



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

**ELC CIVIL SUIT NO. 472 OF 2013**

**MARGARET MUTHONI WANYEE.....PLAINTIFF**

**VERSUS**

**MUKENIA COOPERATIVE SOCIETY LIMITED.....DEFENDANT**

**RULING**

1. By a plaint dated **18<sup>th</sup> June, 2013** the plaintiff, **Margaret Muthoni Wanyee**, through her Attorney, **Ben Kanyi Waweru**, brought the suit herein against the defendant, **Mukenia Cooperative Society Limited**, *inter alia*, praying for judgment against the defendant for:-

**A permanent injunction to restrain the defendant whether by itself, its agents and/or servants from trespassing onto, selling, disposing and/or transferring or in any other manner whatsoever interfering with the property known as Title No. Naivasha/Maraigushu Block 10/11 (Kedong) hereinafter referred to as the suit property and a declaration that the plaintiff is the owner of the suit property.**

2. Simultaneously with the plaint, the plaintiff filed the notice of motion of even date seeking a temporary order of injunction to restrain the defendant from doing the activities sought to be permanently restrained in the plaint pending the hearing and determination of the application and the suit.

3. The application is premised on the grounds that the plaintiff is the rightful owner of the suit property, that the plaintiff is in possession of the suit property and has never parted with the same by way of sale or transfer to any person, the defendant included and that the plaintiff has a *prima facie* case against the defendant who claims a purchaser's interest in the suit property.

4. The motion is supported by the affidavit of the plaintiff's said attorney, **Benny Wanyonyi Kanyi**, who is the holder of a power of attorney dated **18th June, 2013** allegedly donated by the plaintiff. In the said supporting affidavit, the deponent has, in addition to providing a historical background of the dispute herein, deposed that sometime in 2009 the plaintiff who lives in U.S.A returned to Kenya to sort out some issues concerning the suit property, in particular to pay land rates in respect thereof for which the council (Naivasha Municipal council) had threatened to auction. After paying the rates, the plaintiff returned to United States of America, but before leaving the country she instructed the deponent to follow up the issuance of her title from Kedong Ranch Ltd.

5. After visiting the Land offices severally, the deponent got information that the title had been collected by some unknown persons. With that information, he made a report to the police and informed the plaintiff who donated power of attorney to him in order to deal with all matters concerning the suit property.

6. Before he could begin the process of acquiring a new title, the deponent got information that some people had turned up at Kedong Ranch Limited offices at Naivasha claiming that the plaintiff had authorized them to sell the suit property.

7. Armed with the power of attorney, the deponent sought an appointment with the people who purported to have had the authority of the plaintiff to sell the suit property at their advocate's office but the purported sellers failed to turn up.

8. When the advocate realized that the purported sellers of the suit property were not genuine, he gave him the title to the suit property. Thereafter two officers of the defendant, **Kiarie** and **Kangethe**, approached him claiming that the defendant had bought the suit property way back (in 1994) from the plaintiff. To prove their claim they showed him a letter allegedly signed by the defendant.

9. Consequently, he contacted the plaintiff about the allegations and the letter who denied having dealt with the defendant. He also contacted the officers of Kedong Ranch who informed him that they were not aware of the said transaction.

10. Terming the letter allegedly written by the plaintiff a forgery, the deponent contends that if the plaintiff had sold the suit property as alleged by the defendants, the defendants would be having documents capable of proving that fact, for instance, a sale agreement, land control board's consent to transfer as well as proof of payment.

11. Explaining that the defendant has no documents to prove its alleged dealing with the plaintiff, the deponent contends that the defendant's claim is fraudulent.

12. To protect the property from encroachment, the deponent with the permission of the plaintiff, started fencing off the suit property but the members of the defendant destroyed the fence and carried away some of the fencing materials.

13. In view of the foregoing, the plaintiff contends that unless restrained, the defendant through its members and/or agents, will start sub-dividing and selling the suit property to unsuspecting members of the public. The court is urged to grant the orders sought to avert further encroachment on the suit property and/or breach of peace.

14. In reply, the defendants swore a replying affidavit in which it is deposed that the defendant bought the suit property from the plaintiff between 1991 and 1994 for Kshs.1,950,000/=. The sale agreement between the defendant and the plaintiff is said to have been made at the offices of the **M/S Sheth and Waithigo advocates** and witnessed by **James Gatune Wathigo**,

advocate.

15. After the parties herein executed the agreement referred to herein above, the plaintiff left the country for U.S.A. Although the sale agreement is incapable of being traced both at the offices of the advocate and at the defendant's offices, the defendant seeks to rely on a number of documents exchanged between itself and the various entities concerning the transaction to wit, a letter dated **18<sup>th</sup> May, 1994** purportedly written by the plaintiff confirming that she had sold the suit property to the defendant and authorizing it to take possession of the suit property (that letter is shown to have been received by their advocate on **23<sup>rd</sup> May, 1994**).

