



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 428 OF 2009

GODFREY GITONGA.....1ST PLAINTIFF
DUNCAN KINGANGI KANYI.....2ND PLAINTIFF
PETER NDAMBIRI KING'ANGI.....3RD PLAINTIFF
CHARLES MUNENE GATIMU4TH PLAINTIFF
KELLEN WARIARA5TH PLAINTIFF
PATRICK GATIMU.....6TH PLAINTIFF
PAUL NJOROGE7TH PLAINTIFF
JUDY WAMBUI.....8TH PLAINTIFF
MOTOR COMPONENTS & ACCESSORIES LTD... 9TH PLAINTIFF
MARUEI AUTO SPARES LIMITED10TH PLAINTIFF
PATA ELECTRICAL AND
GENERAL HARDWARE LTD11TH PLAINTIFF
SPEAR GENERAL ENTERPRISES LIMITED.....12TH PLAINTIFF
LABAN CHEBON BETT.....13TH PLAINTIFF
JONATHAN KAVUVI MUTIA.....14TH PLAINTIFF
DANIEL MUTUA.....15TH PLAINTIFF

SAMUEL MWAURA KARANJIA.....	16 TH PLAINTIFF
JONATHAN MBERI MAMBO.....	17 TH PLAINTIFF
MARGARET MUENI KAVUVI.....	18 TH PLAINTIFF
DORCAS ANNA.....	19 TH PLAINTIFF
RONALD MUTAYI.....	20 TH PLAINTIFF
MUTISYA NZIOKA.....	21 ST PLAINTIFF
HENRY MAKHOKA.....	22 ND PLAINTIFF
NANCY WANGARI NJOROGE & ANOTHER.....	23 RD PLAINTIFF
BENSON NGUII MAKUSA.....	24 TH PLAINTIFF
CHARLES MWANGANGI.....	25 TH PLAINTIFF
ABIGAEEL MWENDE MAIBO.....	26 TH PLAINTIFF
MR. OMBATI.....	27 TH PLAINTIFF
MR. JULIUS M. KIPTARUS.....	28 TH PLAINTIFF
FRANCIS WANGUI MBATIA.....	29 TH PLAINTIFF
JOHN WANYAMA NYONGESA.....	30 TH PLAINTIFF
NANCY NJERI NDICHU.....	31 ST PLAINTIFF
FRANCIS N. THAIYA.....	32 ND PLAINTIFF
SIMON MULANG'A.....	33 RD PLAINTIFF
MAJ. PETER KING'ANGI.....	34 TH PLAINTIFF
LUCY GAKURU.....	35 TH PLAINTIFF
CHARLES NDIRANGU KARIUKI.....	36 TH PLAINTIFF
FRANK KARURI MWANGI.....	37 TH PLAINTIFF
PATRICK GATIMU.....	38 TH PLAINTIFF
JUPA GEN ENTERPRISE LIMITED.....	39 TH PLAINTIFF
JULIUS KING'ARA NDEGWA.....	40 TH PLAINTIFF
RICHARD MUGU NGUNYENYE.....	41 ST PLAINTIFF

NORAH ATUTI.....	42 ND PLAINTIFF
MONICAH W. KAMAU.....	43 RD PLAINTIFF
FLORENCE MWANGI.....	44 TH PLAINTIFF
DIANA KATUNGE.....	45 TH PLAINTIFF
PETER WAITHAKA KAMUNYU.....	46 TH PLAINTIFF
KATE WANGUI.....	47 TH PLAINTIFF
ROSE KARIUKI.....	48 TH PLAINTIFF
EDWARD MUNGONG’U.....	49 TH PLAINTIFF
JOHN KARIUKI.....	50 TH PLAINTIFF
GEORGE MUNINI GITHUA.....	51 ST PLAINTIFF
CHARITY GACHERI.....	52 ND PLAINTIFF
MERCY KAGWIRA.....	53 RD PLAINTIFF
DOMINIC KIMATHI.....	54 TH PLAINTIFF
ESTHER MWITI.....	55 TH PLAINTIFF
BETTY WASULWA.....	56 TH PLAINTIFF
JACQUELINE ADAMBA.....	57 TH PLAINTIFF
ROSE SANYA.....	58 TH PLAINTIFF
ADELINE ATIENO OKELLO.....	59 TH PLAINTIFF

VERSUS

GLOBAL HOLDINGS LIMITED.....	1 ST DEFENDANT
COMMISSIONER FOR LANDS.....	2 ND DEFENDANT
KIJIJI PROPERTIES LIMITED.....	3 RD DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 29th November 2013 (hereinafter referred to as “the present Application”) in which the Plaintiffs/Applicants are seeking for an interim injunction restraining the 3rd Defendant from selling or disposing off the parcels of land known as L.R. Nos. 25821 to 25922 and/or L.R. No. 21215 (hereinafter referred to as the “Suit Properties”) pending the

hearing and determination of the present Application and suit. They further seek that the 2nd Defendant be ordered to inspect the development being carried out by the 3rd Defendant to establish if it is being done on the Suit Properties. The Plaintiffs/Applicants also seek that the 3rd Defendant be ordered to pay the costs of the present Application.

