REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 344 of 2011

SAMWEL MURIITHI MUHORO ……..……..PLAINTIFF

VERSUS

VINCENT MBOGORO WAINAINA.....…… DEFENDANT

RULING

1. The plaintiff/applicant hereinafter referred as the Applicant filed a Notice of Motion dated 8/7/11, under Order 40 Rule 1 (a), 4 and order 51 Rule 1 of the Civil Procedure Rules (CAP 21) Laws of Kenya seeking the following orders;

i. This Honorable court be pleased to issue a temporary order of injunction restraining the defendant/respondent, his servants, employees, agents, assigns or any other person claiming under, or through him from excavating or harvesting building materials, blocks, soil or stones or in any other manner entering into or interfering with land parcel juja/Kalimoni Block 17/118 pending the full hearing and determination of this suit.

ii. The officer commanding station (OCS) Juja Police station do enforce and ensure compliance with the orders herein until such further notice by this honorable court.

iii. The costs of this application be provided for

The application is based on the following grounds.

a. The suit property Juja/Kalimoni Block 17/118 originally belonged to one Violet Benadicter Wacuka Ngugi who was the registered owner.

b. Pursuant to an agreement of sale and pursuant to obtaining the land control board to transfer, the said property was on 31st March 2011 transferred and registered in favour of the plaintiff/applicant herein and a title deed was issued.

c. Further the said property was charged in favour of Equity Bank Limited for the Plaintiff/Applicants' financiers.

d. The purpose of purchasing the said property being to subdivide into various residential plots for resale at a profit, which profit was intended to service the said loan, the applicant did consequently cause subdivision of the same into various plots and various bacons were erected therein.

e. The defendant without any reasonable cause, excuse and/or legal justification has entered in to the said parcel of land, removed the said beacons and commenced harvesting and/or excavating building blocks and/or materials from therein.

f. The said acts amounts to a waste damage and/or destruction of the property as the same would render the plots unsuitable for residential purposes the very object the applicant bought the said parcel for.

g. Unless the orders herein prayed for a granted, the said parcel of land will be wasted while the applicant risks his properties or assets being attached by the Bank for non-payment of the loan.

2. The applicant filed a supporting affidavit dated 8th July 2011 and a further affidavit dated 29th September 2011. Facts deponed by the applicant are as follows; On the 24th February 2011 he entered into a contract of sale to buy the suit plot Juja/Kalimoni Block 17/118 from Violet Benadicter Wacuka Ngugi and the plot was transferred to him on the 31st March 2011 and he obtained a title (SMM 3(b)) in his name. The property was charged to Equity Bank since he was obtaining the balance of the purchase price from the said bank. His intention in buying the suit plot was to subdivide and resale for profit. In the month of April 2011 he began the process of subdivision and erecting beacon through a surveyor. That without his knowledge, consent and authority, the defendant/respondent entered into the said property, removed the beacons and commenced harvesting and/or excavating building blocks, stones and materials as a result the landscape of the said plots is being interfered with thereby rendering the same unsuitable for residential plots.

3. In response to the defendant's affidavit the applicant states that what the respondent bought was L. R No. 10823/18/B measuring approximately 42 acres as illustrated in the respondent annexures 'VMW' the title and deed plan as well as 'VMW1' Sale Agreements dated 7th June 2010 and 15th February 2010 respectively; that there is no nexus between L.R. No. 10823/18/B which belongs to the respondent and Juja/Kalimoni Block 17/118 which he bought the two parcels of land are very different and distinct; that he has been advised by his advocates that when a contract has been reduced into a form of a document and the same is written no evidence shall be given in proof of the terms of such contract except the document itself; that what the respondent bought was Plot No. 10823/18/B via Sale Agreements dated 7th June 2010 and 15th February 2010 respectively and the respondent cannot allege at the same time to have purchased the suit property Juja/Kalimoni Block 17/118 which he is the only registered owner with a valid and legal title obtained without any fraudulent actions and that the respondent should seek recourse from the person who sold to him the parcel of land 10823/18 which he claims to be the same as his parcel of land Juja/Kalimoni Block 17/118.

4. The defendant hereinafter referred as the respondent filed a replying affidavit dated 15th August 2011 and a supplementary affidavit dated 8th November 2011 and he depones as follows in brief; on the 15th February 2010 and 7th June 2010 he entered into agreements along with his wife Mary Nyokabi Mbogoro with Violet Benadicter Wacuka Ngugi to purchase the suit plot Juja/Kalimoni Block 17/118; that at the time of purchase of the said parcel of land its head title was land reference number was 10823 which was pointed out to him and proposed as Land Reference number 10823/18/B, the alleged title for Juja/Kalimoni Block 17/118 now processed had not been issued. That the beacons for the said parcel of land were pointed out by the surveyor and the vendor and he proceeded to plant tree seedling round the demarcated and identified perimeter. Upon execution of the supplemental agreement of the 7th June 2010 and payment of Ksh.3,750,00/- being 50% deposit towards the purchase price as he awaited completion documents from the vendor; that the suit property herein Juja/Kalimoni Block 17/118 is one and the same property as the proposed subdivision Number L. R. 10823/18/B which has been sold to him

and pointed out by the registered owner in the name of Violet Benadicter Wacuka Ngugi; that at the time of the execution of the agreement the parcel of land sold to him and identified it was a leasehold property registerable under the Registration of Titles Act, Chapter 281 Laws of Kenya and not under the Registered Land Act Chapter 300 Laws of Kenya under which the title was obtained and land regime under which the property fell was changed to solely defeat his interest in the same; that the suit property was adjacent to another parcel L. R 10823/420 registered in his name to another parcel of land and mentioned in the supplemental agreement; that he bought the same land because of its proximity of the existing piece of land for expansion of his stone extraction operations and he has been excavating stones, building blocks and other materials from the time he took possession of the land; that the plaintiff is a trespasser and should seek recourse from the vendor for having sold to him a parcel of land when she knowingly had already sold to him and any subsequent transfer of the property to the plaintiff/applicant by the said vendor is fraudulent and a *nullity ab initio* and he seeks the dismissal of the plaintiff's case.

