



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 385 OF 2012**

NISHITH YOGENDRA PATEL.....1<sup>ST</sup> PLAINTIFF

*(Suing as a Legal Representative of Yogendra Purshottam Patel*

NILESH PRAHLADBHAI PATEL .....2<sup>ND</sup> PLAINTIFF

VERSUS

NAIBUROME EAST AFRICA LTD.....1<sup>ST</sup> DEFENDANT

CLAUDE LYONS ( EA) CO.LTD.....2<sup>ND</sup> DEFENDANT

DANIEL KINYUA MUGO.....3<sup>RD</sup> DEFENDANT

REGINA NYOKABI KURIA.....4<sup>TH</sup> DEFENDANT

THE COMMISSIONER OF LANDS.....5<sup>TH</sup> DEFENDANT

CHIEF LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT

**RULING:**

The matter coming up for determination is the Notice of Motion application dated 30<sup>th</sup> July, 2012 brought by the Plaintiffs/Applicants herein against the 2<sup>nd</sup>, 3<sup>rd</sup>, & 4<sup>th</sup> Defendants/Respondents seeking an injunctive order. The application is brought under **Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules** and the inherent power of the Court. It seeks for these orders:-

- a. *That an interim Injunction be issued restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants either by themselves or their agents and /or employees or otherwise whomsoever from trespassing, transferring, offering for sale, leasing, charging or alienating and/or interfering and/or otherwise dealing in any other manner howsoever with the Plaintiffs' property known as LR No. 12442 pending hearing and determination of this suit.*
- b. *Costs of this application be provided for.*

The application was premised on the grounds stated on the face of the application and on the supporting affidavit of **Nishith Yogendra Patel**. The grounds in support of the Notice of Motion are:-

- i. *The Plaintiffs and one **Pascale Mireille Baksh**, (nee Patel) are the owners of the suit property LR.No 12442.*
- ii. *That the 2<sup>nd</sup> Defendant has recently been allegedly fraudulently registered as the owner of the property from 23<sup>rd</sup> May 2006 and the Plaintiffs have never transferred the property to the 1<sup>st</sup> nor 2<sup>nd</sup> Defendants.*
- iii. *That the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who are Directors of the 2<sup>nd</sup> Defendant have trespassed on the land and or caused 3<sup>rd</sup> parties to trespass on the property.*
- iv. *The Plaintiffs stand to suffer substantial and irreparable loss should the prayers sought herein not granted, which loss cannot be compensated by an award of damages.*

The deponent **Nishith Yongendra Patel** swore his Supporting Affidavit and averred that at all material times, the late **Yogendra Purshottam Patel**, the late **Rajnikant Purshottam Patel** and the late **Prahladbhai Purshottam Patel** were the registered owners of the property known as L R No. 12442 (Original Number 4508/2/1) as tenants in common in equal shares measuring 26.73 hectares. He further averred that he has lived on his property for over 50 years. It was his contention that after the death of the three original owners, the Plaintiffs and one **Pascale Mireille Baksh** (nee Patel) became the bonafide owners of the suit property popularly known as **Kigwa Farm**.

The deponent further averred that a dispute arose over the suit property in 1995, wherein civil case No. 619 of 1995 was filed. Judgment was delivered on 13<sup>th</sup> March 2006, and the deponent was aggrieved by that decision. He filed an appeal at the Court of Appeal, Civil appeal No. 189 of 2007 which is still pending in court. Meanwhile, one **Pascale Mireille Baksh (nee Patel)** had lodged a caveat against the title claiming beneficiary interest on 11<sup>th</sup> November, 1993. He further contended that he is informed by the said Pascale Mireille Baksh (nee Patel) that she has not applied to withdraw the said caveat.

Further, he deposed that the 1<sup>st</sup> Defendant fraudulently obtained registration or ownership of the suit land allegedly on 10<sup>th</sup> January, 1994. The 1<sup>st</sup> Defendant allegedly later sold the suit property to the 2<sup>nd</sup> Defendant on 23<sup>rd</sup> May 2006 for **Ksh.120, 000,000/=**. It was his contention that the said transaction was effected during the pendency of the civil suit and it is therefore fraudulent. The deponent therefore urged the court to grant Orders sought to avert any loss.

The Notice of Motion is vehemently opposed by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants herein. One **Pius Abuki Bwonger**, one of the Shareholders and the Managing Director of the 2<sup>nd</sup> Defendant swore an affidavit on behalf of the 2<sup>nd</sup> Defendant.

