



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL NO. 118 OF 2007**

**JOAB KAMAU NJOROGE..... PLAINTIFF**

**VERSUS**

**THE CATHOLIC DIOCESE OF NAIROBI ..... DEFENDANT**

**(TRUSTEES REGISTERED)**

**RULING**

The plaintiff by his plaint dated 21<sup>st</sup> May 2007 and filed on the same date asserted that he was the registered owner of L.R.NO.22404 Thindigua area Kiambu District. He averred that the Defendant had without any colour of right entered onto the said parcel of land and had deposited building materials with the intention of putting up permanent structures.

The plaintiff sought inter alia an order for the removal of the Defendant's temporary structure on the parcel of land and an order of permanent injunction and general damages for trespass. Simultaneously with the plaint the plaintiff filed a chamber summons application for injunction. The Defendant upon being served with the plaint and the chamber summons filed a replying affidavit to the chamber summons and a statement of defence. On 11<sup>th</sup> July 2007 the plaintiff and the Defendant had a consent order recorded in court in regard to the chamber summons application in the following terms:-

- 1. That an injunction be and is hereby issued restraining the Defendants/Respondents by themselves, their servants and or agents from entering onto, erecting any structures on remaining on, or in any other manner interfering with the plaintiff's quiet possession and enjoyment of the parcel of land known as L.R.NO.22404 Thindigua, Kiambu District, pending the hearing and final determination of this suit.**
- 2. That the plaintiff is not to demolish the structure now existing on the suit land pending the hearing and final determination of the suit.**
- 3. That the costs of this application shall be in the cause.**

The parties despite the consent order have not moved the matter to trial and instead there have been various applications. Presently the Defendant has filed the Notice of Motion application dated 29<sup>th</sup> May 2012 where the Defendant/Applicant seeks the following substantive orders:-

- a. That pending the hearing of the main suit herein, a temporary injunction be issued to restrain the

plaintiff/Respondent either by himself, or through his agents, servants, workers, assignees and/or anyone acting under from developing, subdividing, alienating, disposing off, setting or transferring or in any other way dealing in all that parcel of land known as **L.R.NO.22404**.

- b. That pending the hearing and determination of this application and the main suit the prevailing status quo obtained on 11<sup>th</sup> July 2007 in respect of the parcel of land known as **L.R.NO.22404** the subject matter of the suit herein, be maintained.

The Defendant's application is grounded on the grounds that appear on the face of the application and on the supporting affidavit sworn by Rev. **Father Peter G. Mburu**. The Defendants averment is that the plaintiff in May 2012 contrary to the consent order of 11<sup>th</sup> July 2012 entered the suit land with the objective of effecting developments thereon. The Defendants argues that if the plaintiff is allowed to carry on developments on the suit land that will defeat the due process of the law and the Defendant's legal recourse will effectively be defeated as the plaintiff's actions will in effect amount to forcefully evicting the Defendant from the suit land before the suit is heard and determined.

The plaintiff/Respondent filed a replying affidavit sworn on 18<sup>th</sup> June 2012 and avers that it is the Defendant who infact has been acting in contravention of the consent order recorded on 11<sup>th</sup> July 2007 as the Defendant's agents have continued to use the temporary structure and open field on the suit land and that the Defendant's agents have also been harvesting/cutting grass on the suit land. The plaintiff stated that he wished to fence the suit land and develop the same by putting up a school thereon and that he did not intend to pull down/demolish the temporary structure thereon as directed by the consent order until the suit was heard and determined. The plaintiff maintained that the consent order did not prevent him from carrying on any developments on the suit land and stated that it was indeed the Defendant who was restrained from interfering with the plaintiff's quiet possession and enjoyment of the suit property. The plaintiff's assertion as I understand it, is that the consent order of 11<sup>th</sup> July 2007 did not prevent him from using and/or developing the suit land as long as he did not demolish the temporary structure that was thereon. The plaintiff states he had already leased a portion of the suit land to third parties on the terms set out in the lease annexed and marked "**JKN1**" in the replying affidavit and that it was in pursuance of the terms of the lease that he sought to fence the property.

The plaintiff contends that the Defendant have no proprietary interest in the suit land, a fact admitted in the Defendant's statement of defence dated 17<sup>th</sup> July 2007, and therefore cannot have any justification to prevent the plaintiff from carrying out developments on the suit property.

