



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**

**CIVIL CASE NO. 426 OF 2011**

**TERESIA WANGUI NGANGA.....PLAINTIF/APPLICANT**

**VERSUS**

**JOHN MURITU KIGWE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ALLICE WANJA WANJOHI .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff/Applicant, hereinafter referred to as an Applicant, has filed a Notice of Motion dated 11/8/2011 brought under Order 40 Rules 1(a) and 2(1), and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 3A, and 63(c) and (e) of the Civil Procedure Act and Section 52 of the Transfer of Property Act, 1882 and all enabling provisions of the Law seeking the following orders;

1. THAT the 2<sup>nd</sup> Defendant by herself or through her agents, servants or assigns be restrained by an order of temporary injunction from selling, leasing, charging, mortgaging or in any way alienating the property known as LR. No. 10823/44 Thika (Title No. IR 119148) pending the hearing and determination of this suit.
2. THAT in the alternative this Honourable Court be pleased to order and direct that all dealings in or transaction affecting the property known as LR No.10823/44 Thika (Title No. IR 119148) be prohibited pending the hearing and determination of this suit.
3. THAT the costs of this application be provided for.

The application is based on the following grounds:-

- a) The 1<sup>st</sup> Defendant was the registered owner of the property known as LR No. 10823/12 Thika (IR No. 67253) comprising 73.44 hectares which the 1<sup>st</sup> Defendant had sub-divided into 10 acre parcels of land.
- b) The plaintiff entered into an Agreement for sale of one of such 10 acres properties known as L.R. No. 10823/43 Thika with the 1<sup>st</sup> Defendant at a consideration of Kshs.1,100,000/= on or about 22<sup>nd</sup> January, 1996.
- c) The Plaintiff duly paid the purchase price in full and, with the assistance and connivance of the 1<sup>st</sup> Defendant, obtained the Land Control Board consent to transfer timeously in or about April, 1996.

- d) In breach of the Agreement aforesaid, the 1<sup>st</sup> Defendant failed and/or refused to execute and deliver to the Plaintiff a Transfer of the said parcel of land or to surrender the title documents thereto.
- e) The Plaintiff on or about 20<sup>th</sup> January, 1997 then filed suit, being Thika CMCC No. 99 of 1997, against the 1<sup>st</sup> Defendant seeking, inter alia, an order of specific performance against the 1<sup>st</sup> Defendant.
- f) In his Defence filed on 7<sup>th</sup> February, 1997, the 1<sup>st</sup> Defendant contended that the property sold to the Plaintiff was L.R. No. 10823/44 Thika (the suit property herein) also comprising 10 acres and not L.R. No. 10823/43 Thika.
- g) In a bid to resolve the matter, the Plaintiff accepted to take the suit property and the 1<sup>st</sup> Defendant duly surrendered the original Deed Plan No. 205803, being the only available title document in respect of the suit property following the sub division of the parent property i.e L.R. No. 10823/12 Thika (Title No. IR 67253)
- h) The Plaintiff took possession of the suit property forthwith and further sub-divided the same into sub-plots measuring one-eighth of an acre using the 1<sup>st</sup> Defendant's surveyors who were the project surveyors, Messrs. Gatome & Associates and sold off the same to their parties.
- i) In breach of his obligations and without any colour of right howsoever, the 1<sup>st</sup> Defendant purported to sell and transfer the suit property to the 2<sup>nd</sup> Defendant for a consideration of Kshs. 2,000,000/= pursuant to a transfer dated 26<sup>th</sup> August, 2009 and obtained a certificate of Title Number IR 119148.
- j) In so obtaining the new Title the 1<sup>st</sup> Defendant falsely made a false declaration that he original Deed Plan No. 205803 was lost and obtained a certified copy thereof from Director of Surveyors using the same project surveyors, Messrs. Gatome & Associates.
- k) The sale and subsequent transfer of the suit property by 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was fraudulent, null and void as it was deliberately done with intent to defeat the unregistered interest of the Plaintiff contrary to the provisions of section 2 of the Registration of Titles Act (Chapter 281 of the Laws of Kenya).
- l) The 2<sup>nd</sup> Defendant knew or ought to have known that the suit property was not available for sale and actively participated in the fraud as the loss and certification of the Deed Plan would have put her on notice that something was amiss
- m)The 2<sup>nd</sup> Defendant also knew or ought to have known that the suit property was not available for sale as it had been subdivided into one-eighth plots and demarcation beacons placed and this would have invited an inquiry from her as to why the suit property was fragmented.
- n) The instrument of transfer purporting to vest the suit property to the 2<sup>nd</sup> Defendant is defective, null and void for the reasons that it reflects two distinct properties and does not indicate the nexus thereto.
- o) The sale and transfer of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant is illegal null and void as it does not have the consent of the Land Control Board as required by the Provisions of Section 6 of the Land Control Act (Chapter 302 of the Laws of Kenya)
- p) The Plaintiff sold some of the sub-divided units to third parties and she is exposed to a multiplicity of suits and even possible arraignment in court on criminal charges of obtaining money by false pretence.
- q) The Plaintiff stands to suffer irreparable loss and damage if an injunction as prayed is not granted pending the resolution of this dispute herein.
- r) In the alternative, the suit property should be preserved and all dealings in and transactions affecting

