



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC NO. 436 OF 2014**

**DANIEL MWANGI KARANJA.....PLAINTIFF**

**VERSUS**

**RAILWAYS HOUSING CO-OPERATIVE SOCIETY LTD.....1<sup>ST</sup> DEFENDANT**

**NDATANI ENTERPRISES COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**FUTURE PROPERTY AGENCY LIMITED.....3<sup>RD</sup> DEFENDANT**

**HENRY NYABUTO BORURA.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming up for determination is the Plaintiff's Notice of Motion application dated *18<sup>th</sup> March 2014* for orders that:

1. *Spent*
2. *Spent*
3. *An order of temporary injunction restraining the 4<sup>th</sup> Defendant by himself, his agents, servants and all those claiming under him from erecting any structures on or in any way interfering with the Plaintiff's Plot No. Mavoko Town Block 52/89 (Plot No. 100) pending the hearing and determination of the suit.*
4. *Spent*
5. *An order of temporary injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their agents, servants and all those claiming under them from selling, erecting any structures or in any way interfering with the Plaintiff's Plot No. 245 Embakasi pending the hearing and determination of the suit.*
6. *The OCPD Embakasi be directed to give effect to the Court Order*
7. *Costs be provided for.*

The application is premised on grounds that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants have illegally and fraudulently sold the Plaintiff's plot to the 4<sup>th</sup> Defendant and are likely to sell another plot to potential purchasers. In that event, the Plaintiff stands to suffer irreparable loss as he has already paid the full purchase price for the two plots and started developing one of them.

The application is supported by an affidavit sworn by the Plaintiff wherein he deposes that he purchased 2 plots (No. 83 and 245) from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and paid a consideration of Kshs. 145,000/-. However that he was never issued with a title despite making several follow-ups. The Plaintiff deposed that in **19<sup>th</sup> October 2013** he learnt that the 4<sup>th</sup> Defendant had trespassed on Plot No. 83 later changed to Plot No. 100 and on enquiry; the 4<sup>th</sup> Defendant claimed ownership thereof and produced a title in his favour. The Plaintiff stated that he learnt that the 3<sup>rd</sup> Defendant had sold Plot No. 83 to the 4<sup>th</sup> Defendant and that he was apprehensive that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants would dispose of Plot No. 245. In support of his case, the Plaintiff annexed copies of receipts evidencing Payment to the 1<sup>st</sup> Defendant for Plots No. 83 and 245.

**Evans Orangi Bogonko**, the Chairman of the 1<sup>st</sup> Defendant swore a Replying Affidavit on 22<sup>nd</sup> October 2014. The deponent gave a brief history that sometimes in the year 2003, the 2<sup>nd</sup> Defendant contracted the 1<sup>st</sup> Defendant as a selling agent of its various properties in Embakasi and Kitengela which were still in blocks awaiting sub-division but informally, the properties had been sub-divided and the plots numbered sequentially pending proper registration. It was deposed that the Plaintiff did indeed purchase Plots No. 100 and 245 within LR. No. 7340/90 Embakasi Phase I and paid for the plots in full.

The deponent explained that the agency contract between 1<sup>st</sup> and 2<sup>nd</sup> Defendants became disputed after the 2<sup>nd</sup> Defendant purported to repudiate it. Subsequently, the 2<sup>nd</sup> Defendant instituted a suit **Machakos HCCC No. 224** of 2009 seeking injunction orders against the 1<sup>st</sup> Defendant from further sale of the various plots. The 1<sup>st</sup> Defendant also sought injunction orders restraining the 2<sup>nd</sup> Defendant from interfering with the properties and transferring the same to persons other than those who had purchased from 1<sup>st</sup> Defendant. The deponent referred to the Court Order in Machakos HCCC No. 224 of 2009 issued on **15<sup>th</sup> March 2010** deposing that, it was clear that the Plaintiff herein is a beneficiary from the contents of the said order. Consequently, that any sale and transfer of plots by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the 4<sup>th</sup> Defendant was inconsequential in view of the injunction order. The deponent maintained that from the chronology of events, the 1<sup>st</sup> Defendant had played no role in the Plaintiff's woes and therefore an injunction sought against it cannot issue.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through their Director, **Alexander Muema Muthengi** swore a Replying Affidavit on **30<sup>th</sup> July 2014**. The Director denied ever selling plots to the Plaintiff or promising to give title. It was his deposition that the disputed plot belonged to the 4<sup>th</sup> Defendant.

