



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 320 OF 2011**

**JOHN ELIAS KIRIMI .....PLAINTIFF**

**VERSUS**

**MARTIN MAINA NDERITU .....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI .....2<sup>ND</sup> DEFENDANT**

**AND**

**MARGARET WANJIRU NGARACHU.....INTERESTED PARTY**

**RULING**

This ruling is given with respect to the Plaintiff's application dated 29<sup>th</sup> June 2011. The substantive prayers sought in the Plaintiff's application are as follows:

1. That an injunction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant or any other party prohibiting them from dealing with, transferring, selling, charging or leasing Nairobi Block 83/14/504 situated in Umoja Innercore area (hereinafter referred to as the suit property).
2. That the Defendants or any other person, by themselves, their servants, agents and/or employees be and are hereby restrained by way of interim injunction from ingressing, trespassing, carrying on any construction or erecting structures, carrying out any operations and/or activities of any nature or doing any such nature of things whatsoever on the suit property pending the hearing and determination of this suit.
3. That the Honourable Court do restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants by themselves, their servants, agents and/or employees from interfering with the Plaintiff's quiet enjoyment and use of the suit property.

The grounds for the Plaintiff's application are that the suit property is in danger of being alienated without the Plaintiff's knowledge or consent as the 1<sup>st</sup> Defendant and/or his agent has put his workers on the said property, and they have started excavating the putting a foundation on the suit property despite an on-going investigation as to the ownership of the property.

The Plaintiff states in a supporting Affidavit sworn on 29<sup>th</sup> June 2011 that he has been the registered

proprietor of the suit property since 11<sup>th</sup> May 1999, and that his peaceful enjoyment of the property was interrupted in April 2010 by a party who claimed to be the owner of the parcel, and was attempting to deposit building blocks on the said property. The Plaintiff then states that when he conducted a search at the Ministry of Lands it was indicated that the property was registered in his name, but that a second title was issued on 2<sup>nd</sup> May 2002 in the name of the 1<sup>st</sup> Defendant. The Ministry of Lands also gave him a letter dated 4<sup>th</sup> May 2010 to take to the 2<sup>nd</sup> Defendant requesting them to clarify the rightful owner of the suit property, and a Memorandum of Registration of Transfer of Lands in order for the 2<sup>nd</sup> Defendant to cancel the second lease in the 1<sup>st</sup> Defendant's name.

The Plaintiff further states that on 31<sup>st</sup> May, 2010 he received a letter from the Ministry of Lands, attaching a letter from the 2<sup>nd</sup> Defendant dated 5<sup>th</sup> May 2010, stating that the Lease is registered in the name of the 1<sup>st</sup> Defendant whom they recognize as the owner of the said parcel. The Plaintiff avers that he then proceeded to register a caution and instructed his Advocates to take up the matter. The Plaintiff's Advocate then wrote to the 2<sup>nd</sup> Defendant demanding an explanation for the issuance of 2 leases over the suit property, and for confirmation of the rightful owner of the suit property. The said demands were in letters by the Plaintiff's Advocate dated 25<sup>th</sup> February, 2011 and 29 April 2011. The Plaintiff states that the 2<sup>nd</sup> Defendant then responded in letters dated 16<sup>th</sup> March 2011 and 6<sup>th</sup> May 2011 stating that they are investigating the matter and would revert to the Plaintiff's Advocates in due course. These letters were however not annexed to the Plaintiff's supporting affidavit. To this date the Plaintiff claims he is yet to receive a response on the outcome of the investigations by the 2<sup>nd</sup> Defendant.

The Plaintiff fears that the 2<sup>nd</sup> Defendant and 1<sup>st</sup> Defendant have colluded to illegally transfer his property to the 1<sup>st</sup> Defendant, whom he claims is an employee of the 2<sup>nd</sup> Defendant. The Plaintiff in a supplementary affidavit sworn on 14<sup>th</sup> November 2011 states that it is clear that this is a case of double allocation, and reiterates that the 2<sup>nd</sup> Defendant's officers, particularly one N. M. Mung'alla, the Director of Legal Affairs, conspired with the 1<sup>st</sup> Defendant to disentitle him of the suit property, as he was also the lawyer for the 1<sup>st</sup> Defendant in the sale agreement to sell the suit property to the Interested Party. The Plaintiff further states that there is a clear conflict of interest, and that the said Mr. Mung'alla could not give a valid and unbiased opinion regarding the parallel titles to the suit property as he purports to do in the letter from the 2<sup>nd</sup> Defendant dated 5<sup>th</sup> May 2010.

