



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 617 of 2012**

**KIGIO LAND & BUILDING COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF**

**JECINTA WAIGUMO NDIRANGU..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SIMON M. NJAU.....1<sup>ST</sup> DEFENDANT**

**MUTINDA MUTISO.....2<sup>ND</sup> DEFENDANT**

**A. INGOI.....3<sup>RD</sup> DEFENDANT**

**S.K NDEGWA T/A S. K. NDEGWA AUCTIONEERS.....4<sup>TH</sup> DEFENDANT**

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

**RULING.**

**1.** The application before Court is the Notice of Motion dated 19<sup>th</sup> September, 2012 brought under **Order 40 Rules 1 and 2** of the **Civil Procedure Rules** and all other enabling provisions of the law seeking orders:-

- 1). Spent
- 2). Spent
- 3). Spent

4). That the Defendants, their agents, servants be restrained by order of this court from transferring, interfering, alienating, collecting rents from the first Plaintiff's tenants, or in any other way interfering with the Plaintiffs and the first Plaintiff's tenants quiet possession of Land Reference Number 209/2490/59 pending the hearing and final determination of this suit.

5). That the fourth defendant be ordered to return the goods collected from the second plaintiff's house and open and reinstate the second plaintiff to her house pending the hearing of this application.

6).The first, second and third Defendants do surrender the Certificate of Title described as I.R No. 100877 to court for verification and/or safe keeping pending the hearing and finalization of this matter.

7). Any other relief deemed fit by the court for the purpose of prosecution of this matter.

8). Costs of this application.

2. The application is based on the following grounds:-

- a) That the first Plaintiff bought the suit premises in the year 1987 and had lease from the Government of Kenya which lease expired on/about January, 2002. The first Plaintiff applied for an extension therein and the 5<sup>th</sup> Defendant extended the lease for fifty years.
- b) The second Plaintiff is a director of the first Plaintiff and resides in the first Plaintiff's said suit premises and has resided in the suit premises for more than 20 years. There are other twenty two tenants.
- c) The first, second and third Defendants have purported to be the new owners of the suit premises and have obtained Court order for breaking in and levying distress.
- d) The Certificate of Title used by the first, second and third Defendant is not genuine and has not been issued by the fifth Defendant and the same is a subject of investigation by the criminal investigation department.
- e) That on the 6<sup>th</sup> September, 2012, the fourth Defendant in the presence of the first Defendant and under supervision of the Administration Police from Kariokor District Officer's office broke into the second Plaintiff's house, carried away all her goods, declined to record items collected and proceeded to change locks for the said premises.
- f) The first Defendant instructed the other tenants in the premises to forthwith deposit their rent to the first Defendant's Account as he was allegedly the owner of the suit premises.
- g) That the said order was obtained by giving false information to the court and using a fraudulently obtained title which is under investigation by the criminal investigation department. The first, second and third Defendants have threatened to demolish the suit premises unless the tenants therein comply with their demand.
- h) That unless the Defendants are restrained by the orders of this court they shall continue interfering with the Plaintiffs' premises thereby causing the Plaintiffs to suffer irreparable loss and damage.

Jacinta Waigumo Ndirangu James and Kamande A. Kiruga directors of the 1<sup>st</sup> plaintiff filed a supporting affidavits dated 19<sup>th</sup> September 2012.

3. The applicant's case is as follows. The 1st plaintiff brought the property L.R 209/2490/59 in the year 1987. The 1st plaintiff was the lessee of the government of Kenya up to January 2002 when the lease expired. The 1st plaintiff applied for extension of the lease and the 5th defendant the Commissioner of lands extended the lease for a period of 50 years vide its letter 25/8/10. They paid the land rents on about 18/11/10. That since 1989 the 2<sup>nd</sup> plaintiff has lived in the premises. After the lease was extended on about December 2011 the 2<sup>nd</sup> plaintiff went to City Council of Nairobi to check on the status of the rent account. She found that the same had accumulated and she negotiated to pay by monthly instalments. JWN2 is evidence of the said monthly instalments. That in April 2012 when the 2<sup>nd</sup> plaintiff went to pay the instalment she was given a demand in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant. On inquiring how the account name changed she was told that the 1st, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were the owners of the property L.R 209/2490/59. She was thereafter shown copies of the memorandum of registration of transfer of land and a grant I.R 100877. The 2<sup>nd</sup> plaintiff began her investigation at lands office where she was told that the title of which she had a copy of was not issued by the Commissioner of lands. Thereafter she reported the matter to Nairobi Area CID and investigations began. She took up the issue with City council they reversed the changes and the 1<sup>st</sup> plaintiff paid the bills on the 6/8/12. On the 6/9/12 she was told that a gang of people broke into her house in her absence and removed all the goods. On going to the house she was given a breaking order issued in the Chief Magistrate on MCA 694/12. The order indicated

that the 1<sup>st</sup> defendant was the landlord and she was the tenant. She demanded to find out from the 4<sup>th</sup> defendant about the alleged rent arrears who told her to go and peruse the Court file. She found all the goods removed and the house locks changed. The 1<sup>st</sup> defendant threatened to remove the doors if she gained entry into the house. She later perused the Court file and found that the affidavit in the said case had alleged she is in rent arrears of 1.3 million and that after proclamation she refused to open. She found out that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant had purported to use the title under investigation to get the said orders. As at the time of this application she had no access to the house nor did she know where her goods were. The tenants at the premises have also been threatened by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The affidavit of James Kamande A. Kiruga reiterated the contents of the 2<sup>nd</sup> plaintiff's affidavit. The firm of Muoki and Company filed a notice of appointment on behalf of 1, 2, 3 and 4<sup>th</sup> defendants.