The parties filed written submissions where they articulated their respective positions and basically highlighted the facts as set out in the parties respective affidavits. I have considered the parties submissions and affidavits in support and in opposition to Defendant/Applicants Notice of Motion dated 29<sup>th</sup> May 2012. While the Defendant/Applicant's application seeks an order of temporary injunction against the plaintiff it should be noted that the Defendant has not made any claim against the plaintiff. The Defendant through its defence dated 17<sup>th</sup> July 2007 did not raise a counter claim against the plaintiff. Indeed the Defendant under paragraph 7 of the statement of Defence inter alia states;

**7.(a) That the Defendant by itself servants and/or agents has not now or ever entered onto the plaintiff's parcel of land and put a corrugated iron sheet structure.**

**(b) That the structure erected and being on the suit premises was constructed by the residents of Thindugua Estate.**

**(c) That the Defendant has not now or ever sanctioned any acts of trespass onto the suit premises either by itself, the servants and/or agents and puts the plaintiff to strict proof thereof.**

**(d)-----**

Under paragraph 10 of the statement of defence the Defendant contends that they are improperly enjoined

to the suit and that the plaintiff's suit as filed is fatally defective and ought to be struck out.

An applicant for an interlocutory injunction is required to satisfy the conditions for the grant of an interlocutory injunction which have since the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** literally been settled:-

- a. An applicant has to demonstrate a prima facie case with a probability of success,
- b. That the applicant stands to suffer irreparable harm should the injunction not be granted and that damages would not be an adequate remedy,
- c. In case there is any doubt in regard to the first two conditions, the court may determine the matter on a balance of convenience.

In the present case the Defendants have not made any claim against the plaintiff and my view is that the test to be applied to determine whether an interlocutory injunction can be granted is inapplicable and I thus find and hold that an application for injunction by the Defendant against the plaintiff cannot be sustained. Parties are bound by their pleadings and there being no claim by the Defendant against the plaintiff it is my view that the Defendants cannot be entitled to seek an order of injunction against the plaintiff. Accordingly the Defendant's prayer for an order of injunction is dismissed.

The further issue for determination in this application is whether or not the Plaintiff has contravened the consent order of 11<sup>th</sup> July 2007 and/or whether by the said consent order the parties were to maintain the status quo as was obtaining as at the date of the order in regard to the suit land. I have reviewed the consent order of 11<sup>th</sup> July 2007 whose net effect was two fold. Firstly, the Defendant and their agents and/or servants were restrained from entering onto, erecting any structures or remaining on or in any other manner interfering with the plaintiff's quiet possession and enjoyment of the suit land. Secondly the plaintiff was not to demolish the structure that was on the suit land pending hearing and final determination of the instant suit. My interpretation of this order is that the Defendant was enjoined from in any manner using the suit land including entering thereon or remaining thereon. The injunction did not permit the Defendant to do anything that could be construed as interfering with the plaintiff's right to possession and enjoyment of the suit land. The converse is true that by the order the plaintiff's right to possession and enjoyment of the suit land was acknowledged.

It is to be noted that the plaintiff had demonstrated that he was the registered owner of the suit land and had exhibited a certificate of search that cleared showed he was the registered proprietor of the suit property. Section 25 of the Land Registration Act NO. 3 of 2012 rests upon the registered proprietor of land absolute rights of ownership that are indefeasible except as provided under the Act. Section 26 of Act provides that a certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and further provides that the title of that proprietor shall not be subject to challenge, except:-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party, or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

On the basis of pleadings the Defendant does not make any claim against the plaintiff and there is no challenge of the plaintiff's title on the limited grounds set out under section 26 of the land Registration Act or the previous section 23 of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) under which the plaintiff's title was registered. I can only presume it is against the background that the plaintiff held a title to the suit land that the consent order of 11<sup>th</sup> July 2007 was entered. The order was express and unambiguous. The plaintiff was not restrained from using the suit land and/or developing the same as long as he did not demolish the structure that was thereon. The Defendant was however restrained from making any use of the suit premises.

If it was intended that the status quo was to be maintained as was on the suit land as at the time of making

the order, then there would have been no need for making the order of injunction against the Defendant as nothing would have been easier than the parties entering a consent order to the effect that the parties would maintain the obtaining status quo as at the time. The effect of granting an order of status quo now sought by the Defendant would be to reverse the order of injunction granted in favour of the plaintiff.

The order having been entered by consent, the same can only be reviewed and/or set aside on similar grounds that a contract can be set aside. However, the application before the court is not for review and/or to set aside the consent order but one for injunction against the plaintiff. I do not consider there is any basis for the Defendant's application dated 29<sup>th</sup> may 2012 to be granted, the same lacks merit and it is hereby ordered dismissed with costs to the plaintiff.

Orders accordingly.

Ruling dated signed and delivered this...25<sup>TH</sup> ...day of ...September.....2014.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

.....for the Plaintiffs

..... For the Defendants