



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 973 OF 2012**

**MICHAEL KIRUGO KIBATHI.....PLAINTIFF**

**VERSUS**

**ANTONY GICHUKI GICHAU .....1<sup>ST</sup> DEFENDANT**

**JANE NJERI GICHUHI.....2<sup>ND</sup> DEFENDANT**

**MAHIRA HOUSING COMPANY LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff's Notice of Motion is dated 6<sup>th</sup> December 2012 and is brought under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The Plaintiff is seeking a temporary prohibitory injunction restraining the Defendant from selling, dealing, entering remaining and or in any way howsoever carrying on construction on Land Parcel known as Plot No. 487 in LR No. 10901 (hereinafter referred to as the suit property), pending the hearing and determination of this suit.

The Plaintiff claims that the suit property belongs to him, having been sold to him by the original allottee, namely Ituru Maendeleo Women Group. Further, that the suit property is situated within Land Parcel LR. 10901/36 which is owned by the 3<sup>rd</sup> Defendant, and that the Defendants have unlawfully trespassed on the said property and began construction thereon. The Plaintiff swore a supporting affidavit on 6<sup>th</sup> December 2012 to which he attached copies of original plot certificate with respect to the suit property issued to the original allottee by the 3<sup>rd</sup> Defendant, the sale agreement entered into with the original allottee, the executed plot transfer form, as well as the plot certificate issued to him by the 3<sup>rd</sup> Defendant. He also attached copies of photographs showing the construction on the suit property.

The Plaintiff alleged in a further affidavit sworn on 16<sup>th</sup> May 2013 that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained registration of the suit property by way of fraud, and that his documents of ownership predate those of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Further, that the 3<sup>rd</sup> Defendant has not denied the validity of his documents of ownership.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the Notice of Motion in a replying affidavit they both swore on 26<sup>th</sup> February 2013. They stated that they are the registered proprietors of the suit property, having purchased the said property from the 3<sup>rd</sup> Defendant for Kshs 400,000/= and having been issued with a title deed with respect to the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants attached copies of the said title deed for RUIRU KIU BLOCK 10 (MAHIIRA)/ 934 issued to them on 24<sup>th</sup> August 2012, the sale agreement entered into

with the 3<sup>rd</sup> Defendant, a plot certificate with respect to plot 487 issued to them by the 3<sup>rd</sup> Defendant and a receipt for the transfer fees paid. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further stated that they commenced construction on the suit property on August 2012, and that the Plaintiff demolished the said construction causing them loss which they are claiming.

The 3<sup>rd</sup> Defendant also opposed the Plaintiff's Motion in a replying affidavit sworn on 18<sup>th</sup> February 2013 by Peter Githuka, its Director/Treasurer. The deponent confirmed that the suit property is registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who have been issued with a title deed to the same. Further, that the property referred to by the Plaintiff is L.R. No. Ruiru Kiu Block 10 (Mahiira)/934 and that there is a title deed in existence for the suit property and not the Plot No. 487 as alleged.

The deponent also stated that resolutions were passed by the 3<sup>rd</sup> Defendant on the farms at the L.R. No. 10901/36 and L.R. No. 10901/37 at Mahiira on the 5<sup>th</sup> November 1986, where it was resolved that any purchaser and/or member who purchases a plot in either of the properties and fails to pay the purchase price in full and/or remains in debt for a period of four (4) years from the date of purchase, shall lose the plot and the purchase price funded in full. Further, that if any purchaser purchasing a plot does not occupy or develop the same within a period of eight years from the date of purchase then the purchaser shall have no claim.

The parties were directed to file written submissions, which they relied upon for the ruling herein. The Plaintiffs' counsel in submissions dated 10<sup>th</sup> June 2013 argued that the Plaintiff had produced documents that clearly demonstrate the legal process he followed in processing the ownership of the suit property. Further, that there was evidence of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as all their documents they produced in evidence were processed on the same day namely 24<sup>th</sup> April 2012, and that they did not exhibit any sale agreement entered into with the 3<sup>rd</sup> Defendant contrary to section 3(3) of the Law of Contract Act.