4. In opposing the application under consideration they filed grounds of opposition as follows;

- a) That the Plaintiffs have no locus standi to file the suit and the application dated 19th September, 2012 be dismissed.
- b) The Applicants have no registered legal or any equitable interest in the property and therefore not entitled to any reliefs sought in the application.
- c) It is apparent in the face of the records that the Plaintiffs lost their interest in the property in 2002 after the expiry of the lease and the purported extension of the same in 2010 in a nullity.
- d) The application dated 19th September, 2012 is based on falsehood misrepresentation of facts and doctored documents.
- e) The 1st, 2nd and 3rd Defendants were allocated the property in 2003 and title issued in 2006 long after the Plaintiffs title had expired and hence any application to extend the Plaintiffs lease was null and void.
- f) The 1st 2nd and 3rd Defendants have followed the due process and should be dismissed with costs.
- g) The application has no merit, is frivolous mis-convenient, incompetent, bad in law and the same ought to be dismissed with costs.

Some of the respondents filed replying affidavits in opposition of the application. There is a record the replying affidavit of Simon Njau the 2<sup>nd</sup> defendant dated the 6/11/12 and the 4<sup>th</sup> defendant S. K Ndegwa dated the 26/10/12. The 5<sup>th</sup> defendant did not file any replying affidavit despite being served.

5. Mr. Njau depones that the plaint filed by the plaintiff s defective as it does not provide any particulars of fraud nor does it allege that any act of fraud was admitted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are co owners of the property. That they applied and were allocated the suit property and they paid all the requisite amounts demanded. That to date the 5<sup>th</sup> defendant has not cancelled their title to the suit property and therefore their title is valid and lawful. That the 1<sup>st</sup> plaintiff has not produced any title in its favour but merely relies on miscellaneous documents and receipts. That as owners of the property they shouldn't be deprived of their legal ownership rights to the suit property. That there were conditions in the allotment letter annexed by the plaintiff dated 25/8/10 which were not met as the plaintiff did not pay in full the stand premium within the 30 days specified. That they were issued with the title in April 2006 well before the plaintiffs letter of allotment was issued in August 2010 and therefore their title ranks prior in time. That the plaintiff do not have a valid title and are not entitled to the orders sought.

Mr. S. K Ndegwa in his affidavit states that he did not break into the plaintiff's house as alleged. That the 2<sup>nd</sup> plaintiff was called and on her arrival she was shown the Court documents they had. That the 2<sup>nd</sup> plaintiff is lying as she is the one who removed her goods and vacated the house on her own and no locks

were changed by them. That he does not know anything about the title and cannot respond to the 2<sup>nd</sup> plaintiff's statements.

6. Counsels made oral submission in Court. Mr.Mbabu for the applicant reiterated the contents of the 2<sup>nd</sup> plaintiff's affidavit. He emphasised that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are relying on a title under investigation and hence their 6<sup>th</sup> prayer in the application dated 19/9/12. He asked the court to note the 1<sup>st</sup> to 4<sup>th</sup> defendant's grounds are not supported by any affidavit and that no issue of law has been raised in for them save for the fact that the lease expired. That the title the defendants have no file at the Lands Office nor is it annexed to their replying affidavit.

7. Mr.Othieno for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> to 4<sup>th</sup> respondents submitted that the applicant has not met the requirements in law that the plaintiffs have no prima facie case with a probability of success. That the plaintiff has attached what was issued to the respondent. That the title was not denied or rejected by the 5<sup>th</sup> defendant who is the legal authority to issue and ascertain ownership of land. That despite the matter being reported to the police, the police have not preferred any charges against the defendant neither has the 5<sup>th</sup> defendant issued any notice. That nothing impunes the respondent title. That the title the 1<sup>st</sup>, 2<sup>nd</sup> to 3<sup>rd</sup> defendants have was issued in 2006 and the applicants payment for rates was made in 2010 and 2011.

Mr.Mbabu's reply was that the 1<sup>st</sup> to 3<sup>rd</sup> respondents/defendants has not paid any rates from 2006 to date.

8. I have carefully considered the facts as deponed by the parties and the oral submission made by counsels. The applicant seeks injunctive orders against the defendants at prayers 3 and 4. She also seeks that the 4<sup>th</sup> defendant be ordered to return her goods and to reinstated in the suit premises. Lastly the plaintiff's seeks that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant do surrender the certificate of title described as No.100877 to Court for verification under safe keeping.

