



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

E L C NO. 348 OF 2015

MARY MBAIKA MWANGI.....1ST PLAINTIFF/APPLICANT

LABAN NDWIGA MUKANDI.....2ND PLAINTIFF/APPLICANT

CHRISTOPHER KAGUNDA KIAMA.....3RD PLAINTIFF/APPLICANT

=VERSUS=

CATHERINE WANGUI MWANGI & SAMUEL MAINA NJARIA TRUSTEE OF

CASVALE ENTERPRISES.....1ST DEFENDANT/RESPONDENT

DRUMVALE FARMERS

CO-OPERATIVE SOCIETY LTD.....2ND DEFENDANT/RESPONDENT

RULING:

The matter coming up for determination is the Notice of Motion dated **30th April ,2015** brought by the Plaintiffs/applicants herein under **Order 40 Rules 1,4,& 8 of the Civil Procedure Rules 2010,Section 1A,1B,3A & 63 (c) & (e) of the Civil Procedure Act** and all enabling provisions of the law. The applicants have sought orders against the 1st and 2nd Defendants/ Respondents. The Orders sought are:-

i. That the Defendants/Respondents either by themselves, through their agents, servants, representatives, Directors and or whosoever claims under them be restrained by an order of temporary injunction from selling ,alienating, appropriating, sub-dividing, demarcating, fencing, entering ,using and or in any other way dealing with the parcel of land known as LR No. Nairobi Block 118/1120 pending the hearing and determination of the suit.

ii. That cost of this application be provided for.

The application is premised on the grounds stated on the face of the application and on the Affidavit of **Mary Mbaika Mwangi**.

These grounds are:-

i. That the 1st Defendant/Respondent has illegally, unlawfully, and fraudulently acquired private rights and title on public land that was reserved specifically for public utility.

ii. That the 2nd Defendant/Respondent with full knowledge of the status of the property colluded with the 1st Defendant/Respondent to appropriate public land and confer private rights on the 1st Defendant/Respondent.

iii. That the 1st Defendant/Respondent has acquired title documents to the parcel of land herein and the Plaintiffs/Applicants are quite apprehensive that the 1st Defendant/Respondent shall alienate and/or transfer the land herein, hence the need for preservative orders by way of an injunction.

iv. That the Plaintiff/Applicant stands to suffer immeasurably where the parcel of land herein be alienated prior to the hearing and determination of the suit herein.

v. That the Plaintiff/Applicant are ready and willing to give an undertaking for damages, hence the Defendants/Respondents will suffer no prejudice whatsoever were the orders herein to be granted.

In her supporting Affidavit, **Mary Mbaika Mwangi** averred that together with her co-plaintiffs they own land and reside within the parcels of land originally known as **LR NO. Nairobi Block 118**, which parcel of land was owned by the 2nd Defendant/Respondent but was subjected to a scheme of subdivision at the request of the 2nd Defendant and the said subdivisions gave rise to various portions of land among them **LR No. Nairobi Block 118/566** owned by the deponent, **LR No. Nairobi Block 118/148** and **118/626** owned by her co-applicants as evidenced by annexure **MMM1**. She further averred that one of the condition for subdivision of the parcel of land was that 2nd Defendant was to provide and surrender land for construction of public utilities such as **Nursery, Primary and Secondary Schools** for use and benefit of the residents. She contended that these parcels of land were provided as is evident from **MMM2**. It was her contention that the 2nd Defendant colluded and conspired with the 1st Defendant illegally and fraudulently to transfer and register **LR No. Nairobi Block 118/1120**, which was designated for a Secondary School to the 1st Defendant herein. It was her further contention that this action infringed constitutional rights to access and use of private property.

The deponent also averred that together with other residents, they stand to suffer immeasurably if the public property herein is converted into private property given that the availability of public facilities influenced their decisions to purchase and settle on these parcels of land.