The present Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Charles Munene Gatimu sworn on 29th November 2013 in which he averred that in 1989, both he and his co-Plaintiffs were allocated 101 parcels of land being the Suit Properties from the then Mulinge Scheme situate in Mavoko Municipality in Machakos. He exhibited some title deeds for some of the parcels. He further averred that on 20th August 2009, the 1st Defendant unlawfully and illegally moved into the Suit Properties, started digging trenches and was in the process of putting a permanent wall to fence off the land. He further averred that as a result of that, they instructed their advocates to proceed to file this suit against the 1st Defendant. He further stated that the Suit Properties have now changed hands and are in the name of the 3rd Defendant which has deposited building materials therein and commenced development.

The present Application is contested. The 1st Defendant filed the Replying Affidavit of Ken Okall, the General Manager, who swore that this matter is res judicata. He averred that the Plaintiffs filed a similar Chamber Summons application dated 26th August 2009 (hereinafter referred to as “the previous Application”) which was dismissed by Hon. Justice Muchelule on 22nd June 2010. He further averred that the issues raised in the present Application are the same as those which were raised in the previous Application. He further averred that the only new matter raised in the present Application is the inclusion of Kijiji Properties Limited as the 3rd Defendant. He further pointed out that the Hon. Justice Muchelule delivered a substantive ruling in the previous Application dismissing the same, that the court held that the Suit Properties were not available for alienation, that the 1st Defendant was deemed to be a bona fide purchase for value, that the Plaintiffs have not demonstrated a prima facie case with a probability of success and that the Plaintiffs cannot assert otherwise in the present Application, the same issue having been conclusively determined by this honourable court. He further averred that the present Application is a gross abuse of the court process and ought to be dismissed with costs.

The present Application is further opposed by the 3rd Defendant which filed the Replying Affidavit of Bhupendra Meghji Shah, a director of the 3rd Defendant, sworn on 16th December 2013, who averred that the matter directly and substantially in issue in the present Application was directly and substantially in issue in the previous Application which involved the Plaintiffs/Applicants and the 1st Defendant which application was litigated upon and was dismissed with costs. He further averred that in view of the fact that the 3rd Defendant’s claim to ownership of the Suit Properties is derived from the 1st Defendant, the present Application is res judicata. He further averred that the 3rd Defendant does not know the Plaintiffs/Applicants and is not aware of their claims over the Suit Properties and further that the 3rd Defendant does not know the existence or whereabouts of all those parcels of land known as L.R. Nos. 25821-25922 as the 3rd Defendant is the lawful owner of L.R. No. 21215 only. He further averred that in any event, the Plaintiffs/Applicants failed to comply with the conditions of allotment or develop the properties as required and therefore their terms of allotment lapsed. He further averred that prior to purchasing L.R. No. 21215, he conducted the necessary due diligence, entered into a sale agreement with the 1st Defendant and paid the agreed purchase price of Kshs. 205 million financed by a loan from Bank of Baroda which has a charge over the land. He further averred that at the time of the sale the 100 acres which are the subject of this suit which are being claimed by the Plaintiffs/Applicants lay fallow and that save for the perimeter beacons, the land was undivided, unfenced and was guarded by the guards placed there by the 1st Defendant. He further averred that the 3rd Defendant conducted its affairs above board, did not defraud or collude with anybody to defraud the Plaintiffs/Applicants and as such the present Application should fail.

In response thereto, the Plaintiffs/Applicants filed the Further Affidavit sworn by Charles Munene Gatimu on 12th February 2014 wherein he stated that the Commissioner of Lands has since confirmed

that the Suit Properties belong to the Plaintiffs. He further averred that if the 3rd Defendant is not restrained from further disposing off the Suit Properties to a third party, this suit may end up being more complicated as has been occasioned by the last transfer and the same may never come to an end.

The issue I must address is whether the present Application is res judicata. It has been submitted that the Plaintiffs/Applicants brought the previous Application seeking similar remedies as they are seeking in the present Application. It is submitted that the previous Application was dismissed by Muchelule, J. on 22nd June 2010. I wish to set out the relevant provisions of the law which is **section 7** of the **Civil Procedure Act** which states as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same Parties or between Parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised has been heard and finally decided by such court.”

I have perused the previous Application. The remedies sought by the Plaintiffs/Applicants in the previous Application were orders of a temporary injunction restraining the 1st Defendant from encroaching or in any other way interfering with the Suit Properties pending the hearing and determination of the previous Application and of the suit. Clearly, the issue that the court was required to determine in the previous Application was who as between the Plaintiffs and the 1st Defendant had established that they had ownership rights over the Suit Properties on a prima facie basis. The court delivered a ruling on that issue on 22nd June 2010 stating that the Plaintiffs/Applicants had failed to establish a prima facie case that they were entitled to ownership rights over the Suit Properties. The same issue has now been brought again to this court through the present Application in which the Plaintiffs/Applicants are seeking the same temporary injunction against the 3rd Defendants who bought the Suit Properties from the 1st Defendants. As far as I can see, the issue is the same and it was convincingly dealt with by Justice Muchelule in his ruling. I do therefore agree that the present Application is res judicata. It must now be clear that the present Application is an abuse of the court process. It must be dismissed and it is hereby dismissed with costs to the Defendants.

It is so ordered.

**SIGNED AND DELIVERED AT NAIROBI THIS 14th ___ mDAY OF
March 2014**

MARY M. GITUMBI

JUDGE