



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 90 OF 2008**

**BENARD WACHIRA KIBUI.....PLAINTIFF**

**VERSUS**

**DAVID MACHARIA MWANGI.....1<sup>ST</sup> DEFENDANT**

**JANE MUGUTHI KAREGI.....2<sup>ND</sup> DEFENDANT**

**KASARANI SETTLEMENT LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**The Plaintiff's Application**

The Plaintiff seeks the following outstanding orders in his application by way of an Amended Notice of Motion dated 11<sup>th</sup> March 2008:

1. That pending the hearing and determination of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their contractors, agents, servants, workmen or anyone else under their direction on instruction be restrained by way of an interlocutory injunction from interfering with the Plaintiff's quiet enjoyment of the suit land.
2. That pending the hearing and determination of this suit, the 3<sup>rd</sup> Defendant be restrained from processing and/or issuing title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person in respect of Plot No. 87 which is part of L.R. No. 14235 Kasarani Nairobi (hereinafter referred to as "the suit property").
3. The Officer Commanding Kasarani Police Station and the DO Kasarani to supervise the enforcement of the orders issued herein.

The application is premised on grounds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have, without any lawful cause or justification, taken possession of the suit property and have commenced construction of a structure thereon. The Plaintiff avers that he is apprehensive that the 3<sup>rd</sup> Defendant will possess title and transfer the same in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to his detriment.

In support of the application, the Plaintiff relied on his affidavit sworn on 28/2/2008, wherein he deponed that the L.R. No. 14235 was Government Land allocated to residents of Kasarani, and was managed by a committee under the chairmanship of Bishop Gaitho and the Kasarani District Officer known as the Kasarani Resettlement Project Committee. The Plaintiff further deponed that the property was sub-

divided into various portions, and being a resident of Kasarani, he qualified to ballot for plots which he successfully did and was allocated plot No. 87. The Plaintiff stated that he subsequently surrendered ballot No. 87 to the Committee of the 3<sup>rd</sup> Defendant and he was issued with the ownership certificate dated 16/9/2002 duly signed by the Chairman of the said Committee and the District Officer, Kasarani, together with a sketch plan.

The Plaintiff averred that upon obtaining the certificate of ownership in 2002, he was shown the physical location of his plot by the surveyor for the Kasarani Resettlement Project, one Francis M. Kariuki, after which he immediately took possession. Further, that sometime in 2007, when Kasarani Resettlement Project learnt that the property would be sold off by way of public auction, they formed a company, the 3<sup>rd</sup> Defendant herein, so as to redeem the property that its members had been in occupation.

The Plaintiff stated that the 3<sup>rd</sup> Defendant successfully bid for the property at an amount of Ksh. 32 Million. Further, that he subsequently paid Kshs. 175,000/- to J.K. Gachie Advocates for the Decree Holder in Nairobi HCCC 148 of 2007 to redeem his plot No. 87. It was the Plaintiff's disposition that on 9/1/2008 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, claiming to have purchased the plot from the 3<sup>rd</sup> Defendant, encroached on his property and commenced construction thereon. The Plaintiff deponed that in the event that 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not restrained, he shall continue to suffer irreparable damage. Further, that unless the 3<sup>rd</sup> Defendant is restrained from processing title and/or transfer of documents in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff is apprehensive that they may acquire title.

In support of this application the Plaintiff annexed a copy of the court order in HCCC 148 of 2007; transfer document in respect to the property in favour of the 3<sup>rd</sup> Defendant; certificate of ownership of Plot No. 87 dated 16/9/2002 in favour of the Plaintiff; a site map showing plot locations; and a copy of a cheque No. 011553 dated 24/12/2007 of Kshs. 175,000/- dated in favour of J.K. Gachie & Associates Advocates.

### **The Defendants' Response**

The 1<sup>st</sup> Defendant swore a Replying Affidavit on 17/3/2008 in response to the application on his behalf and that of the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant refuted the claim that the Plaintiff is a member of Kasarani Resettlement Project, but admitted that the 3<sup>rd</sup> Defendant successfully bid at the auction and purchased the property. The 1<sup>st</sup> Defendant referred the court to a Sale Agreement dated 21/8/2006 and deponed that he together with his wife purchased plot No. 087 from one Irene Wangari Irungu, and they were duly issued with a certificate of ownership by the Chairman of the 3<sup>rd</sup> Defendant, Bishop Samson Gaitho. The deponent stated he paid a deposit of the purchase price in two instalments of Kshs. 125,000/- and Kshs. 100,000/- vide cheques dated 10/7/2007 and 27/8/2007, respectively, to J.K. Gachie Advocates copies of which he attached.