She alleged that the registration of the 1st Defendant/Respondent as the owner of the suit property was illegal, unlawful and fraudulently secured with the collusions of the 2nd Defendant and therefore the said title ought to be cancelled and the said parcel of land should revert back to the use of the public and the same be registered as a public utility property under the relevant law. She also averred that for the interest of justice and fairness, the application herein should be allowed so as to preserve the subject matter in dispute herein and that the **status quo** should be maintained till the hearing and determination of the suit herein.

The application is contested, and **Samuel Maina Njaria**, one of the trustees of **Casavale Enterprises**, swore a Replying Affidavit on **25th June, 2015** and averred that indeed the 1st Defendant is the registered proprietor of **LR No. NRB Block 118/1120**, in Kamulu area within Nairobi County having purchased it from the 2nd Defendant on or about **May 2000**. It was his contention that prior to the purchase of the said land, the 1st Defendant carried out an official search and confirmed that the suit land was duly registered in the name of the 2nd Defendant and that there was no prior history of the land having been a public land, The said title was annexed as **SMN1**.

Further that upon purchase, the 1st Defendant obtained a lease **SMN2**. It was his further contention that todate the property remains in the name of the 1st Defendant with no encumbrances whatsoever as per **annexure SMN3**. He therefore contended that the land is not a public utility land and should not be

surrendered to the government as alleged by the Plaintiffs/applicants which allegation is baseless. He further alleged that the Plaintiffs have continued to incite members of the public that the 1st Defendant land is a public land and due to this incitement, members of the public have severally trespassed on their parcel of land which is a complete violation of their constitutional right to own property. He therefore urged the court to dismiss the plaintiff's application with costs.

The 2nd Defendant filed their grounds of objection on **26th June 2015** and stated that :-

i. That the Plaintiffs application is frivolous, bad in law and otherwise an abuse of the due process.

ii. That the application offends mandatory provisions of Section 25 of the Land Registration Act 2012 as the Catherine Wangui Mwangi and Samuel Maina Njaria (Trustees of Casavale Enterprises) are proprietors of LR No. Nairobi Block 118/1120 for valuable consideration and hence their rights shall not be liable to be defeated.

iii. That the said application offends Mandatory provisions of Section 26(10) of the land Registration Act 2012 as the certificate of title issued by the Registrar to a purchaser of land upon a transfer by proprietor shall be taken by courts as prima facie evidence that the proprietor named is the absolute and indefeasible owner of the subject land.

iv. Further that the 2nd Defendant complied with the terms and conditions of the approved subdivisions of the subject land and the same was sold and transferred to the 1st Defendant for construction of nursery, primary, and secondary schools, amongst other use and benefits of the residents.

v. Further that the court lacks jurisdiction to hear and determine this application and the entire suit.

The Court directed the parties to canvass the Notice of Motion by way of written submissions. In compliance thereof, the plaintiff through the Law Firm of **Mwangi Kigotho & Co. Advocates** filed their submissions on **25th August 2015** and submitted that the Plaintiffs have established the principles governing the grant of injunctions . They relied on the case of **Bencaster Investement Ltd Vs John Murithi & 3 Others , ELC No. 439 of 2009** (unreported) .

The 1st Defendant through the Law Firm of **Mugambi Imanyara & Co. Advocates** filed their written submissions on **14th October 2015**, and 2nd Defendant through the Law Firm of **Wachakana & Co. Advocates** for the 2nd Defendant filed their written submissions on **21st July 2015**, and relied on the case of **Sophie Wanjiku John Vs Jane Mwhaki Kimani HCCC No. 490 of 2010** and **Esther Ndegi Njiru & Jane Mugo Wanjiru Vs Leonard Gateii HCCC No. 128 of 2011** , and urged the Court to dismiss the Plaintiffs application as it is very clear that the 1st Defendant bought the suit land as a **bonafide purchaser** for **value** and they did not fraudulently obtain the title deed in issue or the land herein.

