



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 1108 OF 2013**

**JULIUS KIMANI KIBE..... PLAINTIFF**

**VERSUS**

**JOSEPH K. NJENGA alias**

**JOSEPH N. NGANGA.....DEFENDANT**

**RULING**

The application before the court is a Notice of Motion dated 11<sup>th</sup> September 2013 filed by the Plaintiff, seeking orders of a temporary injunction against the Defendant to restrain him from trespassing upon, leasing, transferring, charging and/or alienating in any manner whatsoever plot NO. 1/171 within Soweto Resettlement Scheme (hereinafter referred to as “the suit property”).

The grounds for the application are that the Plaintiff is the owner of, and was allotted the suit property by way of a letter of allotment dated 20<sup>th</sup> September 1990, and has had exclusive possession since then. However, that on or about 7<sup>th</sup> May 2013, the Defendant without the authority and/or consent of the Plaintiff encroached on the suit property and has constructed a temporary structure thereon.

The Plaintiff in his supporting affidavit sworn on 11<sup>th</sup> September 2013 explained that he reported the matter to the local administration who summoned the Defendant, who was unable to produce genuine documents of ownership. Further, that upon inquiry, he discovered that the Defendant’s mother was part of Soweto Scheme and had benefited with a plot no. 1/101 from the scheme where the Defendant resides, and that the Defendant was never part of the Soweto Scheme or at all. He also alleged that the Defendant was seeking to get his plot through fraudulent means by falsifying plot no. 1/171 to be plot no. 171A. The Plaintiff annexed a bundle of documents in support of his claim including his letter of allotment of the suit property.

The Plaintiff’s counsel in submissions dated 22<sup>nd</sup> February 2014 argued that the Plaintiff had established a *prima facie* case for reasons that:

- i. The plot no. is 1/171 and not 1/171A as alleged by the Defendant.
- ii. The plot was allotted to the Plaintiff as a member of Soweto Squatters Resettlement Scheme Phase II.
- iii. The Defendant was not a member of Soweto Resettlement Scheme to warrant him to benefit with a plot.

The Defendant did not file any response to the Plaintiff’s application.

I have read and carefully considered the pleadings filed and submissions by the Plaintiff. 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. 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 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 in his Pleint filed herein on 18<sup>th</sup> September 2013 is seeking a declaration that the suit property belongs to him, an order of eviction of the Defendant and a permanent injunction against the Defendant restraining him from transferring or dealing with the suit property. I have perused the letter of allotment relied upon by the Plaintiff. I note it is a letter of temporary allocation dated 20<sup>th</sup> September 1990 issued by the then District Officer for Nairobi. While the said allotment may not be capable of giving rise to any legal interests in the suit property, this Court notes that the Defendant did not bring evidence of any entitlement to the suit property. I therefore find that the Plaintiff has in the circumstances shown a *prima facie* case with respect to his right to possession of the same.

This finding notwithstanding, I also note that the Plaintiff in his pleadings has alluded to temporary structures built by the Defendant on the suit property. Any orders given by this court will therefore need to preserve the said structures pending the hearing and determination of this suit.

I accordingly allow the Plaintiff's Notice of Motion dated 11<sup>th</sup> September 2013 on the terms of the following orders:

1. That pending the hearing and determination of this suit or until further orders, the Defendant by himself, or through his servants, employees and/or agents be and is hereby restrained from trespassing upon, leasing, transferring, charging and/or alienating in any manner whatsoever plot No. 1/171 within Soweto Resettlement Scheme.
2. That pending the hearing and determination of this suit or until further orders, the Plaintiff shall not demolish the temporary structures constructed by the Defendant on plot No. 1/171 within Soweto Resettlement Scheme.
3. The costs of the Plaintiff's Notice of Motion dated 11<sup>th</sup> September 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_4<sup>th</sup>\_\_\_\_ day of \_\_\_\_December\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**