The 1<sup>st</sup> Defendant further deponed that sometime in January of 2008, he was informed of the Plaintiff claiming to have been allocated the suit property. He stated that on 9/1/2008 he, together with the Plaintiff, went to the 3<sup>rd</sup> Defendant's office whereupon checking the register they confirmed that the Plaintiff's name did not appear. It was his disposition that the said Chairman disowned the Plaintiff's certificate of ownership, stating that the signature thereon did not belong to him.

Subsequently, that the Plaintiff conceded and stated that he would not interfere with the possession and developments undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the suit property. The 1<sup>st</sup> Defendant further deponed that in a meeting by members of the 3<sup>rd</sup> Defendant on 21/10/2007 the firm of M/s. Kinyua Mwaniki & Wainaina Advocates to pursue the sale on their behalf, on the belief that the J.K. Gachie Advocates being advocates for the vendor would not adequately protect their interest. Further, that it was also agreed that members will make payments to the firm of M/s. Kinyua Mwaniki & Wainaina Advocates. Consequently, the Plaintiff's claim that it made payments directly to J.K. Gachie Advocates on 24/12/2007 is an indication that he did not attend the meeting and was therefore unaware of this

development.

The 1<sup>st</sup> Defendant contended that the Plaintiff's application is unmerited and purely meant to derail his construction. Further, that it has not made in good faith as the Plaintiff has been aware that he has been in possession of the suit property and carrying out construction works.

Bishop Samson Gaitho, who stated that he was the Chairman of the Kasarani Resettlement Project until 2007, swore a Replying Affidavit on 17/3/2008. The deponent averred that he has signed and issued certificates of ownership of plots since 2002, and has maintained records including the register of members. The deponent referred the court to an excerpt of the said register, and contended that the Plaintiff is not a member of the 3<sup>rd</sup> Defendant and neither did he purchase plot 87 as alleged.

The deponent denied signing and issuing a certificate of ownership in favour of the Plaintiff terming the same as a forgery, for the reasons that the signature therein did not belong to him. He further stated that the signature thereon allegedly by Mr. George Ayonga did not belong to him, as the deponent was very well familiar with it. He also gave examples of further anomalies in the certificate exhibited by the Plaintiff, and stated that the issue of forged certificates has been rampant prompting the Kasarani Resettlement Project to change the format of its certificates.

One Francis Murigi Kariuki also swore a Replying Affidavit on 17/3/2008, wherein he deponed that he is a surveyor and was engaged by Kasarani Resettlement Project to survey its property. The deponent stated that he duly performed his duties and pointed out plots to various individual members of the Kasarani Resettlement Project. It was his disposition that he pointed out plot No. 87 to one Esther Wanjiru Irungu. The deponent denied the claim made by the Plaintiff that he pointed out the suit property to him.

### **The Plaintiff's Reply**

The Plaintiff swore a Supplementary Affidavit on 20/3/2008 in response to the Defendants' Replying Affidavits. The Plaintiff averred therein that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' sale agreement is at variance with their certificate of ownership, for reasons that they alleged to have purchased the suit property from Irene Wangari Irungu whose Certificate number was 420, whereas the certificate alleged to have been issued to them in respect to the same plot is No. 435. Further, that none of the Defendants had disclosed the names of the persons including the secretary who signed their certificate. The Plaintiff further stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not demonstrated being shareholders and/or directors of the 3<sup>rd</sup> Defendant. In respect of the cheques exhibited by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff deponed that they did not show the payer, and were also at variance with the amount the members paid for the plots.

The Plaintiff contended that Bishop Gaitho by his own admission ceased to be the Chairman of the Kasarani Resettlement Project in 2007, and thus the allegation that he and the 1<sup>st</sup> Defendant went to his office on 9/1/2008 is false and was not corroborated by Bishop Gaitho in his affidavit. The Plaintiff deponed that Bishop Gaitho does not have expertise to comment on George Ayonga's signature. The Plaintiff deponed that it was he who went to make a report to the Police as regards the interference by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants continued to construct the structures without the necessary approvals from the City Planning Development. As regards the meeting alleged to have been held by the members of the 3<sup>rd</sup> Defendant, the Plaintiff deposed that neither the minutes nor the resolution had been availed to court to prove that the meeting took place.