This Court has now carefully considered the instant Notice of Motion and the annexures thereto, the pleadings in reply, the written submissions, the cited authorities and the relevant laws and the court makes the following findings:-

There is no doubt that the parcel of land in dispute **LR No. Nairobi Block 118/1120** is registered in the names of **Catherine Wangui Mwangi** and **Samuel Maina Njaria** and the certificate of lease to that effect was issued on **22nd December 2000**. The said Certificate of lease was issued without any encumbrances save for the restrictions "**no disposition by the proprietor shall be registered without the consent of the lessor**". The lessor herein is the government of Kenya. There is also no doubt that their parcel of land was initially registered in the name of **Drumvale Farmers Co-operative Society Ltd** and the certificate of lease to that effect was issued on **2nd November 1999**. From annexure "**SMN1**" the said registration was

done free from any encumbrances save that the ***no disposition by the proprietor shall be registered without the consent of the lessor who is the government of Kenya. Drumvale Farmers' Co-Operative Society Ltd*** is the 2nd Defendant and was the initial registered proprietor of the larger ***Nairobi Block 118*** (Kamulu) which was later subdivided into various plots, the suit plot being one of them. It is also evident that the Plaintiffs herein are each proprietor of portions of land that resulted from subdivision of LR Nairobi Block 118 . The said portions of land are ***Nairobi/Block 118/566 , LR Nairobi Block 118 /484 and LR No. Nairobi Block 118/626.***

It is also evident that the subdivision was done according to the map (***Nairobi Block 118 Kamulu***), which is annexure ***MMM2*** . According to the Plaintiffs, the subdivision was done in adherence to the subdivision scheme wherein the 2nd Defendant was to surrender land for construction of public utilities such as schools and a commercial center. The Plaintiffs have alleged that ***Nairobi Block 118/1120*** was designated for construction of a secondary school. Indeed from the Map ***MMM2 , LR No. Nairobi Block 118/1120*** is marked as Secondary School .However the Plaintiffs did not attach the subdivision scheme to their application with the said conditions that the 2nd Defendant had to surrender the designated plots for schools to the government so that they would become public land.

It is evident that Nairobi Block 118/1120 was registered in the name of Drumvale Farmers' Co-operative Society Ltd on 19th November 1999 and later to ***Catherine Wangui Mwangi*** and ***Samuel Maina Njaria*** on ***22nd December 2000.*** The said registration was governed by the ***Registered Land Act, Chapter 300*** Laws of Kenya (now repealed) which provided in ***Section 27(a)*** that:-

“The registration of a person as the proprietor ,of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Though Cap 300 Laws of Kenya is now repealed, the above position of law has been replicated in ***Section 24(a)*** of the ***Land Registration Act*** .

The 1st Defendant being the registered owner of ***Nairobi Block 118/1120*** has been vested with absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. The said rights are protected under ***Section 25(1)*** of the ***Land Registration Act*** which provides that:-

“ The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever but subject.....”.

It is also not in doubt that ***LR No. Nairobi Block 118/1120*** was designated for construction of a Secondary School but the same was later transferred to 1st Defendant herein by 2nd Defendant and thereafter a lease was registered on ***2nd November 1999.*** Special condition No. 5 of the registered lease provides that: -

“The land and buildings shall always be used for Secondary School and accommodation for the Head master/Principal”.

The 2nd Defendant has admitted that it sold the suit property to the 1st Defendant for purpose of putting up a Secondary Schools for the intended purpose provided for by the Special Condition No. 5 of the registered lease. ***SMN4***, a letter dated ***1st December, 2008*** from the District Commissioner's Office Nairobi East, to the District Officer, Embakasi Division confirmed that indeed ***M/s Catherine Wangui Mwangi*** and ***Samuel Maina Njaria*** who had purchased ***Nairobi/Block 118/1120*** which had been set aside for development of a school had intentions of putting up a school on the said parcel of and the District Officer had been urged by the District Commissioner to assist the said purchasers who are the 1st Defendant to put up the said school without any hindrance. It is, therefore evident that the 1st Defendant purchased the suit property for purposes of setting up a school as per its intended purpose.

