



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL & LAND CASE 60 OF 2012**

**HILDA KAGURE.....PLAINTIFF**

**- VERSUS -**

**MOSES LESHAO.....1<sup>ST</sup> DEFENDANT**

**LAINI OLE LEI Alias SAMUEL SONDAI.....2<sup>ND</sup>  
DEFENDANT**

**JOSEPH NTOIKA.....3<sup>RD</sup> DEFENDANT**

**COUNTY COUNCIL OF OLKEJUADO.....4<sup>TH</sup>  
DEFENDANT**

**RULING**

1. This is the plaintiff's notice of motion dated 6<sup>th</sup> February 2012. The plaintiff prays for an interlocutory prohibitive injunction to restrain the defendants from interfering with her quiet possession of plot number 346 at Oloosirkon shopping centre, Olkejuado County Council. The motion is expressed to be brought under order 40 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act.
2. In a synopsis, the plaintiff avers that she is the *bona fide* purchaser for value of the suit property and has been in possession since the year 2009. She runs a business there. She has been paying rates and other outgoings to the 4<sup>th</sup> defendant council. She bought the property from the 1<sup>st</sup> defendant by an agreement witnessed by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have not transferred the land to her. In May 2011, the 3<sup>rd</sup> defendant, a close relative of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, in collusion with the 4<sup>th</sup> defendant has attempted to remove the plaintiff from the property. She pleads fraud. The defendants claim that the plaintiff's plot is the same as the 3<sup>rd</sup> defendant's plot numbered 222. As the plaintiff has been served with a formal notice to vacate by the 4<sup>th</sup> defendant local authority, she has brought these proceedings to secure her proprietary rights.
3. The motion is contested. There are four sets of replying affidavits: those by the 1<sup>st</sup> and 2<sup>nd</sup> defendants sworn on 13<sup>th</sup> February 2012; the one by the 3<sup>rd</sup> defendant sworn on 24<sup>th</sup> February 2012; and lastly the affidavit of John Harambee Gitingo sworn on 9<sup>th</sup> May 2012 and for and on behalf of the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant's case is that the property in dispute is plot number 222. That plot, according to the council, is registered in the name of the 3<sup>rd</sup> defendant. It is not owned by the plaintiff who has encroached upon it and placed a container and building materials there. Plot number 346 is owned by the 1<sup>st</sup> defendant. The council has no records indicating ownership by the plaintiff. It thus takes

up cudgels on the plaintiff's complaint that it has delayed or frustrated transfer of the plot to her. The 4<sup>th</sup> defendant's position is that it has unsuccessfully tried to resolve the dispute. It was thus constrained to issue the eviction notice. In a nutshell, the 3<sup>rd</sup> defendant's case is that he is the owner of plot 222. As per the annexed survey report marked "JHG 3", the plot is different from the one claimed by the plaintiff. It was also submitted that plot 346 in any event belongs to the 1<sup>st</sup> defendant. Accordingly, the defendants aver that the plaintiff's suit lacks merit.

4. I have heard the rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive and mandatory injunctions are now well settled. When a litigant approaches the court for prohibitive injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. Applying those principles to the facts, I find as follows. The hub of the entire claim turns on the true location of plots 346 or 222. The plaintiff contends she is in occupation of plot 346. The defendants cross claim is that that is actually plot 222. I have studied the agreement for sale dated 11<sup>th</sup> September 2009 between Moses Leshau Laini, the 1<sup>st</sup> defendant and the plaintiff. It is a simple handwritten agreement for sale of a business plot number 346 at Oloosirkon trading centre, county council of Olkejuado. It is not stamped. It is witnessed by the 2<sup>nd</sup> defendant, a brother of the 1<sup>st</sup> defendant, and a Mr. C.K. Njai advocate. I have then looked at the letter of allotment dated 10<sup>th</sup> March 2006 to the 1<sup>st</sup> defendant by the 4<sup>th</sup> defendant council annexed to the plaintiff's supplementary affidavit sworn on 28<sup>th</sup> June 2012. It is not clear whether the 1<sup>st</sup> defendant fully complied with the terms of that allotment. Nevertheless, the 4<sup>th</sup> defendant does not contest that ownership. However, from a legal standpoint, a letter of allotment is not a title to property. It is a transient and often conditional right or offer to take the property. See Wreck Motor Enterprises Vs. Commissioner of Lands and others Nairobi Civil Appeal 71 of 1997 (unreported), Jaj Super Power Cash & Carry Limited Vs Nairobi City Council and others Nairobi, Civil Appeal 111 of 2002, Court of Appeal, (unreported). The transfer of the interest of the 1<sup>st</sup> defendant under the letter of allotment to the plaintiff is thus on a weak platform. But those are matters for determination by the trial court.

