



**REPUBLIC OF KENYA**

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

**ENVIRONMENTAL & LAND DIVISION**

**ELC CIVIL NO. 1542 OF 2014**

**SARAH WANJIRU NDAMBARI.....PLAINTIFF**

**-VERSUS-**

**DANIEL JOSEPH GATHAIYA NJAGI.....1<sup>ST</sup> DEFENDANT**

**ELIJAH MBUTHIA IRURA T/A**

**WARLEEN AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff seeks an injunctive order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants their servants and or agents assigns employees from interfering trespassing or otherwise dealing with the Plaintiffs property known as Land Reference No. 209/11092/32 Nrb pending hearing and determination of suit.
2. The application is dated 10<sup>th</sup> December, 2014 based on the grounds stated on the face thereof as well as the affidavit of the Plaintiff sworn on the same day.
3. The application is premised on the following facts. The Plaintiff is the beneficial owner of the suit property and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have falsely presented themselves as the proprietors of the suit property and have further proceeded to obtain court orders to evict the Plaintiff's tenant from the suit property. The orders were obtained by the first Defendant in the Chief Magistrates court vide a miscellaneous application No. 1100 of 2014. Apparently, the Plaintiff's tenant has himself moved the court in Milimani Civil Case No. 245 of 2014 seeking to regain possession of the premises and the said suit is still pending.
4. As evidence of proprietorship the Plaintiff has exhibited a lease between the Plaintiff's deceased husband Taylor Chabari and the City Council of Nairobi, the predecessor in title to the County Government of Nairobi. The lease was issued in 1997 and registered on 29<sup>th</sup> May, 1998 under the Registration of Titles Act (Cap 281) Laws of Kenya. The Plaintiff's husband was until his demise on 21<sup>st</sup> December, 2013 the registered proprietor of the suit property. The Plaintiff did obtain the Grant of Letters of Administration intestate of the estate of the deceased Taylor Chabari on 22<sup>nd</sup> July, 2014 effectively entitling the Plaintiff to file this suit.

5. It is the Plaintiff's statement that the 1<sup>st</sup> Defendant with the assistance of the 3<sup>rd</sup> Defendant fraudulently obtained a title namely a Certificate of Lease under title No. Nairobi Block 37/113 and which Certificate of Lease the 1<sup>st</sup> Defendant has used to lay claim to the Plaintiff's property registered as Land Reference No. 209/11092/32.
6. Despite service with the suit papers as well as the application none of Defendants filed a reply to the application or appeared before the court on 9<sup>th</sup> February, 2015 when the application came up for hearing.
7. I have considered the application as well as the Plaintiff's affidavit. It is evident that the Plaintiff's deceased husband was until his demise on 21<sup>st</sup> December, 2013 the registered proprietor of the suit property known as Land Reference No. 209/11092/32. The Plaintiff is the widow and administrator of the deceased's estate. Evidently, the Plaintiff has the standing to bring and maintain this suit as the suit property constitutes part of the deceased's assets. The Plaintiff is also entitled as the administrator to claim both legal and beneficial ownership subject to confirmation of the Grant of Letters of Administration under Section 71 of the Law of Succession Act (Cap 160). Likewise the Plaintiff is under an obligation to secure the assets of the deceased's estate.
8. From the affidavit evidence, it is easy to ascertain the Plaintiff's registrable interest the suit property. It is also easy to ascertain the effect that the Plaintiff's deceased husband had actually let the premises to third parties. This is evident from a copy of the lease between the deceased and the Nairobi City Council as well as the Lease Agreement between the deceased and one Nazaf M. H. Daud. Records from the County Government of Nairobi's rates department also reveal that the suit property as of February, 2014 was still registered in the name of the deceased. The same too is a reflected by the records obtaining from the Central Lands' Registry. All these would point to proprietorship obtaining under a Lease which ought to be protected under **Sections 24, 25 and 26** of the **Land Registration Act** from any unauthorized or unpermitted interferences.
9. From the record too, it would appear that the 1<sup>st</sup> Defendant also holds a Certificate of Lease which was issued by the 3<sup>rd</sup> Defendant on 12<sup>th</sup> January, 2009 pursuant to a lease by the Nairobi City Council. The original lessee was one Kevin Gicheru Maina. It is however not clear how the 1<sup>st</sup> Defendant acquired ownership of the property known as title No. Nairobi/Block 37/113. The Plaintiff states that it is the same property. Is this possible? Apparently, yes. The 1<sup>st</sup> Defendant's title is registered under the Registered Land Act (Cap 30) now repealed. The Plaintiff's title is registered under the Registration of Titles Act (Cap 281) (also now repealed). **Sections 104 and 105** of the **Land Registration Act** as well as **Section 162** of the **Land Act** save and protect title documents and titles issued under the repealed statutes. Effectively, both the Plaintiffs as well as the 1<sup>st</sup> Defendants titles were transited and saved with the repeal of both the Registration of Titles Act and the Registered Land Act.
10. Obviously, even a person who knows nothing about land registration would tell you that concurrent or double registration of title to the same piece of land on two different persons is an invitation to trouble. The problem is that as a matter of law the disputed land can only be owned by either the claimant or the defendant but not both. The trial court will have to sort out this muddle and decide who has a better title.
11. For now it must hinge on the preliminary evidence and which title was first in time. In this case the Plaintiff's title was. The Plaintiff would then in the circumstances have established a prima facie case with chances of success. The 1<sup>st</sup> Defendant on the other hand may as well want to counter the same by claiming that the 1<sup>st</sup> Defendant ownership is also protected under **Sections 24, 25 and 26** of the **Land Registration Act**. That may very well be so, but it must be noted that he Plaintiff's title was issued first in time. Then there is nothing before the court to show that the same was at one time surrendered back to the lessor to allow for its subsequent allotment and leasing to the 1<sup>st</sup> Defendant under a different registration regime. The Plaintiff in fewer words

stands in better stead at this stage of the proceedings and especially in the absence of the 1<sup>st</sup> Defendant's side of the story.

12.As to whether the Plaintiff stands to suffer irreparably, I have little doubt in so holding. The subject matter of the suit is land; it is a unique item. Monetary compensation hardly makes up for the loss. In any event, under Section 26 of the Land Registration Act, if the trial court finally determines that the 1<sup>st</sup> Defendant's title was unprocedurally or fraudulently or irregularly acquired then the same must be cancelled. I do not see how such cancellation can be avoided through an award of damages.

13.I hold the view consequently that the circumstances of this case would dictate that the suit property is protected by way of an injunction. I will consequently allow the application dated 10<sup>th</sup> December, 2014 in terms of prayer No. 3 which is that pending the hearing and determination of this suit the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, agents, assigns, employees or any one claiming under them be restrained by way of an injunction from interfering, trespassing or otherwise dealing with the Plaintiffs property known as Land Reference No. 209/11092/32.

14.Further with a view to ensuring the efficacy of such court order, I further order pursuant to the provisions of Section 68 of the Land Registration Act that pending determination of this suit or until further orders of the court an order of inhibition do issue inhibiting the registration of any dealing with the properties known as Land Reference No. 209/11092/32 and Title No. Nairobi/Block 37/113. The extracted order of this court is to be registered against both the registers of Title No. Nairobi/Block 37/113 and Land Reference No. 209/11092/32.

15.The Plaintiff will have the costs of the application.

16.Orders accordingly.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of April, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

Mr. Onyancha for the Plaintiff/Applicant

No appearance for the Defendants/Respondent