5. In the supplementary affidavit the respondent avers that he has established that the applicant is the same person who was introduced to him as a surveyor by the vendor, Violet Benedicter Wacuka Ngugi, when he was buying the land, a fact that was also confirmed by the vendor at Thika police station after she was arrested by police for obtaining money by false pretenses; that the applicant had full particulars and knowledge of his purchase, possession and occupation of the said property as he was the one who together with the vendor pointed out the beacon to himself of the proposed L. R No. 10823/18 (B) which was to be subdivided from L.R. No. 10823/18 the alleged title for JUJA/KALIMONI BLOCK 17/118 now registered in the name of applicant thus the applicant is stopped from denying the same as he had full knowledge of his purchase, occupation and possession of the said property; he contends further that there was conspiracy between the applicant and the vendor to defeat my interest on the said land by changing the regime of the said property from leasehold to freehold property (from land registerable under chapter 281, Registration of Titles Act to Chapter 300, Registered Land Act) and subsequently effecting registration in the name of the applicant; that has also established that the applicant and the vendor are well known to each other and it was evidenced when the applicant became a surety of the vendor at the Criminal Case No,. 4545 of 2011 at Thika Law Courts, where he confirmed that he knew the vendor well and the applicant will ensure here attendance in court; that he has been advised by his advocates on record which he believe to be true the change of the land regime from the Registration of Title was changed to solely defeat his interest and any claim thereto as the land on the ground remains the same physical location pointed out to him by the plaintiff and demarcated by himself by planting of 20,000 tree seedling; that the transfer and registration of the applicant is fraudulent and *void ab initio* as he has been in peaceful possession of the said suit property since 7th June 2010 harvesting and or excavating building blocks, stones and materials and had planted tree seedlings in the said parcel of land; that L.R. No. 10823/18B and Juja/Kalimoni Block 17/118 is one and the same parcel of land as evidenced by the Registry Map sheet for Juja/Kalimoni Block 17/118 which clearly indicate the field sheet is of L.R. No. 10823/18 and indicated in the title deed; that him being in possession and occupation of the said parcel of land the applicant could not have acquired legal title without considering his interest as a purchaser. Further the applicant was registered as proprietor of the disputed suit property subject to the overriding interest set out in Section 30 of the Registered Land Act as may subsist and affect the land, thus registration of plaintiff/applicant as absolute owner is *void ab initio*; that he further contend that the consent to transfer and transfer was obtained by mis-presentation of the fact that the disputed/suit property was in vacant possession while he was in occupation.

6. Counsel filed written submissions which I have carefully read and considered together with the affidavits in the annexures and I find as follows; the applicant is seeking injunctive orders against the defendant, both parties have quoted the case of Geilla Vs. Cassman Brown & Co. Ltd (1973) EA which clearly lay out the principles of granting an injunction that;

i. The applicant has to show that he has a prima facie case with probability of success

ii. That he will suffer irreparable injury, damage and loss

iii. If the Court is in doubt it will decide the case on a balance of convenience.

The applicant states that he bought the suit property from Violet Benadicter Wacuka Ngugi. His title is known as Juja/ Kalimoni Block 17/118. He has exhibited the sale agreement and the title SMM1(a) and SMM2 and he claims to be the lawful registered proprietor. The title he holds is under the Registered Land Act Cap 300. The respondent on the other hand states that he bought the same suit plot from the same Violet Benadicter Wacuka Ngugi. To support his claim he has exhibited a title issued under the Registration of Titles Act Cap 281 and agreements showing he bought 10 acres that was to be excised from L.R No. 10823/18 the head title and that subsequently the alleged title of Juja/Kalimoni Block 17/118 was processed in the applicant's name. The respondent states that the land the applicant claims is his is the same one he bought from the Violet Benadicter Wacuka Ngugi. Prima facie from what is on record the applicant has a title to the suit premises registered under Registered Land Act Cap 300. The respondent bought land that was to be excised from L.R No. 10823/18. Although he claims that it is the same piece of land which the applicant claiming, I find that he has not clearly shown that this is the same parcel of land as the applicants. However I note that the respondent has alleged fraud on the part of the applicant and also his allegations that the applicant was the same surveyor who pointed out the land together with the defendant was not controverted by the applicant. I do note however that the applicant has exhibited a title that shows the suit property is in his name. Prima facie he has established he has a prima facie case with a probability of success. The applicant has also shown that he has obtained a loan using the said title from Equity Bank, it is evident that he is likely to suffer loss in the event that the orders are not granted as he has a loan to repay. The balance of convenience in this case tilts in favour of the applicant on the documents attached. I therefore grant an injunction restraining the defendant/respondent, his servants, employees, agents, assigns or any other person claiming under, or through him from excavating or harvesting building materials, blocks, soil or stones or in any other manner entering into or interfering with land parcel Juja/Kalimoni Block 17/118 pending the full hearing and determination of this suit. Costs are awarded to the applicant.

Dated and delivered this 17th Day of May 2012

R. OUGO
JUDGE

In the Presence of:-

…….. For the Applicant

…… For the Respondent

…… Court Clerk