



**NO.109**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT & LAND CASE NO. 21 OF 2012**

LUCIA ANYANGO MON.....1<sup>ST</sup> PLAINTIFF

EUNICE ATIENO MONY.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

GEORGE ODHIAMBO ODHIAMBO..... DEFENDANT

**RULING**

1. The plaintiffs moved this court by way of a Notice of Motion application dated 11<sup>th</sup> December, 2012 under certificate of urgency seeking an order of temporary injunction to restrain the defendant by himself or through his agents from interfering with or demolishing the rental houses that the Plaintiffs had put up on a parcel of land known as **LR No. Kamagambo/ Kabuoro/ 6843** (hereinafter referred to as “**the suit property**” where the context so permits) pending the hearing and determination of

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this suit. The facts giving rise to the Plaintiffs’ claim against the defendant on the basis of which this application for injunction was brought are straight forward and to a large extent not in dispute. The 1<sup>st</sup> Plaintiff is the mother of the 2<sup>nd</sup> Plaintiff. At all material times, the 1<sup>st</sup> Plaintiff was the registered proprietor of all that parcel of land known as **LR No. Kamagambo/ Kabuoro/ 5782** (hereinafter referred to as “**the original parcel**”). The 1<sup>st</sup> Plaintiff held a portion of this original parcel in trust for the 2<sup>nd</sup> Plaintiff. On or about 8<sup>th</sup> May, 2012, the 1<sup>st</sup> Plaintiff caused the original parcel to be subdivided into 5 portions, namely, **LR Nos. Kamagambo/ Kabuoro/ 6858, 6840, 6841, 6842 and 6843** so as to transfer to the 2<sup>nd</sup> Plaintiff the portion that the 1<sup>st</sup> Plaintiff held in trust for her. On 7<sup>th</sup> June, 2012, the 2<sup>nd</sup> Plaintiff and the defendant entered into an agreement for sale in writing whereby the 2<sup>nd</sup> Plaintiff agreed to sell to the defendant and the defendant agreed to purchase a portion of the original parcel that was held by the 1<sup>st</sup> Plaintiff in trust for the 2<sup>nd</sup> Plaintiff

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namely, **LR No. Kamagambo/ Kabuoro/ 6843** (hereinafter referred to as “**the suit property**”) at a consideration of Ksh. 450,000.00. The agreement for sale between the 2<sup>nd</sup> Plaintiff and the defendant was prepared by the firm of Minda & Co. Advocates and was duly executed by all the parties in the presence of C.O.Minda, Advocate and other independent witnesses. According to this

agreement for sale, the suit property that the 2<sup>nd</sup> Plaintiff agreed to sell to the defendant measured 100 feet by 150 feet. In a supplementary agreement dated 6<sup>th</sup> July, 2012 pursuant to which the 2<sup>nd</sup> Plaintiff was paid and she acknowledged receipt from the defendant of the balance of the purchase price in the sum of Ksh. 80,000.00, the measurement of the suit property was again given as 100 feet by 150 feet. This supplementary agreement was executed by all the parties in the presence of P. R. Ojala Advocate. After the payment of the full purchase price by the defendant to the 2<sup>nd</sup> Plaintiff, the 2<sup>nd</sup> Plaintiff to whom the 1<sup>st</sup> Plaintiff had already

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transferred the suit property on 13<sup>th</sup> July, 2012 transferred the same to the defendant on 31<sup>st</sup> August, 2012.

2. The Plaintiffs have not disputed the fact that they sold the suit property to the defendant at a consideration of Ksh. 450,000.00. They have also not denied the fact that the defendant paid to them the said sum of Ksh. 450,000.00 being the purchase price in full. The bone of contention in this suit is the actual measurement of the suit property that was sold by the 2<sup>nd</sup> Plaintiff to the defendant. The Plaintiffs claim that what they had agreed to sell to the defendant was a portion of the suit property measuring 100 feet by 50 feet and not 100 feet by 150 feet as indicated in the agreement for sale between the 2<sup>nd</sup> Plaintiff and the defendant. The Plaintiffs claim that the portion of the suit property that was sold by the 2<sup>nd</sup> Plaintiff to the defendant was identified on the ground at the time of sale and that it was limited to 100 feet by 50 feet. It is the Plaintiffs' contention that the defendant took advantage of their illiteracy