it prohibited until the dispute herein is resolved.

The application is supported by the Affidavit dated 11<sup>th</sup> August 2011 sworn by the Applicant, Teresia Wangui Nganga and states as follows:- the 1<sup>st</sup> Defendant was the registered owner of the piece of land known as L.R. No. 10823/12 Thika (I.R No. 67253-“TWN) comprising 73.44 Hectares which he sub-divided into 10 acre parcels for sale; that by an Agreement for Sale dated 22<sup>nd</sup> January, 1996 and made between the 1<sup>st</sup> Defendant and the Applicant of the other part, the 1<sup>st</sup> Defendant agreed to sell to the her one 10 acres out of L.R. No. 10823/43 Thika Comprising for a sum of Kshs.1,100,00/- .TWN 2” is a copy of the said Agreement; that She paid in full the purchase price to the 1<sup>st</sup> Defendant, and duly applied for and obtained the Land Control Board consent to transfer in April, 1996, TWN 3A” and “TWN 3B are copies of the acknowledgments of Receipt of payment and the Land Control Board consent respectively; that the said parcel of land was demarcated and the boundary beacons placed and she took possession thereof immediately; that however, the 1<sup>st</sup> Defendant resiled in his obligations under the said Agreement and refused to process the Title Deed of the said parcel of land in her favour, thereby prompting her to file the proceedings in the Sub-ordinate Court at Thika being CMCC No. 99 of 1997 against the 1<sup>st</sup> Defendant in January, 1997; that the 1<sup>st</sup> Defendant filed a Defence stating that the parcel that was sold to her was L.R. No. 10823/44 Thika (“the suit property”) and not L.R. No. D10823/43 Thika. She accepted the substituted property L.R. No. 10823/44 Thika and took possession thereof and sub-divided into various sub-plots measuring approximately one-eighth of an acre for sale to third parties under her company, Wamuki Enterprises Limited; that the 1<sup>st</sup> Defendant surrendered to her the original Deed plan Number 205803 in respect of the suit property, which was the only document of title available at the time following sub-division by the 1<sup>st</sup> Defendant and she carried out the said sub-division of the suit property, L.R. No. 10823/44 Thika with the 1<sup>st</sup> Defendant’s knowledge and using the 1<sup>st</sup> Defendant’s surveyors who were the official Surveyors for the 1<sup>st</sup> Defendant’s entire project Messrs. Gatome & Associates and who had processed the Deed Plan for the suit property amongst others; that the 1<sup>st</sup> Defendant without her knowledge and without any colour of right, purported to sell the suit property to the 2<sup>nd</sup> Defendant and swore a false statutory declaration that the original Deed plan for the suit property was lost; the false declaration led to the Director of survey issuing a certified true copy thereof which resulted in the Certificate of Title being issued in favour of the Applicant, “TWN 9” a copy of the Certificate of Title No. IR. 119148 together with a copy of the certified Deed plan Number 205803.