6. I have seen a number of payment receipts for single business permit for a business carried on by the plaintiff at the disputed property. Those receipts cannot be the basis of ownership. The plaintiff has not provided any other evidence of ownership beyond the sale agreement. The receipts for land rent or rates annexed to the supporting affidavit and marked "HKM 4" are made out in the names of the 1<sup>st</sup> defendant. One was issued as late as 18<sup>th</sup> January 2012. At paragraph 8 of the supporting affidavit, the plaintiff concedes that she paid the purchase monies to the 2<sup>nd</sup> defendant, the father of the 1<sup>st</sup> defendant. I find it odd because she was buying the property from the 1<sup>st</sup> defendant. Although the plaintiff states there was fraudulent collusion by the two defendants to transfer the land to their relative, the 3<sup>rd</sup> defendant, there is a paucity of evidence of the fraud. It may be inferred. But there must be a basis. I am alive to the cardinal precept of the law of evidence that he who alleges must prove. I am also cognizant that the burden of proof of fraud is very high and beyond a balance of probabilities. See Koinange and 13 others Vs Koinange [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E A 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR 67. It requires proof beyond the usual standard of balance of probabilities in civil cases. Again, the less I say the better to avoid encroaching on the province of trial court.

7. There is then the central issue of the location of plot 346: Is it the same as plot 222? The latter plot

was allocated to the 3<sup>rd</sup> defendant on 6<sup>th</sup> August 2002. It is an older allotment to the one for plot 346 to the 1<sup>st</sup> defendant of 10<sup>th</sup> March 2006. I am not impressed by the explanations by the 4<sup>th</sup> defendant county council. If the 4<sup>th</sup> defendant was forthright and methodical in its allotments, the parties would not be in a maze about the true location of the disputed properties. Instead, the 4<sup>th</sup> defendant has provided a map, annexure "JHG 3" that is a Mumbo Jumbo. Plots are selectively numbered. Plot 374 can be seen. But there is no indication of plot 376. To demonstrate my frustration with this conundrum of a map, plot 374 is sandwiched between plots numbered 435 and 452. Plot 5 is between plots numbered 130 and 117. There is no logical sequencing. Even the validation exercise referred to by the plaintiff is difficult to comprehend. Where then is plot 346? It is not enough to simply state as in the letter of 16<sup>th</sup> April 2012 by the council to the court that plot 346 is owned by Laini Ole Lei.

8. In the end, I am doubtful that the plaintiff has made out a *prima facie* case. The 1<sup>st</sup> and 2<sup>nd</sup> defendants certainly sold some property to the plaintiff. Where is that piece of land on the firmament or dry earth? There is then a real question whether plot 222 is superimposed upon plot 346. That matter can only be resolved by the trial court upon tested evidence. I am thus also in doubt that damages would be an adequate remedy. Damages are not always an adequate remedy where there is breach of a legal right. See *Aikman Vs Muchoki* [1984] KLR 353. I would in the circumstances then weigh the balance of convenience. The plaintiff is in possession. She is running a hardware business there. The county council has failed to provide clear light on the whereabouts of plot 346. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have conveniently fallen silent on the matter. They are the ones who sold the property and received the monies. The 4<sup>th</sup> defendant has issued an eviction notice. On a preponderance of the available evidence, I am of the considered opinion that the balance of convenience tilts in favour of the plaintiff. I am also fortified by the requirement in article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. In a land matter, that becomes an overriding objective of the court. I am thus minded to grant a temporary relief pending hearing of the suit.

9. In the result, I order as follows:

- a) There is hereby issued an injunction restraining the defendants by themselves, their agents, servants or howsoever from interfering with the plaintiff's quiet possession and enjoyment of plot number 346 or by whatever other number or designation at Oloosirkon shopping centre, Olkejuado County Council until the hearing and determination of this suit.
- b) The plaintiff shall file and serve a suitable undertaking as to damages.
- c) The main suit shall be determined within one year of today's date failing which the orders of injunction shall lapse.
- d) As the rights of the plaintiff and the 3<sup>rd</sup> defendant over the suit property have not been determined, I order that costs shall abide the judgment.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of September 2012.**

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

No appearance for the Plaintiff.

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr. Nduna for the 3<sup>rd</sup> Defendant.

Ms Kasim for Mr. Naikuni for the 4<sup>th</sup> Defendant.