st</sup> Defendant did not enter appearance though served as per the **Returns of Service** sworn by one **Walter Mutahi Onchuru** a process server on 18/3/2013 and 24/4/2013.

However the 2<sup>nd</sup> Defendant entered appearance and filed a Replying Affidavit. The said affidavit was sworn by one **J .W Ndonga**, the acting Director, Housing Development. He averred that the 2<sup>nd</sup> defendant's records shows that the rightful owner of the premises is M/s Nyagatugu Gathama Trading Co, the 1<sup>st</sup> Defendant herein. He further alleged that the Plaintiff's allotment documents are suspect. That the plaintiff did not accept the allotment within 30 days and the receipts attached were payments of long after expiry of 30 days. That plaintiff has failed to produce his letter of allotment and Beacon Certificate to confirm his allegations.

It was further deposed that the 2<sup>nd</sup> Defendant had even served the plaintiff with notification of illegal development on the premises as evidenced by JWN 1 & 2. That the plaintiff has come to court with unclean hands and his application should be dismissed. The parties herein canvassed the application through written submissions which I have considered.

The Plaintiff/Applicant has come to court to seek for an order of injunction which is an equitable relief.

Order 40 Rule 1 provides instances where an order of Temporary Injunction can be granted:-

1. ***where in any suit it is proved by affidavit or otherwise-***
  - a. ***That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree; or***
  - b. ***That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.***

The purpose of the Order of injunction is to preserve the Status Quo. For this court to grant an order of temporary injunction the applicant must satisfy the threshold principles for grant of the same. These conditions were stated in the case of **Kibutiri Vs Kenya Shell Nairobi High Court, civil case No. 3398 of 1980 (1981) LR 390** where the court held that:-

**“The conditions for granting a temporary injunction in East Africa are well known and these are: First an applicant must show a *prima –facie case* with a probability of success. Secondly an interlocutory injunction will not normally be 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 (See Industries Vs Trufods (1972) EA 420”.**

Has the applicant herein fulfilled any of the conditions in this case?.

The applicant told the court that he was allotted plot No. 24325/ Dandora Infills Nairobi on 18<sup>th</sup> January, 1994 that he has been in possession since then. However he noted in January 2013 that the 1<sup>st</sup> Defendant with permission of 2<sup>nd</sup> Defendant encroached into this plot and fenced it off. He later discovered that the 2<sup>nd</sup> Defendant issued an allotment to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant on its part submitted that the Plaintiff's allotment letter dated 18/1/1994 was suspect. That in any event he did not accept the allotment within a period of 30 days. That he only paid for the plot in the year 2003 which was long after expiry of 30 days.

I have considered the allotment letter **BNW1**. Indeed the last paragraph states as follows:-

**“If acceptance and payment respectively are not received within 30 days from the date hereof, this allocation will be deemed to have lapsed”.**

Though there is no prove that the plaintiff accepted the allocation within a period of 30 days, I have noted that on 3/10/2003, the City Council of Nairobi accepted payment of 7,000/= from the plaintiff on account of plot No. 24325/A Dandora Infills which is the Plot in issue ( BNW1) . Again on 21/12/2012 the plaintiff paid **Kshs. 29,444/-** to the City Council of Nairobi over the said Account 24325/A Dandora Infills. It is evident that City Council of Nairobi the 2<sup>nd</sup> Defendant received and continued to receive payment from the plaintiff over the said plot. Then the 2<sup>nd</sup> Defendant cannot now turn round and allude that the letter of allotment was not accepted within a period of 30 days. The Plaintiff might be guilty by laches but the 2<sup>nd</sup> Defendant condoned the plaintiff action by accepting payment from him long after 30 days were over. I will rely on the case of *Doge Vs Kenya Cannels Ltd (1989) KLR/29*,

**“ When a man by his conduct had led another to believe that he may safely act on the faith of them and the other, does not act on the faith of them, he will not be allowed to go back on what he has said or done when it would be unjust or unequitable for him to do so”.**

The Plaintiff contended that he is in possession of the suit land and has continued development. It is indeed true that plaintiff has commenced development as he was served with a Notice of illegal structure by the 2<sup>nd</sup> Defendant on 12<sup>th</sup> February, 2013. The 2<sup>nd</sup> Defendant has conceded that records show that the plot in issue is allocated to the 1<sup>st</sup> Defendant. A letter of allotment to the 1<sup>st</sup> Defendant was not annexed to the affidavit of J.W Ndonga . The 1<sup>st</sup> Defendant could have been allocated the plot in issue well after plaintiff has paid the Kshs.7,000/- to the City Council of Nairobi in the year 2003. If that is the state of affairs and the court fails to issue preserve orders, then the 1<sup>st</sup> Defendant might proceed and pull down the plaintiff's structure. The plaintiff has therefore demonstrated that he has a *prima –facie case* with probability of success. The issue of whether his letters of allotment are suspect can only be determined after a full trial.

He has also demonstrated that there is a danger of his structure being pulled down. The 2<sup>nd</sup> Defendant has already served him with a Notice of illegal structure. The plaintiff stands to suffer loss which would not adequately be compensated by an award of damages.

As I stated earlier, the purpose of injunction is to maintain status quo, I find that the Status Quo which the applicant reasonably expected is the Status Quo which existed before the 1<sup>st</sup> Defendant fenced off the plot in issue.

I consequently find that the Plaintiff/Applicants Notice of Motion dated 1<sup>st</sup> March 2013 is merited.I confirm the interim orders issued on 5/3/2013 and allows the plaintiff's application in terms of prayer No. 3. Costs be in the cause.

Plaintiff to set down the matter for hearing within the next 12 months otherwise the orders issued today will lapse automatically.

Orders accordingly.

Dated, Signed and delivered this **14<sup>th</sup> day of March, 2014**

**L. N. GACHERU**

NVI.

In the Presence of:-

.....for the Plaintiff/ Respondent

..... for Defendant/Applicant

Ann: Court Clerk

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