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and ignorance and manipulated the agreement for sale to read 100 feet by 150 feet contrary to the agreement that the parties had reached. The Plaintiffs claim that they signed mostly blank documents and did not even appear before the Land Control Board where the consents were purportedly obtained for the transaction in dispute. The Plaintiffs claim that no effort whatsoever was made to explain to them the contents of the agreements that they executed. The Plaintiffs claim that due to the increase in the size of the suit property, the same now extends and includes the area where the Plaintiffs had put up rental houses and which was not sold by the 2<sup>nd</sup> Plaintiff to the defendant. The Plaintiffs' complaint is that the defendant as the registered proprietor of the suit property on which the said rental properties owned by the Plaintiffs now fall albeit fraudulently according to the Plaintiffs has threatened the Plaintiffs with eviction from the suit property and unless restrained by this court, will proceed to demolish the said

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rental houses. It is on the basis of the forgoing that the Plaintiffs have sought a temporary injunction to restrain the defendant from demolishing the said houses pending the hearing and determination of this suit.

3. In his statement of defence dated 8<sup>th</sup> January, 2013 and replying affidavit sworn on 23<sup>rd</sup> January, 2013 in response to the injunction application, the defendant denied the Plaintiffs' claim herein in its entirety. The defendant stated in his replying affidavit that the Plaintiffs were involved in the whole process leading to the transfer of the suit property to by the 2<sup>nd</sup> Plaintiff to the defendant from the beginning to the end. According to the defendant, the Plaintiffs who were desirous of selling a portion of the original parcel proceeded to sub-divide the same, sourced for a buyer for the suit property which was one of the portions of the original parcel, entered into an agreement for sale with the defendant with respect to the suit property which had a definite measurement, sought and

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obtained a consent of the Land Control Board to transfer the suit property to the defendant and duly effected the transfer of the same in favour of the defendant. The defendant stated further that the agreement for sale between the 2<sup>nd</sup> Plaintiff and the defendant was prepared by an advocate who explained to the parties and their witnesses the terms and effect thereof before the parties and their witnesses executed the same. The defendant stated further that the contents of the said agreement for sale was reiterated in a supplementary agreement for sale dated 6<sup>th</sup> July, 2012 which was once again executed by the parties after the contents thereof had been explained to the parties and their witnesses by an advocate. The defendant termed the allegations contained in the 1<sup>st</sup> Plaintiff's affidavit in support of the application for injunction as "consciously" manufactured and deliberate falsehoods. The defendant contended that the agreement for sale between the 2<sup>nd</sup> Plaintiff and the defendant is very clear that the suit

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property measured 100 feet by 150 feet and that contrary to the Plaintiffs' claim that they have rental houses thereon; the suit property has no developments on it. The defendant contended that as the registered proprietor of the suit property, he has exclusive rights over the same which rights cannot be restricted save as provided by law. The defendant contended that the injunction sought would negate his proprietary interest in the suit property. The defendant claimed that the Plaintiffs have not established a prima facie case against the defendant neither have they shown that they stand to suffer irreparable harm unless the orders sought are granted. The defendant exhibited in his replying affidavit; a copy of the Mutation Form pursuant to which the original parcel was sub-divided into 5 portions, a copy of the extract of the land register for the suit property, a copy of the agreement for sale dated 7<sup>th</sup> June, 2012 between the 2<sup>nd</sup> Plaintiff and the defendant, a copy of a supplementary agreement dated 6<sup>th</sup> July, 2012 between the 2<sup>nd</sup>

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Plaintiff and the defendant and a copy of the application for consent of land control board.

4. On 4<sup>th</sup> June, 2013, the parties agreed to argue the Plaintiffs' application by way of written submissions. The Plaintiffs filed their written submissions on 24<sup>th</sup> June, 2013 while the defendant filed his submissions in reply on 25<sup>th</sup> June, 2013. In their submissions, the Plaintiffs argued that the defendant obtained title to the suit property fraudulently contrary to the provisions of section 26, 44 and 45 of the Land Registration Act No. 3 of 2012. They are therefore entitled to the temporary injunction sought pending the determination of their claim against the defendant. In their submissions in reply, the defendant's advocates reiterated the contents of the defendant's affidavit which I have already highlighted above and submitted that the Plaintiffs are not entitled to the injunction sought because; the Plaintiffs have not shown that they have a prima facie case against the defendant with a

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probability of success and that they stand to suffer irreparable harm unless the order of injunction sought is granted. The defendant's advocates submitted further that the Plaintiffs have no genuine and/or bona fide claim or right over the suit property and that considering all the circumstances of this case the Plaintiffs are not deserving of the order sought.

