



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC NO 270 OF 2013**

**WATERFRONT OUTLETS LIMITED.....PLAINTIFF**

**VERSUS**

**NJEKA OCHUNYI.....1<sup>ST</sup> DEFENDANT**

**WILLIS AGWATA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for this court's consideration is the Notice of Motion dated **10<sup>th</sup> October 2013** brought under **Sections 1A, 3, 3A and 63 of the Civil Procedure Act and Order 40 Rules 1,2,3 Order 51 Rule 1 & 3 of the Civil Procedure Rules** seeking for orders that :

- 1. Pending the hearing of this application inter parties this Honourable Court be pleased to issue an order restraining the plaintiff its servants workmen licensees agents or any other persons acting on his behalf or on behalf of the plaintiff including officers from Parklands Police Station or such other security officers from howsoever evicting, dispossessing, alienating, reclaiming, stopping the 1<sup>st</sup> Defendant from accessing and or harassing the 1<sup>st</sup> Defendants or his servants and agents or interfering with their peaceful occupation and entitlement of Land Reference **209/16716** , Parklands Nairobi.*
- 2. That the Honourable Court be pleased to issue an order restraining the 1<sup>st</sup> Defendant into occupation of Land Reference **209/16716**, Parklands Nairobi.*
- 3. This Honourable Court be pleased to issue an order reinstating the Plaintiff, its servants, workmen, licensees, agents or any other persons acting on his own behalf or behalf of the plaintiff including officers from parklands police station or such other security officers from howsoever evicting dispossessing, alienating, reclaiming, and /or stopping the 1<sup>st</sup> Defendant from accessing and or harassing the 1<sup>st</sup> defendant or his servants and agents or interfering with their peaceful occupation and entitlement of Land Reference 209/16716, Parklands, Nairobi.*
- 4. This court makes a declaration that the plaintiff's actions of eviction and destruction of property of the 1<sup>st</sup> Defendant from Land Reference 209/16716, Parklands and LR No 209/16717 and or LR No 209/1539 Parklands Nairobi was contrary to law and exercise amounting to abuse of court orders and thus contemptuous pf the plaintiffs.*
- 5. Pending the hearing of the appeal the court be pleased to issue an order restraining the plaintiff, its servants, workmen, licensees, agents or any other persons acting on his own behalf or on*

*behalf of the plaintiff, including from Parklands officers police station or such other security officers from howsoever evicting ,dispossessing, alienating, reclaiming, stopping the 1<sup>st</sup> Defendant from accessing and or harassing the 1<sup>st</sup> defendant or his servants and agents or interfering with their peaceful occupation and entitlement of land LR No 209/16716 Parklands Nairobi.*

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Njeka Ochunyi**, the 1<sup>st</sup> defendant herein who stated that on **26<sup>th</sup> July 2013** this court ordered among other things that he be evicted from **LR No 2019/16716** and on 7<sup>th</sup> October 2013 the plaintiff while using hooligans thugs and looters descended on his home and evicted him and destroyed his property. That it has been a common ground that the subject parcel comprises of **Land Reference 209/16716** and **LR No 209/16717**.He contended that the orders purely related to **LR No 209/16717** which is the subject matter of this suit. That the court never made an order that he be evicted **from LR No. 209/16716** at any time and it is not possible to tell where **LR No 209/16716** and **LR No. 209/16717** lie since there are no beacons on the ground. He further deposed that the plaintiff has never exhibited any title document in respect of **LR No 209/16716** or **LR No 209/16717** in their name or any map where their alleged land lies on the ground. That the application for stay had been slated on 13<sup>th</sup> November 2013 at the Court of Appeal .He feels that the plaintiff's actions amount to gross abuse of the court orders and the same are contemptuous of the court order and should be punished grievously.

In opposing this application, the plaintiff through its Director **Christine Nyanchama Onwonga Oandah**, swore a replying affidavit which was filed on **24<sup>th</sup> October 2013** stating that the 1<sup>st</sup> defendant was lawfully evicted by **Muhatia Pala Auctioneers** who sought and obtained assistance from the County Police Boss to effect an order made by the Court on 26<sup>th</sup> July 2013.She further added that parties in court cases were bound by their pleadings and cannot be allowed to take inconsistent positions when it suits them. She pointed out that all along the 1<sup>st</sup> Defendant had sworn under oath that **LR No 209/16716** and **LR No 209/16717** did not exist .She stated that the plaintiff was registered as the owner of **LR No 209/16716** therefore the proprietary rights of a stranger cannot defeat that of a registered person. She further added that missing beacons will not change the character of the ownership of the suit property as a beacon is not a title to a property but a landmark to distinguish property. She therefore believes that there are no compelling reasons that the applicant has placed before the court to be granted the orders sought therefore the application should be dismissed with costs.

A further Replying affidavit was deposed by **Peter Mugo** an advocate of the High Court of Kenya who stated that he was the original owner of the suit land **LR No 209/16716**, which he sold to the plaintiff in 2008.That the 1<sup>st</sup> defendant did not own any plot since he lost his adverse possession claim against the original owner MG Shah in 2000 and has never appealed. That the 1<sup>st</sup> defendant clearly admitted in his letter dated 27<sup>th</sup> February 2008 to the Commissioner of Lands that the lease to M.G Shah had expired and issued to him. That the 1<sup>st</sup> defendant further in his affidavit dated 16<sup>th</sup> July 2012 admits that he was buying the original plot **LR No 209/1539** but never paid the full consideration price and as such he could not acquire the title therefore he could not own the land. He also added that the 1<sup>st</sup> defendant had already been given **Ksh 26,000,000/=** and has been collecting rent from other tenants apart from levying distress on free houses.