The Plaintiff avers that unless an injunction is issued to stop any further dealings or developments on the land until this matter is heard and determined, he stands to suffer irreparable loss and damage through fraudulent alienation of his land, and that damages will not adequately compensate. The Plaintiff has attached as evidence a copy of the certificate of Lease and Lease by the 2<sup>nd</sup> Defendant and copies of the letters referred to in the foregoing from the Ministry of Lands and his Advocates.

The above facts are reiterated in written submissions filed by the Plaintiff's Advocate dated 14<sup>th</sup> November 2011 in wherein it is contended that the Plaintiff has thereby shown a *prima facie* case, and fraud and collusion between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff's Advocate relied on the decisions in **Gitwany Investment Limited v Tajmal Limited and 3 others, (2006) eKLR**, **Samson Kagengo Ongeri v Greenbays Holdings & 2 others (2006) eKLR** and **Alberta Mae Gacie v Attorney General & 4 others (2006) eKLR**, to argue that as the Plaintiff's title was first in time, the 1<sup>st</sup> Defendant had no interest in land capable of transfer to any other person.

The 1<sup>st</sup> Defendant in his replying affidavit sworn on 12<sup>th</sup> August 2011 states that he was the registered proprietor of the suit property and acquired a title to the property on 2<sup>nd</sup> February 2002, and transferred the property to the Interested Party herein on 24<sup>th</sup> September 2009. The 1<sup>st</sup> Defendant further states that during the period prior to the transfer of the suit property to the Interested Party herein, all searches conducted at the lands office confirm that he was the registered owner of the property and not the Plaintiff as alleged. The 1<sup>st</sup> Defendant confirms having received the correspondence referred to by the Plaintiff in the foregoing, and states that as per the communication of 5<sup>th</sup> May 2010, the 2<sup>nd</sup> Defendant was categorical that he was the legal owner of the property as lessee and they did not recognize any other lease. The 1<sup>st</sup> Defendant avers that he made the relevant rates payments to the 2<sup>nd</sup> Defendant for the period he was the legal owner of the property, and denies engaging in any collusion or illegality in acquiring the suit property or being an employee of the 2<sup>nd</sup> Defendant. Further, that having transferred his interest in

the subject property to the Interested Party, the orders sought against him are unnecessary and a waste of the Court's time and the same ought to be discharged. The 1<sup>st</sup> Defendant has annexed is a copy of the agreement for sale to the interested party, copies of certificate of official Searches dated 18/1/2010 and 11/12/2008, and copies of rates payment receipts dated 17<sup>th</sup> September 2009 and 15<sup>th</sup> January 2010. The 2<sup>nd</sup> Defendant's response is contained in the replying affidavit sworn on 12<sup>th</sup> October 2011 by Aduma J Owuor, the 2<sup>nd</sup> Defendant's acting Director of Legal Affairs. The 2<sup>nd</sup> Defendant's response is that according to their records, the rate paying owner of the suit property is the Interested Party herein, having bought the property from the 1<sup>st</sup> Defendant to whom the Council had leased out the property in 2002. The 2<sup>nd</sup> Defendant states that at no time did it lease out the suit property to the Plaintiff, and disputes the probity of the documents attached to the affidavit of the Plaintiff in purported proof of a lease from the 2<sup>nd</sup> Defendant. It is also averred that the fact that the suit property was at all material times leased to the 1<sup>st</sup> Defendant was communicated to the Plaintiff both by the 2<sup>nd</sup> Defendant and the Registrar of Lands.

The 2<sup>nd</sup> Defendant denies that the 1<sup>st</sup> Defendant is its employee, and also states that it is under no obligation to approve development plans presented by a person who is not the registered owner of the property upon which development is proposed to be undertaken. Further, that the orders of injunction sought herein cannot issue against the 2<sup>nd</sup> Defendant as to do so would be to unlawfully inhibit its statutory mandate under section 29 of the Physical Planning Act.

The Interested Party also filed a replying affidavit sworn on 12<sup>th</sup> August 2011, and stated that she is the registered proprietor of the suit property which she acquired from the 1<sup>st</sup> Defendant on or about the 10<sup>th</sup> February 2010. The said registration took place after she purchased the said property from the 1<sup>st</sup> Defendant on 24<sup>th</sup> September 2009 for the sum of Kenya Shillings One Million. Further, that searches prior to the transfer confirmed that the property was registered in the name of the 1<sup>st</sup> Defendant. The Interested Party also states that she has since the purchase of the suit property been making the necessary the rates payments to the 2<sup>nd</sup> Defendant, has already taken possession of the property and installed water connection thereon, and has sought the necessary approval from the relevant authorities and commenced construction on the property.