The Respondent denied the entire allegation contained in the applicants' Notice of Motion dated 3<sup>rd</sup> July, 2012. He further averred that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have no **locus standi** to file the suit herein. He contended that the 2<sup>nd</sup> Defendant is the registered proprietor of all that parcel of land known as LR No. 12442 (original 4508/2/1) having purchased the same from the 1<sup>st</sup> Defendant on 21<sup>st</sup> December, 2005 as per the copy of the sale agreement marked PAB5. He reiterated that the 2<sup>nd</sup> Defendant purchased the suit property after due diligence and ascertaining that the 1<sup>st</sup> Defendant was the registered proprietor and 2<sup>nd</sup> Defendant paid all the payments due to the government and obtained consent from the Commissioner of Lands for the transfer of the suit property as evidenced by PAB 6.

The Respondent further deposed that prior to purchase; the directors of 2<sup>nd</sup> Defendant visited the suit property in company of the directors of the 1<sup>st</sup> Defendant who pointed out the beacons to them.

Consequently after the transfer, the 1<sup>st</sup> Defendant handed over possession of the suit property to the Directors of the 2<sup>nd</sup> Defendant. Subsequently, the 2<sup>nd</sup> Defendant has had quiet and peaceful possession of the suit property and has carried a lot of improvements and maintenance of the property. The 2<sup>nd</sup> Respondent therefore averred that he is a stranger to all the allegations raised by the 1<sup>st</sup> Plaintiff and that 2<sup>nd</sup> Defendant is a bonafide purchaser for value and not a party to any fraud as alleged. He prayed for dismissal of the Notice of Motion dated 3<sup>rd</sup> July 2012 with costs.

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not file any Replying Affidavit instead, they filed a Notice of preliminary objection in which they averred that:-

- i. *The suit/claim as against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is incurably defective as the said Defendants are shareholders and directors of the 2<sup>nd</sup> Defendant and thus cannot be sued.*
- ii. *That the suit/claim as against the 3<sup>rd</sup> and 4<sup>th</sup> Defendant offends the express provisions of the Companies Act , Cap 486 Laws of Kenya and should be struck off .*
- iii. *That the suit/claim against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is an abuse of the court process and should be struck out.*

The 1<sup>st</sup> Plaintiff herein, **Nishith Yogendra Patel**, filed a further Affidavit and reiterated that the Plaintiffs' did not have the original title deed, because it was deposited by the late **Yogendra Purshottam Patel** to the Ministry of lands to enable a surrender of a portion of the suit property for the purposes of construction of Roads. He further stated that the suit property is an agricultural land and the Defendants failed to get the Land Control Board Consent required in this transaction and therefore the transaction is a nullity. He also disputed that the 2<sup>nd</sup> Defendant is enjoying any vacant and/or peaceful possession of the property as the applicant has custody of the suit property and there are no improvements made by any of the Defendants on the property.

The 3<sup>rd</sup> Defendant, **Daniel Kinyua Mugo**, also filed a supplementary affidavit and averred that he is also one of the Directors of the 2<sup>nd</sup> Defendants and reiterated the contents of the Affidavit sworn on 7<sup>th</sup> August 2012. He further averred that since 1<sup>st</sup> Plaintiff admitted that he did not have original title deed that was enough evidence that the property did not belong to the plaintiff herein as the same had already been sold to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein. 3<sup>rd</sup> Defendant further deposed that there was no evidence to show that 1<sup>st</sup> Plaintiff was the legal representative the Estate of **Yogendra Purshottam Patel** and therefore Plaintiffs have no **locus standi** to bring any proceedings herein in respect of the suit property. He further averred that the 2<sup>nd</sup> Defendant is a total stranger to the allegations raised by the Plaintiffs herein.

Further, on 1<sup>st</sup> October, 2013, the 4<sup>th</sup> Defendant filed a Notice of Preliminary objection on points of law and stated that the suit against the 4<sup>th</sup> Defendant's as drawn is unsustainable as it offends the mandatory provisions of law. It was contended that the parallel operation of the present civil case and criminal case at Milimani Chief Magistrates Court **CR. Case No. 1603 of 2012 is** prejudicial to the 4<sup>th</sup> Defendant's right to fair trial.

