



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL SUIT NO 59 OF 2012**

PAULINA C MAIYO.....PLAINTIFF

VERSUS

SALLY C KORIR.....1<sup>ST</sup> DEFENDANT

DISTRICT LAND REGISTRAR (NAKURU).....2<sup>ND</sup> DEFENDANT

THE ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT

**RULING**

By a plaint dated 7th November, 2012 the plaintiff Paulina Maiyo, instituted this suit against the defendants seeking the following orders:-

1. Cancellation of title issued to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant over Nakuru /Likia/ 815 (hereafter referred to as the suit land) and the same be reissued to the plaintiff.
2. A permanent injunction restraining the 1<sup>st</sup> defendant, her agents and/or servants from entering and or trespassing on the land parcel Nakuru/ Likia/815.

Simultaneously with the plaint, the applicant filed a notice of motion of even date seeking among others, the following orders:-

1. That pending the inter-parties hearing of the application, there be temporary injunction restraining the 1<sup>st</sup> defendant, her agents and or servants from entering and or trespassing on the suit property;
2. That pending the hearing and determination of this suit, there be temporary injunction restraining the 1<sup>st</sup> defendant, her agents and or servants from entering and or trespassing on the suit property;
3. Costs of the application.

Upon being certified that the application was urgent, the application was set down for inter parties hearing

The application is supported by the affidavit of the applicant and is premised on the grounds that the applicant is the lawful and beneficial owner of the suit land; That the applicant was allotted the suit land and her name entered in the area register: That she took possession of the suit land and has carried out developments therein: That in May 2001 when the plaintiff went to apply for a title deed,

she found that that the suit land had been registered in the name of the 1<sup>st</sup> respondent who now entered into the suit land and commenced construction.

The application is strenuously opposed. In an affidavit sworn on 18<sup>th</sup> December, 2012 the 1<sup>st</sup> respondent deposes that she is the registered absolute owner of the suit land after being allocated the same measuring 5 acres in 1997 and later obtaining a title deed on 31<sup>st</sup> January 2000. She avers that she has been in occupation of the suit land since 2000 without any interference until 2012 when the plaintiff started claiming the whole portion of the 1<sup>st</sup> respondents land: That she has neither encroached nor trespassed on the applicants land but rather it is the applicant who has built a house for her son on the 1<sup>st</sup> respondent's land.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents entered appearance but did not oppose the application stating that the issues raised were between the applicant and the 1<sup>st</sup> respondent.

I have read and considered the pleadings filed by the respective parties, the affidavit evidence adduced in support thereof and the submissions by counsels for the respective parties.

The application herein being for a temporary injunction, the burden is on the applicant to satisfy the conditions set down in **Giella V Cassman Brown & Co Ltd. ( EA 358**, namely that she has a *prima facie* case with a probability of success, that unless an injunction is granted, she might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

The applicant's case is that she legal and beneficial owner of the suit land. She states that the respondent's title was fraudulently obtained and that its ownership is subject of their unregistered interest thereto ( as a person in possession or occupation of the suit property). That further, on 25<sup>th</sup> June, 2012 the District Land Registrar wrote to the 1<sup>st</sup> respondent asking her to surrender her title. In his letter he stated in part... **you are required within 21 days from the date hereof, to surrender the above title which understandably you had yourself registered without the proper procedure being followed'** and a further letter dated 11<sup>th</sup> May, 2001 by District Land Registration Officer addressed to the District commissioner, Samburu stating that indeed the land was allocated to Pauline Maiyo.

It is common ground that the Respondent is the registered owner of the suit property. Being the registered owner, her interest in the suit property is indefeasible. Her aforementioned contention is based on Section 27 and 28 of the Registered land Act, Chapter 300 Laws of Kenya (repealed). The sections proves:-

**“Subject to this Act-**

**27(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

**(b).....**

**28. The right of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

**(a) to the lease, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as effect the same and are declared by section 30 not to require Noting on the register ,**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty obligation to which he is subject as a trustee. ( emphasis is mine).**

As such, the 1<sup>st</sup> respondent is *prima facie* the indefeasible owner of the suit property, together with all privileges and appurtenances thereto. However, I hasten to point out that unless there is evidence to the contrary the applicant's rights in the suit property are by dint those of the provisions of section 30 of the repealed Registered Land Act Cap 300 ( which governed the suit property when registration was effected) subject to overriding interest that may affect the property even though not noted in the register.

Such overriding interests are expressed under Section 30 ( supra) to include the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed. See section 30 (g) of the Registered Land Act.

Whereas the respondent is *prima facie* the registered owner of the suit property, there is evidence that she has been involved in a long protracted dispute with the applicant and that the applicant is in occupation of the suit property( this is confirmed by the District Land Registration Officer in his letter dated 11<sup>th</sup> May 2001).There being no evidence to prove otherwise, I find the balance of convenience tilts in favour of the applicant and grant prayer 3 of the orders sought in the application.

The upshot of the foregoing is that the plaintiff's application dated 7<sup>th</sup> November 2012 is allowed with costs.

**Dated, Signed and delivered in open at Nakuru this 12<sup>th</sup> day of July 2013**

**L N WAITHAKA**

**JUDGE**

**Present**

Ms Langat for defendant

Ngure holding brief for Mrs Ndeda for Plaintiff

Stephen Mwangi: Court Clerk

**L N WAITHAKA**

**JUDGE**