The plaintiffs have alleged that the said parcel of land was set apart as a public land for purposes of putting up a public secondary school. That allegation has been disputed by the Defendants who have contended that though the use of the plot was intended to accommodate a secondary school, the approval of subdivision did not indicate that the same should be a public secondary school. It was further contended by the Defendants that the land was never surrendered to the government for the same to qualify to be public land and the Certificate of Lease issued to the 1st Defendant did not have any such condition that the said parcel of land was public land and only meant for development of public secondary school. The Defendants have contended that as the registered proprietor of the suit property, the 1st Defendant is the absolute owner as provided by Section 26 of the Land Registration Act which provides that: -

26. (1) The 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and 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.

The Plaintiffs have alleged that the suit property having been set aside for purposes of constructing a public secondary school is, therefore, a public property and the Defendants should be restrained from carrying any activity that is contrary to the intended purposes and thus the filing of this application for injunctive Orders. The issue now for determination is whether the Plaintiffs/applicants are deserving of the orders sought in their Notice of Motion dated 30th April, 2015.

In deciding whether the applicants are deserving of the orders sought, the court will be guided by the laid down principles for grant of injunctive orders. These principles were well elucidated in the case of **Geilla Vs Cassman Brown & Co. 1973 EA 358**, and which principles have been repeated in the other Judicial pronouncements. In the case of **Kibutiri Vs Kenya Shell, Nairobi High Court Civil Case no. 3398 of 1980 (1981)KLR**, 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.”

The applicants herein had the duty to establish the above stated principles. Firstly, the Applicants needed to establish that they have a prima facie case with probability of success. Prima facie case was described in the case of **Mrao Vs First American Bank of Kenya Ltd and Others (2003) KLR**, the Court described prima facie case as;-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

In the said description it is clear that prima facie case meant more than an arguable case as the evidence available must show an infringement of a right and the probability of success of the Applicants case at the trial.

In the instant case, the Applicants have alleged that the suit land ***Nairobi Block 118/1120*** that was sold to

the 1st Defendant by the 2nd Defendant was sold illegally and fraudulently as the same was a public utility land designated for a Secondary School. It was their allegation that the 2nd Defendant had fraudulently sold public land to the 1st Defendant and therefore the Plaintiffs constitutional right to access and use of public property had been infringed.

However, the Defendants have alleged that the suit property was a private land which was sold to the 1st Defendant by the 2nd Defendant free of any encumbrances and therefore the 1st Defendant's rights to the suit property are well protected by Section 25 of the Land Registration Act.

It is without doubt that **Nairobi Block 118** was initially registered in the name of 2nd Defendant and 2nd Defendant subdivided the land into various plots which it allegedly sold to various individuals, the Plaintiffs being among the purchasers. It is also clear that in the subdivision map, various parcels of land were designated for specific purposes such that **Nairobi Block 118/1120** was designated for construction of a secondary School. However, there is no evidence to confirm that the said parcels were to be surrendered to the Government or not.

The conditions for the scheme of subdivision were not attached to the Notice of Motion and at this juncture the court cannot find and hold that indeed the parcels of land set aside for schools were to be surrendered to the Government so that they can now be referred to as public land or were set aside for schools and that private schools would suffice for the intended purpose. It was alleged by the 1st Defendant that they purchased the suit land for purpose of putting up a secondary school and so they have not breached the intended purpose of the land nor Clause 5 of the registered lease.

Public land is defined by **Article 62 (1)** of the Constitution and for our purpose **Article 62 (1) (c)** would suffice being;- **land transferred to the State by way of sale, reversion or surrender** and the above position is buttressed by **Section 9(1)** of the Land Act which provides for situation when private land may be converted to public land and one of such situation is by surrender. Since the original **Block Nairobi 118** was a private land, for Nairobi Block 118/1120 to be considered a public land, then there should be evidence of surrender of this Land to the Commissioner of Land or Government for it to qualify to be public land. That evidence of surrender was not availed. The court would, therefore find it difficult at this juncture to hold that indeed the suit land herein is public land and thus the 1st and 2nd Defendants fraudulently converted it to private land. That evidence would have to be availed at the main trial.