9. For one to be entitled to an injunction order an applicant must meet the principles of law set out in the famous case of **Geilla vs. Cassman Brown E. A 1973**. The applicant must establish that he has a prima facie with the probability of success, that he will suffer irreparable loss that cannot be easily compensated and if the Court is in doubt it will decide the case on balance of convenience.

10. The applicants claim to be owner of L.R 209/2490/59. The 2<sup>nd</sup> plaintiff to support this claim states that after the expiry of the lease in January 2002 they applied for extension and the 5<sup>th</sup> defendant extended the Lease for 50 years vide their letter dated 25/8/10. To support this the applicants have annexed an a letter allotment of renewal of lease for L. R 209/2490/89, a pay in slips for land rent dated 18/11/10, 3/2/10 and a certificate of title I. R 6464 that shows that the land was transferred to the 1st plaintiff on the 3/2/87 and the last entry No. 501 shows it was charged to National Bank of Kenya for Kshs. 500000/- on the 10/12/87.

11. There appears to be no other entry in the title after the applicants have given the allotment letter dated 25/8/10. The applicant has also annexed a title issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants dated 1/7/03 under No. I.R 100877 which the applicants claim is under investigations. To support this applicant has annexed a statement by Sarah Maina an officer at Lands office. In the said statement the said Sarah Maina states that as per their records 100877 was issued in respect to property No. I.R No. 13537/749 and not L.R 209/2490/59.

12. The applicant has also annexed the advocates letter dated 16/5/12 to the Commissioner of lands where the applicants counsel is asking the Commissioner of lands to confirm if the respondents title had been issued through their office and whether their applicants title is still undergoing processing. It appears that there was no response to this letter.

13. The 1st, 2nd and 3rd respondents' case on the other hand is that they have a letter of allotment dated 1/7/03 for the same premises L.R 209/2490/59 and the title exhibited by the applicants. The issue here is who owns this property? There are 2 letters of allotment on the said premises exhibited by the applicant

and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent and a title said to be under investigation. The 5th defendant who could have shed light on these documents did not file any response to this application. I cannot tell whether the 2 letters of allotment and title are genuine documents. There is the copy statement of Sarah Maina, whom I note did not swear an affidavit, in which she states that the title the 1st, 2nd and 3rd respondents have is not for this suit premises but for property I.R No. 13537/749. This title is said to be under investigation. It is the 5th defendant who could have shed light on the issue on who owns this property. There is a letter addressed to the Commissioner of lands by the applicant seeking to know status of their clients' title after the letter of allotment . Who owns this property ? I am unable to tell in absence of evidence from the 5th defendant. The title annexed by the applicant has no other endorsement after 10/12/87. The title held by the 1st, 2nd and 3rd respondent is said to be under investigations. It is apparent that the applicant paid land rates up to time they discovered the change of names and thereafter resumed payment in July 2012.

**14.** From the facts before me as stated I am unable to decide who owns this premises or whether the title held by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents is valid. It has also been deponed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant levied distress against the 2<sup>nd</sup> plaintiff but no lease was attached to show that the 2<sup>nd</sup> plaintiff is their tenant. The case of **Geilla Vs. Cassman Brown** states that if the Court is in doubt it will decide the case on a balance of convenience. An order of injunction helps in preserving the status quo of property. I therefore order the defendant, their agent, servants be restrained by an order of the Court from transferring interfering alienating, collecting rent from the tenants on the compound or in any other way interfering with the said tenants quiet possession on L.R 209/2490/59 pending the hearing and final determination of the suit. I note that there was no response to rebut the facts deponed by Mr. S. K. Ndegwa Auctioneers in his affidavit that the 2<sup>nd</sup> plaintiff who vacated the premises and took away her goods. Could this have happened? I therefore decline to grant prayer 5 as prayed. I also decline to grant prayer 6 as this Court shall not be part of the investigations that the 5<sup>th</sup> defendant is required to do. The parties should take up the issue of verification with the 5<sup>th</sup> defendant. Parties are ordered to comply with the provisions of order 11 of the Civil Procedure Rules and set down the suit for hearing. Costs shall be in the cause.

Costs shall be in the cause.

**R. OUGO  
JUDGE**

Dated, signed and delivered this 26th February 2013.

In the presence of:-

.....1<sup>ST</sup> PLAINTIFF/APPLICANT

.....2<sup>ND</sup> PLAINTIFF/APPLICANT

.....1<sup>ST</sup> DEFENDANT/RESPONDENT

..... 2<sup>ND</sup> DEFENDANT/RESPONDENT

.....3<sup>RD</sup> DEFENDANT/RESPONDENT

.....4<sup>TH</sup> DEFENDANT/RESPONDENT

.....5<sup>TH</sup> DEFENDANT/RESPONDENT

.....COURT CLERK