16. After entering into the transaction herein, the defendant engaged the services of M/S Muritu and Associates to sub-divide and demarcate the suit property into 0.350 hectare plots. Thereafter the defendant's share holders balloted for their plots and after they were allocated their plots, took possession. Some shareholders are said to have ever since transferred their plots to third parties. It is explained that the suit property was not transferred to the defendant and its shareholders because the plaintiff has been out of the country.

17. The allegation that the plaintiff returned to Kenya and paid land rates at the council are said to be false and unsupported by evidence. The demand letter in respect of the land rates is said to be not genuine.
18. As for the title issued to Ben, the title is said to have been obtained fraudulently using an identity Card belonging to **Cheni Lubule Luutu**, who is not the plaintiff herein.
19. The alleged loss of title and fraudulent dealings with the suit property are said to be a ploy by the deponent of the supporting affidavit (Ben) to justify his illegal activities on the suit property. The power of attorney held by Ben, on the other hand, is said to be a forgery.
20. Contrary to Ben's allegation that the letter dated **18<sup>th</sup> May, 1994** which was allegedly written by the plaintiff is a forgery, the defendant maintains that the said letter is genuine.
21. It is the defendant's case that the management of Kedong Ranch Ltd was informed about the transaction between the plaintiff and the defendant. Its management's denial of having knowledge of the transaction is said to be part of the scheme hatched by Ben to defraud the society and enrich themselves.
22. It is admitted that the defendant's advocate wrote to the deponent concerning the transfer of the suit property to it but denied that the defendant, its management and/or shareholders are fraudsters.
23. The defendant has also admitted that there were discussions with Ben to settle the dispute amicably which failed. The defendant, has however, denied the allegations that after the discussions failed its members invaded the suit property.
24. Contrary to the allegations that there was an attempt to erect new beacons on the suit property, the defendant maintains that the beacons were erected in 1990s.
25. The allegations that the defendant's members invaded the suit property and destroyed the fence erected thereon are said to be untrue and contended that if such an occurrence had happened, the defendants' members would have been arrested and arraigned in court.
26. It is admitted that the defendant placed a caution on the suit property after realizing that the plaintiff intended to grab it and/or to dispossess them. The defendant contends that the plaintiff's actions and activities on the suit property are illegal and an affront to justice and the rule of law.
27. The defendant has also reiterated that the suit property was surveyed in 1990's and its members allocated the whole suit property. In this regard, it is contended that the defendant's members and 3rd party's have been in possession and/or occupation of the suit property for over 22 years.
28. The defendant accuses Ben of having had some illegal dealings with some of its members over the suit property. For instance, Ben is said to have represented to some of the defendant's officials that he could assist the society get the suit property and alleged that for the help that Ben was to accord the defendant in procuring transfer of the suit property, he would get 10 acres of the suit property.
29. It is contended that Ben decided to institute the current suit after the defendant failed to fulfill the conditions he had imposed on it for helping it secure title to the suit property. The defendant describes Ben as a land grabber who wants to take advantage of a rift in its management to dispossess it of its land.
30. Ben is also accused of working in cohorts with some renegade officials of the defendant namely, Evans Ndungu Kiarie, to steal the defendants sensitive documents like registers, certificates of registration and the documents attesting the transaction entered into between the plaintiff and the defendant .
31. Although the defendant does not have in its possession the sale agreement executed between the plaintiff and itself, the defendant has in its possession photocopies of communication which passed between itself, the bank which funded the transaction, the surveyor and the plaintiff herself. It is also

reiterated that its members are in possession of the suit property.

32. Wondering how documents concerning the transaction could disappear in all relevant offices, the defendant argues that the loss of the documents is enough proof of the alleged scheme by Ben and its renegade members to grab the suit property.

33. The Defendant argues that unless the scheme referred to herein above is curtailed by this court, the defendant and its members will suffer irreparable loss and injury. The plaintiff's alleged unlawful dealings with the suit property are also said to be a recipe for chaos (land clashes).

34. For the foregoing reasons the plaintiff is said to have failed to establish a *prima facie* case with probability of success. The alleged imminent loss is said to be quantifiable and reiterated that the plaintiff's claim is fraudulent.

35. During the pendency of the application herein, the defendant brought the notice of motion dated **8th February, 2014** seeking to, inter alia, restrain the plaintiff, either acting by herself, any donee of power of attorney, her agents and/or her servants from trespassing onto, selling, alienating, purporting to fence, transferring or in any other manner prejudicial to its interest and/or interest of its shareholders pending the hearing and determination of the suit.

36. Since the two applications herein raise similar issues of fact and law, it was agreed that they be disposed off together. It was also agreed that the applications be disposed of by way of written submissions. Subsequently, advocates for the respective parties filed submissions which I have read and considered.