The applicant also filed a Supplementary Affidavit dated 27<sup>th</sup> October 2011. In it the Applicant avers that she never resiled her desire to own the suit property; that the 1<sup>st</sup> Respondent has not produced evidence of the applicant alleged withdrawal from the sale and purchase or alleged rescission of the contract of sale and if that was the case, his defence in the Sub-ordinate Court would have been on those lines; that the 1<sup>st</sup> Respondent has never before demanded from the Applicant the she release or return the original Deed Plan of the suit property to him as alleged or at all and the reason advanced for him swearing a false affidavit for issuance of a certified copy are not only false, belated and unconvincing but are self-serving; that having taken possession of, and sub-divided the suit property as permitted by Clause 7 of the Agreement for Sale dated 22<sup>nd</sup> January, 1996, and having subsequently sold the sub-plots to third parties as beneficial owner, the applicant lack capacity and she is not prepared to accept a refund of the moneys she paid to the 1<sup>st</sup> Respondent; that the 2<sup>nd</sup> Respondent is not a bona fide purchase of value without notice as she knew or ought to have known, and had the means to know of the existence of her adverse interest in the suit property by virtue of the project surveyors therein who sub-divided the property on her behalf, and the issuance of a certified copy of the Deed plan which should have put the 2<sup>nd</sup> Respondent on notice.

The 1<sup>st</sup> Defendant filed a replying affidavit dated 30<sup>th</sup> September 2011 and stated the following in brief; that he agreed to sell and the Plaintiff agreed to purchase from him a portion of property L.R. No. 10823/44 being L.R. No. 10823/44 and not 10823/43 as claimed by the plaintiff; that the plaintiff upon paying the purchase price for property L. R. No. 10823/44 recalled her decision to purchase any of the sub-divisions and demanded or a refund of the purchase price. She never took possession of the property or place any boundary beacons on any properly as claimed or at all; that he did not resiled his obligations under the agreement and refused to process the title deed but the plaintiff upon paying the purchase price

recall her decision to purchase any of the sub-divisions and demanded for a refund of the purchase price; that he has been advised that the transaction for the sale of property L.R. No. 10823/44 to the Plaintiff was not concluded and was rescinded whether Plaintiff demanded a refund of the purchase price and he is not trustee as claimed by the Plaintiff; that the plaintiff conduct of demanding a refund of the purchase price showed she did not wish to be bound by the terms and condition and therefore of the agreement for sale and therefore waived her entitlement to the property; that when the plaintiff demanded her money he asked her to surrender the original title deed and she said it was lost and could not trace it and he proceed to make a statutory declaration stating that the deed plan was lost and that at no point did he know that the Applicant had it in her possession as she claims.

The 2<sup>nd</sup> Respondent Alice Wanja Wanjohi filed a replying affidavit dated 2<sup>nd</sup> September 2011 in which she states as follows in brief;-that she was unaware of the plaintiff's alleged interest in the subject land as there was no adverse interest was registered against the titles as by law envisaged and therefore she was a bonafide purchaser for value without notice; that she obtained a good and valid title from the Registrar of Titles upon purchasing the land L.R. No. 10823/12 (I.R. No. 119148) from the 1<sup>st</sup> Defendant; that she sold the said land vide an agreement dated 15.02.2010 (copy annexed Marked "AWN 1") and have no further interest in the land; that it is evident that the plaintiff herein despite knowing that she had not title or colour of rights over the land she was allegedly purchased proceeded to subdivide and sell the same and fraudulently issued share certificates to third parties.