The 4<sup>th</sup> Defendant swore a Replying Affidavit on **3<sup>rd</sup> November 2014** wherein he deposed that he is the owner of the Mavoko Town Block 52/89 having purchased the same from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Therefore, that he should not be dragged to any dispute between the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The application was canvassed by way of written submissions, which I have carefully read. The dispute before Court is the ownership of a parcel of land known as, according to the Plaintiff, Plot No. 83 also known as Plot No. 100 and according to the 4<sup>th</sup> Defendant, **Mavoko Town Block 52/89**. From the pleadings, it emerges that the Plaintiff purchased the parcel from the 1<sup>st</sup> Defendant whereas the 4<sup>th</sup> Defendant purchased the same from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 1<sup>st</sup> Defendant explained the principal-agent relationship it had with the 2<sup>nd</sup> Defendant and the dispute that arose between them leading to the injunction orders obtained in **Machakos HCCC No. 224 of 2009**. This relationship, the 2<sup>nd</sup> Defendant has remained tight lipped to comment on.

Notably, also, despite the 4<sup>th</sup> Defendant asserting to be the registered owner of the suit parcel, he has failed to avail a copy of the title document and receipts evidencing payment of the purchase price thereof. On the other hand, the Plaintiff exhibited the copies of receipts showing payment of the purchase price for Plot No. 83. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have also remained economical with the information as to how the Plaintiff acquired the title to the disputed plot noting that there was an injunction order in favour of the 1<sup>st</sup> Defendant herein against the 2<sup>nd</sup> Defendant in in ***Machakos HCCC No. 224 of 2009***. On perusal of the said Court Order, the Plaintiff's name herein appears in the list of purchasers as ***No. 38 (Plot 100) and 151 (Plot 245)*** denoting that he was a beneficiary of the said order. The Court of Appeal in the case of ***Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal number 239 of 2009*** held that:

***“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal, and free from any encumbrances including any and all interests which would not be noted in the register.”***

In this instance, the 4<sup>th</sup> Defendant has not even availed the instrument of title as proof of ownership let alone demonstrated how he acquired the title. In addition, **Section 26 of the Land Registration Act, 2012** provides that title can be challenged (a) **On the ground of fraud, or misrepresentation 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.**

It is evident that ownership and the legality of acquisition of title are issues that can only be determined at the trial upon further evidence. In the meantime, however, the Court is convinced that the Plaintiff has established an interest over the disputed plot and it would therefore be in the interest of justice that the same be safeguarded pending the determination of the suit. As regards **Plot No. 245**, it is my finding that the Plaintiff has not laid a basis for the grant of injunction order. His is a mere apprehension that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will dispose of the same, which cannot be a basis for injunctive relief. In the circumstances, the Plaintiff's application is hereby allowed to the extent that:

- 1. The 4<sup>th</sup> Defendant is hereby restrained from selling, transferring, carrying on further development, or in any way alienating Plot No. Mavoko Town Block 52/89 (Plot No. 100) also referred to as Plot No. 83 pending the hearing and determination of the suit or until further orders of this court.***
- 2. Costs of the application shall be in the cause.***

It is so ordered.

Dated, Signed and Delivered this 19<sup>th</sup> day of June 2015

**L. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the 1<sup>st</sup> Defendant

.....For the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

.....For the 4<sup>th</sup> Defendant

Hilda: Court Clerk