37. In the submissions filed in support of the plaintiff's case, it is submitted that the defendant has failed to prove their interest in the suit property. In this regard it is submitted that their claim is premised on a mere allegation of purchase. The letter allegedly written by the plaintiff to the effect that the plaintiff had sold the suit property to the defendant is said to be a forgery. In this regard reliance is made on a document examiners report exhibited in Ben's affidavit as **BKW1**.

38. It is further submitted that the defendant's case is vitiated by lack of agreement for sale of land which the law requires to be in writing; lack of proof of consideration for the sale; lack of consent to sub-divide the land as required by law and lack of consent to transfer from the land control board.

39. In view of the foregoing gaps in the case of the defendant it is submitted that the plaintiff has satisfied the conditions for grant of a temporary injunction enunciated in the **Giella v. Cassman Brown & Co. Ltd** (1973)E.A 358.

40. On behalf of the defendant, it is maintained that the defendant entered into the alleged sale of the suit property with a faction of the plaintiff. The plaintiff's representative herein is said to be aware of that fact and accused of colluding with the defendants' renegade group to steal the document necessary for proving the defendants interest in the suit property.

41. It is also contended that the plaintiff's representative obtained title document in respect of the suit property fraudulently. In this regard, the power of attorney held by the plaintiff's representative is said to be forged. This is said to be so because the signature therein does not match with the one maintained by the government.

42. The title deed relied on to prove the plaintiff's interest in the suit property is also said to have been obtained fraudulently using a title deed that does not belong to the plaintiff. (It is noteworthy that the allegation that the identity card used to obtain the title deed herein does not belong to the plaintiff is not disputed). Instead the plaintiff representative contends that there was an error in recording the plaintiff's identity card number in the title deed.

43. The power of attorney relied on to file the current suit is also said to forged. The signature endorsed

thereon is said to be different from that kept by the Government in respect of the plaintiff.

44. On proof of the sale agreement allegedly executed between the plaintiff and the defendant reference is made to an affidavit sworn by Mr. James Gitune Wathigo, advocate, where the advocate confirms that he recorded a sale agreement between the defendant and the plaintiff sometime in 1994. The advocates has also confirmed that the copies of document relied on by the defendant to prove that they entered into the impugned transaction are genuine.

45. Based on survey documents which show that the suit property was sub-divided and shared amongst the members of the defendant, it is submitted that sub-division of the property would not have been carried without the land board's consent to sub-divide the suit property.

46. The copies of documents that the defendant has in support of its case against the plaintiff's claim are said to be admissible under **Section 68** of the Evidence Act, Chapter 80 Laws of Kenya. The averments of the advocate herein, who allegedly acted for the two parties in the transaction in question, is said to be proof that there was an executed agreement between the parties herein.

47. In view of the foregoing, the question of validity or otherwise of the agreement executed between the plaintiff and the defendant is said to be incapable of being determined at this stage of the case. It is also submitted that the defendant has gained proprietary rights over the suit property under the doctrine of adverse possession, its members having been in quiet possession thereof for over 22 years.

48. It is reiterated that members of the defendant and/or other third party's are in occupation of the suit property, having gained interest thereon as innocent purchasers for value without notice. Based on the conflicting interests herein the court is urged to preserve the suit property by an order of status quo.

49. Having considered the pleadings and submissions by the respective parties I find that the sole issue for determination is whether any of the parties to the application herein has made a case of the orders sought. If not, what order(s) should the court make.

#### **Analysis of evidence and determination**

50. According to the evidence adduced in the applications herein, there is no doubt that the plaintiff' has or had an interest in the suit property. That fact is born out in the affidavits sworn in support of the applications herein. There is a dispute concerning whether the plaintiff sold the suit property to the defendant and/or whether the title issued to the plaintiff was fraudulently obtained. There is also the unresolved question of whether the defendant and/or its members are illegally on the suit property. In my view, these are matters that this court cannot determine at this stage of the suit. For instance, the allegation that the documents relied on by the respective parties to establish their claim would require to be tested through oral evidence and cross-examination.

51. The foregoing notwithstanding, given the conflicting interests of the parties herein and the possibility that the contending parties may deal with the suit property in a manner prejudicial to the interests of the contending parties, it is necessary to preserve the suit property by way of an order for maintenance of the status quo.

52. In view of the above, I order that status quo to be maintained as follows; the defendant and/or its members/assignees will restrict themselves to the areas they are currently occupying, they will not encroach on the unoccupied portions of the suit property. They will not deal with the suit property by way of sell or transfer to any member of the public and/or in any other manner prejudicial to the plaintiff's interest thereon, pending the hearing and determination of this suit.

53. Each party to bear their own costs for the application.

**Dated, signed and delivered in open court this day of 30th day of January 2015.**

**L N WAITHAKA**

**JUDGE**

**Present**

Kabaiko for the plaintiff/Applicant

Mr Biko holding brief for Mr Olonyi for the defendant

Emmanuel Maelo : Court Assistant

**L N WAITHAKA**

**JUDGE**