Parties filed written submissions which I have carefully read and considered together with all the affidavits and annexures and cases cited. In the Plaintiff submission the following issues has been raised whether the 1<sup>st</sup> Respondent had capacity to sell the suit premises to the 2<sup>nd</sup> Respondents, whether there was fraud on the part of the Respondents in the manner in which the property was sold, was the requisite consent obtained under the Land Control Board. These are just some of the issues. In the 1<sup>st</sup> Defendant's submissions the 1<sup>st</sup> Defendant raises the issue of the plaintiff failure to stamp the agreement for sale as required in terms of section 19(3) of the Stamp Duty Act; that the plaintiff has never issued a completion notice to the Defendant, as required by the Law and submits further that the plaintiff conduct of demanding a refund of the purchase price is a clear indication that she did not wish to be bound by the terms of agreement and that the plaintiff has not demonstrated any breach of right to warrant a grant of an injunction nor has she demonstrated that she will suffer irreparable loss if the order of injunction is not given or that damages will not be an adequate remedy.

The 2<sup>nd</sup> Respondents in their submission stated that he applicant has failed to demonstrate that she has a prima facie case as she is a purchaser in good faith and not a party to any fraudulent transactions, that the plaintiff has no registered interest in the suit premises and her claim against the 2<sup>nd</sup> defendant is baseless as there is not caution or inhibition registered against the title, that the 2<sup>nd</sup> Respondent obtained the requisite consent from the Land Control Board, that the plaintiff did not take possession of the suit premises and there is no deed of mutation to show that she intend to subdivide the land and further that the Applicant has failed to show that she will suffer irreparable harm which cannot be satisfied by an award of costs.

The principles of granting an injunction as set out in the case of Geilla Vs. Cassman Brown E.A 1973 are that the Applicant has to show that she has prima facie case with a probability of success, that she will suffer irreparable damages if the injunction is not granted and if the court is in doubt it will decide the case in the balance of inconvenience. It is not in dispute that the applicant bought 10 acres from the 1<sup>st</sup> Defendant which

10 acres the 1<sup>st</sup> Defendants states he subsequently sold to the 2<sup>nd</sup> Defendant. The issues raised by the Applicant in their submission on whether the 1<sup>st</sup> Defendant had capacity to sale the said suit premises to the 2<sup>nd</sup> Defendant is of importance. The Applicant denies that she sought a refund of the money and that the 1<sup>st</sup> Defendant asked for the title that she had. The 1<sup>st</sup> Defendant claims that the Plaintiff told him that she had lost the title and thereafter he proceeded to get a certified copy of the title. For the Court to establish whether the 1<sup>st</sup> Defendant had capacity to sell the suit premises to the 2<sup>nd</sup> defendant and whether

there was fraud on the part of the Respondents there is need to hear evidence from each party. The 2<sup>nd</sup> Respondent claims to be a bonafide purchaser but the process of how the property was sold to her is in issue. Does she have a good title? This can only be determined at a full hearing. The issues between the parties in that matter are contentious and will definitely affect the rights of one party over another and even other parties for instance, the parties the Applicant states she sold the property to and the party 2<sup>nd</sup> Respondent said she sold the suit premises to. It is apparent that none of the parties claims to be in physical possession. This is an interlocutory application and the issues raised by the parties can only be determined at a full hearing. In the interest of justice bearing in mind that this is a court of equity I find that there is need to issue an order of prohibition. I therefore order and direct that all dealings in or transaction affecting the property known as L.R. No. 10823/44 Thika (Title No. I.R 119148) be prohibited pending the hearing and determination of this suit. Costs shall be in the cause. Parties in this suit shall comply with the provisions of order 11 of the Civil Procedure Rules within 30 days and take a mention for pre-trial conference. The Court shall thereafter give directions on the hearing.

Dated and delivered this 24<sup>th</sup> Day of February 2012

**R. OUGO**  
**JUDGE**

In the Presence of:-

Mr. Mutuli For the Applicant

Mr. Anzala For the 1<sup>st</sup> Respondent

Mr. Ngechu holding brief for Mrs Githae For 2<sup>nd</sup> Respondent

Mr. Kabiru Court Clerk