The parties herein consented to canvass this Notice of Motion by way of written submissions. I have now carefully considered the pleadings generally, the annexures thereto, the relevant provisions of law and the written submissions and I make the following findings.

I have taken into account that at this stage, I am not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled to determine at this stage is whether the applicants are entitled to an injunction sought on the usual criteria of whether they have made out a prima facie case with probability of succeeds at the trial. The other issue is whether or not the applicants have shown that they are likely to suffer an injury which could not be adequately compensated in damages if

the injunction is refused and if the court is in doubt to decide on a balance of convenience (See **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd, Nairobi ( Milimani) High Court Civil Case No. 1118 of 2002**).

The applicants have come to court seeking injunctive relief. This is an equitable remedy which is granted at the discretion of the court. However, this discretion must be exercised judicially.

From the perusal of the available documents annexed herein, there is no doubt that the suit property **LR No. 12442** was initially owned by **Yogendra Purshottam Patel, Rajnikant Purshottam Patel and Prahladbhai Purshottam Patel** (The above persons are now deceased). This is evident from copy of registration of titles **NYP1**. There is also no doubt that the suit land was dogged with ownership dispute which culminated in High Court Civil Case No. 617 of 1995, **Yogendra Purshottam Patel Vs Pascale Mireille Baksh, Nilesh Prolahad Patel and Chachalben Patel**. Judgment in the above Civil Case was issued on 13<sup>th</sup> March 2006 by Githinji J. There is no doubt that an appeal No. 189 of 2007 was filed at the Court of Appeal. It was alleged that the said Civil Appeal is still pending in court. The suit land is popularly known as **Kigwa Estate**.

It is also evident from the copy of certificate of title; one **Pascale Mireille S Patel** had lodged a caveat on 11<sup>th</sup> November 1993 through presentation No. 595 claiming beneficial interest. The said caveat was allegedly withdrawn on 10<sup>th</sup> November, 1994. It is also evident that the suit property was later transferred to **Naiburome East Africa Ltd**, on 18<sup>th</sup> January, 1994 through presentations No. 794.

Further on 23<sup>rd</sup> May, 2006, the suit property was allegedly transferred to **Claude Lyons (EA) Company Ltd**. This is the 2<sup>nd</sup> Defendant herein.

The Plaintiffs herein have alleged that the said suit property is embroiled in an ownership dispute and has never been sold to anyone. The 1<sup>st</sup> Plaintiff further alleged that one **Pascale Mireille Patel** has never withdrawn the caveat lodged in 1993. It was the plaintiff's contentions that the subsequent entries on the title documents are a forgery and fraudulently entries meant to deprive them of their property. 1<sup>st</sup> Plaintiff further contended that he has always been in custody and possession of the suit property and has never given vacant possession to the 1<sup>st</sup> Defendant nor 2<sup>nd</sup> Defendant. Further, Plaintiffs disputed that there are any developments on the suit land.

On their parts, the **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants** have contended that the suit property was legally purchased from the 1<sup>st</sup> Defendant on 23<sup>rd</sup> may, 2006 as evident from the sale agreement marked PAB 5 and the transfer documents even dated. The 2<sup>nd</sup> Defendant therefore claims ownership of the suit property.

From the foregoing, there is no doubt that the Plaintiffs' on other hand are claiming ownership of the suit land and the **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants** are claiming the same ownership. There is an ownership dispute which can only be effectively decided after calling evidence. The court finds that there is a controversy herein which needs to be litigated and determined through a full trial by calling of witnesses and examinations of the same.

Taking into account the foregoing, have the applicants established the threshold principles to enable this court issue the injunctive orders sought?.

The applicants needed to establish they have a **prima facie case** with high probability of success (See **Giella Vs Cassman Brown ( 1973) EA 358**).

Prima Facie case was defined in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125**, as:-

***“A Prima facie case in a civil application includes but not confined to a genuine and arguable***

*case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.*

The Plaintiffs have alleged that they are the lawful owners of the suit property. They also alleged that they have never sold the land to either the 1<sup>st</sup> or the 2<sup>nd</sup> Defendants herein. It was their contention that the title documents in the names of the 1<sup>st</sup> Defendant and later in the name of 2<sup>nd</sup> Defendant were fraudulently obtained. The above position is buttressed by the letter from the Principal Registrar of Documents, dated 20<sup>th</sup> July, 2012, which confirmed that the suit property was registered in the names of **Yogendra Purshottam Patel**, and that the entries in the title purporting that the same was transferred to 1<sup>st</sup> Defendant and later to 2<sup>nd</sup> Defendant were fake entries.