5. I have considered the plaintiffs' application for injunction together with the affidavit and written submissions filed by the Plaintiffs in support thereof. Equally, I have considered the replying affidavit and written submissions filed by the defendant in opposition to the application. The following is the view I take of the matter. The principles for granting a temporary injunction are well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973]**

**E.A 358**, an applicant for a temporary injunction must show that he has a prima facie case against the defendant with a probability of success and that unless the injunction is granted, he will suffer

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irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. In the case of **Mrao Ltd. –vs- First American Bank of Kenya ltd (2003) KLR. 125**, it was held as follows;

**“a prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to court a tribunal properly directing itself will conclude that, there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

6. The first question that I need to answer therefore, is whether on the material placed before this court the Plaintiffs have shown on a prima facie basis that the defendant has infringed on any of their rights. The Plaintiffs have admitted that they sold to the defendant the suit property at a consideration of Ksh. 450,000.00. They have admitted further that they executed the agreement for sale and received the purchase price in full

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from the defendant. The Plaintiffs’ problem with the sale transaction between the Plaintiffs and the defendant is that the defendant took undue advantage of their ignorance and illiteracy and fraudulently obtained more land than they had agreed upon and in the process ended up encroaching on an area where the Plaintiffs had put up houses for rent and which they did not intend to sell and never sold to the defendant. At the trial of this suit, the Plaintiff will have to prove the alleged fraud against the defendant. At this stage what is required is only a prima facie evidence of the alleged fraud. Have the Plaintiffs furnished any proof of the same? The Plaintiffs have made mere allegations of fraud with no tangible evidence in proof thereof. The evidence on record shows that; the 1<sup>st</sup> Plaintiff was registered as the proprietor of the original parcel. The original parcel was subdivided by the 1<sup>st</sup> Plaintiff into 5 portions on or about 8<sup>th</sup> May, 2012. One of the subdivisions of the original parcel was the suit property which was registered

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in the name of the 1<sup>st</sup> Plaintiff on 31<sup>st</sup> May, 2013. On 7<sup>th</sup> June, 2012, the 2<sup>nd</sup> Plaintiff entered into an agreement for sale with the defendant of the suit property. As at this date, the suit property was in existence, its register having been opened on 31<sup>st</sup> May, 2012. Its measurement was indicated in the said register as 0.18 hectares. When the defendant entered into the said agreement for sale with the 2<sup>nd</sup> Plaintiff, the suit property was registered in the name of the 1<sup>st</sup> Plaintiff who was indicated in the agreement for sale as holding the property in trust for the 2<sup>nd</sup> Plaintiff. The suit property was transferred into the name of the 2<sup>nd</sup> Plaintiff on 13<sup>th</sup> July, 2012 and the 2<sup>nd</sup> Plaintiff transferred the same to the defendant on 31<sup>st</sup> August, 2012. It is clear from the foregoing that that the suit property was sold to the defendant as a separate and distinct parcel of land whose measurements had been ascertained and recorded at the lands registry. It is not clear to me why the suit property was referred to in the agreement for sale as measuring 100 feet

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by 150 feet instead of 0.18 hectares which was its official measurement according to the extract of the land register that was produced in court by the parties. If the 2<sup>nd</sup> Plaintiff was selling to the defendant the suit property measuring 0.18 hectares according to the land register, why was it necessary to give the measurement thereof as 100 feet by 150 feet? This issue has disturbed my

mind a great deal and I will lay it to rest at the conclusion of this ruling. If the 2<sup>nd</sup> Plaintiff sold to the defendant a parcel of land (the suit property) that was registered in her own name and which had been surveyed and had an officially ascertained measurement, I don't see how issues can again arise over the measurements of the property. Such issues could arise only in two instances in the circumstances. The first instance would have arisen if the Plaintiffs had sold to the defendant a portion of the original parcel measuring 100 feet by 50 feet subject to subdivision and which during the subdivision of the original parcel the

