



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**PETITION NO. 62 OF 2011**

**BETWEEN**

**ALEX NYAMWEYA OSIEMO ..... PETITIONER**

**AND**

**GLADYS KWAMBOKA ONCHANGU ..... 1<sup>ST</sup> RESPONDENT**

**JAMES ONCHANGU MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

**DANIEL KANGWANA ONCHANGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner herein Alex Nyamweya Osiemo, filed this Petition dated 7<sup>th</sup> September 2011 on the same day. The Petitioner prays for the following orders:-

- a) Injunction order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their servants and agents from construction on the same piece of land namely parcel NO. NYARIBARI CHACHE/B/B/BOBURIA/6309 until investigations are over.
- b) Costs of this suit.
- c) Any other relief that this Honourable Court may deem fit.

2. The Petitioner's prayers are anchored on his contention that the Respondents herein have forged their way into parcel Number Nyaribari Chache/B/B/Boburia/6309 (the **suit land** ) which parcel was registered in the name of the Petitioner before 14<sup>th</sup> July 2010 when the Petitioner entered into a written sale agreement with the 1<sup>st</sup> Respondent, Gladys Kwamboka Onchangu and subsequently sold the whole of the suit land together with the improvements standing thereon including a permanent house and building materials together with two permanent toilets, two bathrooms and a permanent perimeter fence. Since the buyer Gladys Kwamboka Onchangu was living in the USA, she left immediately upon execution of the sale agreement but before discharge of charge since the suit land which was charged to the Co-operative Bank. The 1<sup>st</sup> Respondent also allegedly left before consent from the Land Control Board was given. The Petitioner was to ensure that the transaction was carried out to its logical conclusion in accordance with the law. The 1<sup>st</sup> respondent paid the full purchase price of Kshs.2,000,000/=. The Petitioner acknowledges the payment.

3. On the 11<sup>th</sup> February 2011, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents started construction works on the suit land. These two were according to the Petitioner, witnesses to the agreement for sale. The Petitioner contends that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were involved in forgeries of both his signature and that of the 1<sup>st</sup> Respondent.

4. Because of the apparent massive fraud leading to the transfer of the suit property into the name of the 1<sup>st</sup> Respondent, the Petitioner filed the notice of motion dated 7<sup>th</sup> September 2011 seeking an order of temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and their agents/servants from constructing and or doing any act on the suit land till the hearing and determination of this Petition. The notice of motion is supported by the Petitioner's affidavit sworn on 7<sup>th</sup> September 2011 and on the two (2) grounds on the face of the application to the effect that the 1<sup>st</sup> Respondent fraudulently obtained title to the suit land and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had already embarked on construction works on the suit land.

5. The application is opposed vide the Replying Affidavit of James Onchangu Macharia ID/NO.1619740 sworn on 21<sup>st</sup> November 2011. He contends that the Petitioner's petition is fatally defective, that the Petitioner sold the suit land to the 1<sup>st</sup> Respondent on or about 14<sup>th</sup> July 2010 and that having been paid the full purchase price, the Petitioner has no further interest in the suit land. The deponent also contends that the 1<sup>st</sup> Respondent signed all the transfer documents upon payment of the purchase price to the Petitioner and that it is the Petitioner who wants it to appear like the Respondents were involved in forgeries. He prays that the Petitioner's application for injunction be dismissed for lacking merit, especially so when the Petitioner seeks to have this honourable court carry out investigations of a criminal nature into this whole transaction.

6. In his further Replying Affidavit sworn on 16<sup>th</sup> December 2011, the 1<sup>st</sup> Respondent avers that the sale agreement and the transfer documents between the Petitioner and the 1<sup>st</sup> respondent were duly signed by the Petitioner and the 1<sup>st</sup> Respondent themselves and that thereafter the whole transfer process was done by the Petitioner himself, and that the question of fraud does not therefore arise. The deponent says that the Petitioner is interfering with the 1<sup>st</sup> Respondent's quiet enjoyment of the suit land.

7. This application was canvassed by way of written submissions which were duly filed and exchanged. I have carefully read the submissions. This being an application for injunction, the issues that arise for determination are as framed by counsel for the petitioner at page 2 of the written submissions and these are, in principle, the conditions that were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. These conditions must be met by the petitioner herein if the order sought is to be granted. These conditions are:-

- a) The applicant must demonstrate that he has a prima facie case with probability of success;
- b) The applicant must further demonstrate that if the order sought is not granted, he will suffer irreparable loss, which cannot be compensated by payment of damages;
- c) In case of doubt, it must be shown that the balance of convenience tilts in favour of the Petitioner.

8. Upon reading the pleadings and the submissions, I have come to the conclusion that the Petitioner has not met the threshold for the granting of an injunction. In the first place, the prayer in the Petition is at variance with the prayer in the notice of motion dated 7<sup>th</sup> September 2011. In the Petition, the Petitioner prays for an order of temporary injunction pending completion of investigations. In the application, the petitioner seeks an order of injunction pending the hearing and determination of the Petition. To this court's mind, the Petitioner is not certain of what it is that he wants from the court.

9. Secondly, the Petitioner has not demonstrated that he has a *prima facie* case with the probability of success. It is not in dispute that the suit land was sold to the 1<sup>st</sup> Respondent vide the agreement of Sale

dated 14<sup>th</sup> July 2010. The Petitioner was paid the entire agreed purchase price of Kshs.2,000,000/=. That is what the Petitioner says at paragraphs 3, 4 and 5 of the Petition. The Petitioner's complaint is that he is not the one who applied for consent from the Land Control Board and that in any event, the alleged consent was given before the suit land was discharged by the Co-operative Bank to which it was charged. This court has examined all the annexures to the respective affidavits and what the Petitioner says sounds incredible. In any event, having sold the suit land and been paid the full purchase price, the Petitioner has no such interest in the suit land as would assist him in establishing a **prima facie** case with the probability of success. There is also no evidence to show that if the order sought is not granted, the Petitioner will suffer irreparable loss that cannot be compensated by payment of damages. The Petitioner's loss, if any, has already been secured by payment of the agreed purchase price by the 1<sup>st</sup> Respondent. Even if I were to consider this application on a balance of convenience, the same tilts in favour of the Respondents. The 1<sup>st</sup> Respondent bought the suit land and paid off the entire purchase price to the Petitioner. If the Petitioner's case was that the transfer had been effected before payment of the purchase price, this court would have thought otherwise.

10. Accordingly, I find and hold that the Petitioner's notice of motion dated 7<sup>th</sup> September 2011 lacks merit. The same is hereby dismissed with costs to the Respondents.

11. It is so ordered.

**Dated and delivered in open court at Kisii this 28<sup>th</sup> day of March, 2012.**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Sagwe for Aunga Momanyi for Applicant/Petitioner

Mr. Kaburi (present) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**