Parties filed their written submissions. The applicant submitted that the plaintiff admitted to have used the court orders to evict him from **LR No 2019/16716**, to which there were no court orders and therefore the plaintiff's actions in claiming ownership of the said **LR No 209/16716** were grossly mischievous. He now seeks to be reinstated on this property as it does not belong to the plaintiff. He further submitted that since HCCC No 690 of 2010 had not been heard and determined, it was wrong for the plaintiff to evict him from **LR No 209/16716**.He concluded that it is common knowledge that a party cannot use a court order for a different intention.

The plaintiffs filed their written submissions on 29<sup>th</sup> November 2013 wherein it submitted that a certificate of title issued by the Registrar to any purchaser of land was to be taken as conclusive evidence

that the person named therein was the absolute and indefeasible owner thereof. That the title was not subject to challenge except on the ground of fraud or misrepresentation to which the purchaser was a party. That the applicant has not established or disclosed any right that might have in the suit land and in the absence of that they could not expect this court to interfere with the plaintiffs' ownership. The applicant has no possessory rights therefore this application cannot succeed. The plaintiff further submitted that the applicant under **Order 2 Rule 6 of the Civil Procedure Rules** cannot be allowed to depart from his pleadings unless he amends them on the leave of the court. The plaintiff further submitted that the applicant's prayers are not grounded on the plaint therefore the orders cannot be granted on the strength of the Notice of Motion. That the applicant having failed to obtain stay of execution in the Court of Appeal on 13<sup>th</sup> November 2013 wants this court to embark upon a reconsideration of merits and demerits of the same so that a different decision can be made.

I have considered the pleadings; submissions and the authorities relied upon by the parties herein. The issue for this court's determination is whether the applicant has showed this court that his application for the prayer for injunction is merited. In deciding whether or not to grant an injunction, courts have been guided by the consideration that unless the injunction is granted, the damage so occasioned is such that the applicant would not be adequately compensated by an award of damages. Secondly, the Applicant must show that his case has a probability of success. Thirdly, if the court is in doubt it will decide the application on the balance of probability. The applicant must further show that the aim of the temporary injunction is to maintain the Status Quo until the determination of the whole dispute. **Section 63(e) Civil Procedure Act** gives this Honourable Court power to grant orders of a temporary injunction in all cases in which it appears to it to be just and convenient to do so to restrain any person from doing actions. The grant of a temporary injunction is invariably in the discretion of the Court.

In ordinary situations, the principles governing the grant of a temporary injunction are well settled although each case must be considered upon its own peculiar facts. In the case of the **American Cyanamid Co v Ethicon Ltd [1975] AC 396**, Lord Diplock laid down guidelines for the grant of temporary injunctions which are that;

- a. *The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;*
- b. *The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the Status Quo not maintained; and*
- c. *The balance of convenience is in the favour of the Application.*

Has the applicant showed this court that he has a prima facie case with chances of success? The applicant has stated that he was driven out of the suit property by the plaintiff on **7<sup>th</sup> October 2013** but his contention is that the order of this court was specifically on LR No 209/16717 and not LR No 209/16716. He further added that it was not possible to tell where the beacons lie. However he has not shown his proprietary interest in the suit property as he has not shown any title to the suit property. The plaintiff has however shown this court a copy of title on LR No 109/16716 that the applicant is laying claim on. The law protects a registered owner's indefeasible title. **Section 26(1) of the Land Registration Act 2012** provides that,

***“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, un procedurally or through a corrupt scheme.”*

The applicant has not claimed fraud or misrepresentation neither has he made any claim that the suit had been acquired illegally. Having failed to show this court that he has a prima facie case, I need not look at the other principles in granting injunction.

Further the applicant has come to court after he had been evicted from the suit property. Injunctions generally operate upon unperformed and unexecuted future, rather than past acts. A cause of action for injunction arises when a real threat of future violation of a nature is likely to continue or likely to recur therefore the object or purpose of an injunction is to preserve and keep or to restore things in the desired peaceable stated condition and would injure the person seeking the injunction in such a manner that other relief would not be adequate. In the case of **State v. Odell, 193 Wis.2d 333 (1995)**, the Court stated that

***“an injunction is a prohibitive, equitable remedy issued or granted by a Court at suit of a Petitioner directed at a Respondent forbidding the respondent from doing some act which the respondent is threatening or attempting to commit or restraining a Respondent in continuance thereof, such act being unjust, inequitable or injurious to the Petitioner and not such as can be addressed by an action at law. “***

The grant of the prayers sought by the applicant cannot therefore be of any help to him as he has confirmed that he has already been evicted from ***LR No 209/16717*** and ***LR No 209/16716***.

The upshot of the foregoing is that this court finds that the applicant’s application dated ***10<sup>th</sup> October 2013*** is without merit and the same is dismissed with costs to the plaintiff and interested party.

It is so ordered.

**Dated, Signed and delivered this 13<sup>th</sup> day of February, 2015**

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mr Ochieng for the Plaintiff/ Respondent

None attendance for the Defendants/Applicants though served with a Ruling Notice.

Kamau: Court Clerk

**L.N. GACHERU**

**JUDGE**