The counsel also submitted that there was collusion between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to deny the Plaintiff his right to ownership of the suit property, as the minutes annexed by the 3<sup>rd</sup> Defendant showed that only three members were present at the meeting in which the resolutions it relied upon were made. Further, that the 3<sup>rd</sup> Defendant had not exhibited their membership register.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel filed submissions dated 24<sup>th</sup> June 2013 and stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were *bona fide* purchasers for value, and that the fact that the documents they relied upon were issued to them by the 3<sup>rd</sup> Defendant on the same date is not proof of fraud. Further, that the title to the suit property was issued to them four months after the said documentation. The counsel further argued that the documents relied upon by the Plaintiff predate those of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and no reason has been proffered as to why he did not acquire the title to the suit property.

It was also argued that the resolutions by the 3<sup>rd</sup> Defendant were passed on 5<sup>th</sup> November 1986 before it entered into the transaction with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and it cannot therefore be argued that there was collusion among the defendants to defraud the Plaintiff. The counsel submitted that the Plaintiff had therefore failed to establish a *prima facie* case for the issuance of the injunctive orders sought.

The 3<sup>rd</sup> Defendant's counsel filed submissions dated 17<sup>th</sup> June 2013 wherein he argued that the Plaintiff had not shown a *prima facie* case as required by the decision in **Giella vs Cassman Brown & Another (1973) EA 358** as it has been shown that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the registered proprietors of the suit property, and have a title deed issued to them in this respect. Further, that the Plaintiff did not bring any evidence of payments made to the 3<sup>rd</sup> Defendant or of meeting the conditions in the letter of allocation to entitle him to a title deed over the suit property.

Counsel for the 3<sup>rd</sup> Defendant relied on the decisions in **Njilux Motor Ltd vs Kenya Power & Lighting Co. Ltd and Another (2000) 2 E.A. 466** and **Dr. Joseph arap Ngok vs Justice Moijo ole Keiwa & 4**

**Others, Nairobi CA No 60 of 1997** for the position that the Plaintiff had no proprietary interest in the suit property, as the title deed to the property is in the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's names, and no injunction can therefore issue against the registered proprietors. He also relied on the decisions in **Pioneer General Assurance Society Ltd & Another vs Aulfikarali Nimji Javer & Others Nairobi HCCC No. 120 of 1999** and **Musa Musango vs Eria Musigire & Others (1966) E.A 390** for the position that the 3<sup>rd</sup> Defendant in passing the resolutions relied upon acted *intra vires* and within the provisions of its Memorandum and Articles of Association and the Companies Act (Cap 486 of the Laws of Kenya).

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of a plot certificate dated 23<sup>rd</sup> August 2005 issued to him by the 3<sup>rd</sup> Defendant with respect to the suit property as his evidence of ownership. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant have on the other hand brought evidence of a title deed issued to them with respect to L.R. No. Ruiru Kiu Block 10 (Mahiira)/934 which they claim to be the suit property, and which appears not to be disputed by the Plaintiff.

In the circumstances I find that the Plaintiff has not established a *prima facie* case, and I am in this respect guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation a party who has been issued with a good title takes precedence over other equitable rights to the title. While I appreciate that the issue of whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's title is good title will have to be determined after full trial, it is my opinion that the existence of the said title is sufficient to deny the Plaintiff the injunction sought. Likewise, the issue raised as to whether the resolutions made by the 3<sup>rd</sup> Defendant were valid can only be determined after the court has had the benefit of examining further evidence at full trial.

The Plaintiff's Notice of Motion dated 6<sup>th</sup> December 2012 is accordingly denied, and the costs of the said motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_25<sup>th</sup>\_\_\_\_ day of \_\_\_\_September\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**