There is no doubt that the suit property has been engulfed in dispute over ownership. I believe that the parties would not have transferred the suit property while they had a civil dispute over the same property.

The Principal Registrar of Documents through her letter stated that the Plaintiffs are the registered owners of the suit property. Assuming that they are indeed the proprietors, then they were protected by **Section 23 of the Registration of Titles Act**

(Now repealed) which was in force when the suit land was allegedly sold out to the Defendants. The plaintiffs have alleged that they did not participate in the said sale. The circumstances of such transactions need to be interrogated through a full trial.

**Section 23 of the Registration of Title Act** reads as follows:-

**“The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof; shall be taken by all courts as conclusive evidence that the person named as proprietor of the land is the absolute and indefeasible owner; thereof 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; on grounds of fraud or misrepresentation to which he is proved to be a party”.**

The Plaintiffs in their submissions relied in the case of **Wreck Motors Enterprises Vs The Commissioner of Lands & Others Civil Appeal No. 71 of 1997**, where the Court of Appeal held that **Section 23 of the Registration of Titles Act** was very specific on its protection of titles and it sanctified titles .

The 2nd, 3rd, & 4th Defendants on their part submitted that applicants have not established a prima facie case with probability of success. They further submitted that applicants did not produce the original title because the registered proprietors sold the same to the 1st Defendant who subsequently sold to the 2nd Defendant and therefore 2nd Defendant is a bonafide purchaser for value . However, the issues of whether Plaintiffs have original title and whether 2nd Defendant is a bonafide purchaser for value is an issue in controversy which only be determined after evidence has been called.

The Plaintiffs further relied on case of **Igbal Sigh Raj Vs Mark Leechini and Registrar of Titles, HCCC No. 1054 of 2001** where it was held that :-

**“ The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor . He obtained a transfer from a fraudulent person who had no claim to the land. He cannot, I find invoke the provisions of section 23(1) to say he obtained indefeasible title”.**

The Plaintiffs who were the original owners of the suit property have denied ever transferring this suit land. They have questioned the 2nd Defendant’s ownership of the land. The 1st Plaintiff is still in possession of the suit land and has an appeal pending over the suit property at the Court of Appeal. I find

and hold that the Plaintiffs have therefore established that they have a prima facie case with probability of success.

The other issue is whether the plaintiffs will suffer irreparable loss . There is evidence that the 1st Plaintiff got to know about the sale of this land after he saw some people on the suit land trying to survey and subdivide it. The 3rd and 4th Defendants have not denied that survey work was going on at the suit land at their instructions . If the said survey and subdivision is allowed to go on, the applicants property will have been interfered with and there is imment danger that the Plaintiffs might loose their right to property. The applicants have been in possession of this land all their life time and have invested in it as **Kigwa Estate** . If it is not preserved, the applicants stand to suffer irreparable loss that cannot be compensated by an award of damages.

On the balance of convenience, there is no evidence that the 2nd, 3rd and 4th Defendants have had vacant possession of the suit property. However, it is evident that the 1st Plaintiff is the one in possession of the suit land. The balance of convenience will therefore tilt in favour of the applicants herein (*See the case of James Jamwa Ndeda Vs Dorine Alouch Oluoch, Kisumu High Court , Civil case No. 136 of 2007*), where the court held that:-

**“The balance of convenience would tilt in favour of the defendant who is in actual occupation suit land rather than Plaintiff who may be in occupation by remote control”.**

The Defendants /Respondents had raised some preliminary objection which were not pursued in their submissions. I will make no findings in any of them.

Having now considered the pleadings herein, the written submissions and the relevant law, the court finds that the applicants Notice of Motion dated 3rd July 2012 is merited.

The same is allowed in terms of prayers No. 3 with costs to the applicants to be borne by the 2nd, 3rd and 4th Defendants jointly and severally.

It is so ordered.

Dated, signed and delivered this **16<sup>th</sup> day of May, 2014**

**L.GACHERU**

**JUDGE**

In the Presence of:-

Ms Mathai for the Plaintiffs/ Applicants

Mr. Nyaribo 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> for the Defendants/Respondents

None attendance for the other Defendants

Lukas: Court Clerk

**L. GACHERU**

**JUDGE**