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defendant if he was the one charged with the responsibility of doing the same, increased to 100 feet by 150 feet or 0.18 hectares. The second instance would arise if the 2<sup>nd</sup> Plaintiff sold to the defendant only a portion of the suit property measuring 100 feet by 50 feet which the defendant then increased in the agreement for sale to 100 feet by 150 feet. The first scenario is not possible because, the agreement for sale between the 2<sup>nd</sup> Plaintiff and the defendant made no reference whatsoever to the original parcel and the defendant's involvement in the sub-division of the same. This leaves only the possibility of the second scenario whereby the 2<sup>nd</sup> Plaintiff may have agreed to sell to the defendant only a portion measuring 100 feet by 50 feet of the suit property. Still I can't find evidence in support of this scenario either in the pleadings or in the material placed before the court. The Plaintiffs who are acting in person have maintained that they sold to the defendant only a portion measuring 100 feet by 50 feet but the

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defendant proceeded to process a title for land measuring 100 feet by 150 feet. It is not clear from the pleadings by the Plaintiffs whether this, 100 feet by 50 feet was of the original parcel or of the suit property. The defendant has also not come out very clearly in his response on why the suit property was referred to in the agreement for sale as 100 feet by 150 feet and not 0.18 hectares whereas the agreement for sale provided that the 2<sup>nd</sup> Plaintiff was desirous of selling the whole property. From the foregoing, it is not clear whether the defendant is being accused of fraud in acquiring a larger portion of the original plot or of the suit property. I must say that I don't have before me evidence of fraud in either case. I am however of the view that reference to, 100 feet by 150 feet in the agreement for sale between the parties had some meaning which may not come out at this stage. This view is informed by the fact that 100 feet by 150 feet of land that the defendant maintains to have been sold to him by the 2<sup>nd</sup> Plaintiff is not equal to the

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actual size of the land registered in the name of the defendant which measures 0.18 hectares. From my own calculation, land measuring 100 feet by 150 feet translates to **0.1394** hectares only and not **0.18** hectares. This means that the land registered in the name of the defendant exceeds what the defendant claims to have been sold to him by up to **0.0406** hectares. The Plaintiffs' claim that the land registered in the defendant's name extends to what was not sold to him may not in the circumstances be a conscious and deliberate falsehood as claimed by the defendant after all. That said, considering the totality of the evidence and other material placed before me I am doubtful whether the Plaintiffs have established a prima facie case against the defendant with a probability of success.

7. On the issue as to whether the Plaintiffs will suffer irreparable harm unless the orders sought are granted, the Plaintiffs claim to have houses on the suit property which are threatened with demolition by the defendant. The defendant has denied this fact

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and maintained that the suit property is not developed. The Plaintiffs have not placed any evidence

before the court concerning the existence of these houses. In the circumstances, the court is equally in doubt whether the Plaintiffs would suffer irreparable harm unless the orders sought are granted.

8. In view of the findings above, the Plaintiffs' application falls for consideration on a balance of convenience. The defendant is the registered proprietor of the suit property. The evidence placed before the court shows on a prima facie basis that the defendant followed the due process in acquiring the suit property. There is however at the same time, evidence that the land registered in the name of the defendant is in excess by a significant margin of what the 2<sup>nd</sup> Plaintiff had agreed to sell to the defendant assuming that the parcel of land sold to the defendant was 100 feet by 150 feet as maintained by the defendant. The Plaintiffs may therefore have a bona fide claim over a portion of the suit property and in the event that they

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have houses on the said portion, the same need to be protected pending the hearing and determination of this application. In the circumstances the balance of convenience would tilt against granting the injunction sought by the Plaintiffs but at the same time would favour granting the Plaintiff some form of protection with regard to their alleged interest on the suit property. The Plaintiffs application dated 11<sup>th</sup> December, 2012 is therefore dismissed. I would however in the interest of justice order that in the event that the Plaintiffs or any one of them have any houses standing on the suit property or on any portion thereof as of the date hereof, the defendant shall not demolish or in any other manner interfere with the Plaintiffs' occupation or use of the same until the hearing and determination of this suit. The defendant shall however be at liberty to deal with the suit property in any other manner in exercise of his proprietary rights save as aforesaid. The costs of

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this application shall be in the cause.

**Dated, signed and delivered at Kisii this 30<sup>th</sup> day of August, 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:**

No appearance for the plaintiffs

Mr. Ochwangi for the defendant

Bibu Court Clerk.

**S. OKONG'O,**

**JUDGE.**

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