The Interested Party claims that the interim orders in force and the orders being sought by the Plaintiff are adverse to her right and interest in the property as she rightfully obtained the property from the 1<sup>st</sup> Defendant for valuable consideration, and having made immense investment on the property, stands to suffer irreparable loss and damage if the orders sought are granted. The evidence annexed by the Interested Party include a copy of the said agreement for sale; a copy of the certificate of lease dated issued to her 27<sup>th</sup> October 2010; copies of Certificates of official Search dated 18/1/2010, 11/12/2008 and 18/3/2011; copies of the fees payments receipts to the 2<sup>nd</sup> Defendant for valuation and construction activities; and copies of photographs. Also attached are a copy of an invoice from the City Water & Sewerage Company Ltd and copies of the building approval documents by the 2<sup>nd</sup> Defendant. No payment receipts for rent or rates were however attached.

The 1<sup>st</sup> Defendant's Advocate and Interested Party's Advocate in written submissions both dated 9<sup>th</sup> December 2011 argue that the Plaintiff has not demonstrated a *prima facie* case, as he has conceded that the Interested Party has title to the suit property and has failed to demonstrate that he is in possession of the said property. In addition, they contend that the Plaintiff can be adequately compensated by way of damages. The interested party relied on the decision of this Court (Azangalala J.) in **Margeret Akoth Olang v Mama Juma Baya & 4 others (2008) eKLR**

The 2<sup>nd</sup> Defendant's Advocate in submissions dated 6<sup>th</sup> December 2011 also contend that the Plaintiff has not established a *prima facie* case as he cannot claim using a fraudulent title, and relies in this regard on the Court of Appeal authorities of **Mrao v First American Bank, (2003) KLR 125**, **Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others, (2004) eKLR** and **Amrital v City Council of Nairobi (1982) KLR 75**. The 2<sup>nd</sup> Defendant's Advocate further submits that the orders sought cannot issue against his client, particularly the prayer of the application which seeks to restrain the 2<sup>nd</sup> Defendant from carrying out any of its operations. The Advocate argues that granting such an order would inhibit the 2<sup>nd</sup> Defendant's statutory mandate under sections 29, 38 and 39 of the Physical Planning Act (Cap 286), and sections 30 and 39 of the Local Government Act (Cap 285). Reliance is

placed upon the decisions of this court (Angawa J.) in **Morioson Holding v City Council of Nairobi HCCC No. 432 of 2003**.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I will proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**, and as elaborated upon in **Benir Investments Ltd v Commissioner General & Anor (2010) eKLR**. Both the Plaintiff and the Interested Party have produced evidence of ownership the suit property by annexing copies of title to the suit property. The validity of the said titles, and which title was the first in time are issues to be determined at the full trial, and for this reason I am unable at this stage to find a *prima facie* case in favour of the Plaintiff.

Likewise the issue of whether there was any fraudulent dealing with the suit property either by the Plaintiff or Defendants is a matter that can only be decided after a full hearing of the suit filed herein. I will therefore decide the prayers sought in the Plaintiffs' application dated 29<sup>th</sup> June 2011 on a balance of convenience. The balance of convenience in the present application tilts in favour of the Interested Party, who has brought evidence to show her possession of the suit property.

The only outstanding issue is the submissions by the 2<sup>nd</sup> Defendant that an injunction cannot issue against it. The decision in **Morioson Holding v City Council of Nairobi HCCC No. 432 of 2003** is distinguishable from this case as it did not involve double allocation of land by a local authority, as is the case in the present application. Secondly the rights of the applicant in the cited case as the proprietor of a school were already established, unlike in the present case, and damages were indeed an adequate remedy as what was in issue was trespass.

In addition, there is no proposition of law that states that an injunction cannot issue against a local authority. Order 29 of the Civil Procedure Rules states injunctions may not issue against the Government as defined in the Government Proceedings Act (Cap 40). A local authority as constituted under the Local Government Act is a distinct legal person separate from Government, and injunctions can issue against it, so long as such an injunction properly brought under the provisions of Order 40 of the Civil Procedure Rules and the conditions for its issue are met.

For the reasons given in the foregoing, I hereby order that the *status quo* be maintained as follows:

1. The Plaintiff, Defendants and Interested Party, either by themselves or through their representatives, agents or servants, are restrained from transferring, leasing, charging, or undertaking further construction on the land parcel identified as Nairobi Block 83/14/504 situated in Umoja Innercore area in Nairobi, pending the hearing and determination of this suit or until further orders.
2. The Plaintiff and Defendants either by themselves or through their representatives, agents or servants not to interfere with the Interested Party's occupation and possession of the suit premises pending the hearing and determination of this suit or until further orders.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_27<sup>th</sup>\_\_\_\_ day of \_\_\_\_February\_\_\_\_, 2012.

**P. NYAMWEYA**  
**JUDGE**