For now what is evident is that the 1st Defendant are the registered owners of the suit land since the year 2000. They hold the said land without any conditions, restrictions, or encumbrances as provided by Section 26 (1) of the Land Registration Act, the 1st Defendants, Certificate of title is prima- facie evidence that they are absolute and indefeasible owners of the suit property. The said Certificate of title can only be challenged if there is evidence that it was acquired fraudulently and illegally. Though the Plaintiffs have alleged that the same was acquired though fraud by the Defendants, the said allegation can only be established by calling of evidence but not through an interlocutory application.

At this juncture, the court finds that the 1st Defendant are the registered proprietor of the suit property and that registration vest in the 1st Defendant absolute ownership of the said land together with all rights and privileges belonging or appurtenant thereto. (See **Section 24(a)** of the Land Registration Act). The said Rights are protected by dint of **Section 25(1)** of the same Act and can only be defeated by provision of the law. The 1st Defendant herein should be allowed to enjoy their rights as proprietor of the suit property until the suit is heard and determined. Such rights include access to the suit land, use and dealing with the same as they deem fit. Allowing the Plaintiffs application would mean that the said rights have been curtailed without any evidence of having acquired the said parcel of land irregularly or fraudulently. Further, **Article 40 (1)** of the Constitution accords the 1st Defendant protection of their property and the property herein is Nairobi **Block 118/1120** which is registered in the names of 1st Defendant without any condition or encumbrances. Since the Plaintiffs have alleged fraud on the part of the Defendants, they have the onus of proving the same in the main trial, as fraud must be pleaded and strictly proved, the burden being heavier than on the balance of probabilities generally applied in Civil matters. Further, when

fraud is pleaded, it must be sufficiently proved by the party who has pleaded it. See the case of **Urmilla W/o Mohendra Shah Vs Barclays Bank International Ltd and Another 1979 KLR 76** where the court held: -

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt; something more than a mere balance of probabilities is required a Higher standard of proof is required to establish such findings.”

The court finds that the 1st Defendant being the registered owner of the suit land, then their title is protected unless there is concrete evidence of fraud in acquisition of the same and they are proved to be a party to the said fraud. This Court will be persuaded by the case of **Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another (2013) eKLR**, where the Court held that;-

“ The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through corrupt scheme”.

As this moment, there is no evidence of fraud, misrepresentation or corrupt scheme, on the party of the Defendants and the court finds that the plaintiffs have not established a ***prima facie case*** with probability of success and no evidence that any of their rights have been infringed specifically their constitutional right to access the public land as pleaded in the Plaintiff.

On the second limb of irreparable loss, the court finds that the 1st Defendants have been registered as the proprietors of the suit land since 2000. The Plaintiffs have not suffered any loss or harm since 2000. The suit was designated for construction of secondary school as per the subdivision map ***SMN2***. The 1st Defendants purchased the suitland with intention of developing a school as per the letter from the District Commissioner, Nairobi East to the District Officer Embakasi dated ***18th December 2008***. The 1st Defendant therefore wishes to develop the suit land as per the intended purpose in the scheme of subdivision and the clause 5 of the registered lease. The Plaintiffs cannot be said to suffer any loss due to the said construction of a school by the 1st Defendant as per the original purpose.

On the balance of convenience, the court finds that it is not in doubt. However even if it was in any doubt, the balance of convenience would tilt in favour of the 1st Defendants who are the registered proprietors of the suit land without any encumbrances and with rights protected by the Constitution and the Land Registration Act.

Having now carefully considered the Instant Notice of Motion, the rival submissions, and the relevant laws, the Court finds this application is not merited and the same is dismissed entirely with costs to the Defendants herein.

It is so ordered.

Dated, Signed and Delivered this ***26th*** day of ***September 2016***.

L. GACHERU

JUDGE

In the Presence of:-

Mr Mwangi the 1st, 2nd, 3rd Plaintiffs/Applicants

M/s Mureithi for the 1st Defendant/Respondents

Mr Wawire holding brief for Mr Wachakana for the 2nd Defendant/ Respondents

Court Clerk : Hilda

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above stated advocates.

L. GACHERU

JUDGE