In response to the affidavit by Francis Murigi Kariuki, the Plaintiff deponed that he had not exhibited that he is a licensed, registered and/or gazetted surveyor. The Plaintiff also deponed that the plot was allegedly purchased by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from Irene Wangari Irungu whereas the surveyor identified the site to one Esther Wanjiru Irungu. To this claim, the Plaintiff deponed that the said Irene Wangari Irungu never balloted nor had a certificate of ownership for plot 87. Further, that there was also no evidence adduced of the transfer from Esther Wanjiru Irungu to Irene Wangari Irungu. The Plaintiff reiterated that he paid the purchase price for the suit property to J.K. Gachie & Associates and was issued with a receipt by the Kasarani Resettlement Project indicating acknowledgement of payment.

## **The Submissions**

The counsel for the Plaintiff and Defendants made oral submissions during the hearing of the Amended Chamber Summons on 6<sup>th</sup> March 2014, wherein they reiterated the arguments made in the foregoing. The counsel for the Plaintiff argued that he had exhibited payment for the plot and his ownership certificate, and that no certificate of ownership by Irene Wangari Irungu from whom the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's bought the suit property from had been exhibited. Further, that the issue of ownership can only be resolved after a full hearing.

The counsel for the Defendants submitted that the balance of convenience lies in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who have exhibited their construction on the suit property, and that the Plaintiff will not suffer any irreparable damage which cannot be compensated in damages.

## **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 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, which 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 owner of the suit property having acquired it by purchase, and has availed evidence of payment and a certificate of ownership to prove his entitlement. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants on their part also aver to be owners of the same suit property and have also exhibited evidence of a sale agreement, payment and a certificate of ownership. The Defendants have also impugned the Plaintiff's certificate of ownership claiming it to be a forgery.

From the foregoing, it is evident that the dispute herein emanates from an apparent double allocation of the suit property, and I note in this respect that the Defendants have not exhibited the certificate of ownership of Irene Wangari Irungu, whom they allege to have bought the suit property from. I also note that the allegations of forgery of the Plaintiff's certificate of ownership can only be established after a full hearing, and not at this stage

That said, as both the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have exhibited documents of entitlement to the suit property, this is a case that can 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. It is not disputed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have commenced construction on the suit property, and I therefore find that for this reason the balance of convenience tips in their favour.

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

1. That the *status quo* to be maintained by the parties for one year from the date of this ruling

pending the parties herein setting this matter for hearing shall be as follows:

- a. Both the Plaintiff and the Defendants 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 parcel known as Plot No. 87 which is part of L.R. No. 14235 Kasarani, Nairobi.
  - b. The Plaintiff either by himself or through his representatives, agents or servants is restrained from interfering with the possession and occupation by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the land parcel known as Plot No. 87 which is part of L.R. No. 14235 Kasarani, Nairobi, and from demolishing or in any manner interfering with the structures constructed thereon by the said Defendants as at the date of this ruling.
  - c. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or through their representatives, agents or servants are restrained from undertaking any further construction and/or developments on the land parcel known as Plot No. 87 which is part of L.R. No. 14235 Kasarani, Nairobi.
  - d. The 3<sup>rd</sup> Defendant by itself or through its representatives, agents or servants is restrained from processing and/or issuing title to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person in respect of Plot No. 87 which is part of L.R. No. 14235 Kasarani, Nairobi
2. The Officer Commanding Kasarani Police Station shall ensure the enforcement of, and compliance with the orders of *status quo* issued herein.
  3. The Plaintiff shall take the necessary steps to set this suit for hearing within one year of the date of this ruling, and in default the *status quo* orders herein shall lapse.
  4. The Plaintiff's Amended Notice of Motion dated 11<sup>th</sup> March 2008 is accordingly hereby dispensed with.
  5. The costs of the said Amended Notice of Motion shall be in the cause.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_\_8<sup>th</sup>\_\_\_\_\_ day of \_\_\_\_\_April\_\_\_\_\_, 2014.**

**P. NYAMWEYA**

**JUDGE**