



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 602 of 2010**

**FRANCIS NDUNGU KIMANI.....PLAINTIFF**  
**VERSUS**

**UPSTATE INVESTMENT LIMITED .....1ST DEFENDANT**

**THE REGISTRAR OF TITLES.....2ND DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a Notice of Motion dated 14/6/11 under order 40 rule 2 (1) & (2) of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, seeking the following orders.

i. Spent

ii. That pending the hearing and determination of this applicant, the 1st defendants, their agents, servants and/or employees or any persons (s) acting under their direction be restrained from selling, transferring, constructing any structure and/or in any other way dealing with the suit land namely L.R No. 13330/389.

iii. That pending the hearing and determination of this suit, the 1st defendants, their agents, servants and/or employees or any persons(s) acting under their direction be restrained from selling, transferring, constructing any structure and/or in any other way dealing with the suit land namely L.R No. 13330/389.

iv. That costs of this application be provided for.

The application is based on the following grounds.

(a) That at all material times to this suit the applicant was the registered owner of a parcel of land known as L.R No. 13330/389 situated in the City of Nairobi.

(b) That on 7th December 2010, the applicant filed suit against the respondents alleging that on or about 29th October 2008, the 2nd defendant in collusion with the 1st defendant fraudulently and illegally transferred the entire applicants land L.R No. 13330/389 to the 1st defendant and sought interalia orders directing the 2nd defendant to cancel the title in the 1st defendants name and reinstate the applicant as the sole owner of the suit land.

(c) That the 1st, 2nd and 3rd defendants have filed their defences and the 1st defendant has gone further

and sought indemnity from the 2nd defendant for any loss that may be incurred as a result of the pending suit.

(d) That the suit land has always been vacant until on or about 10th June 2011, when the 1st defendant started excavating the same with clear intention of putting or constructing structure (s) on the suit-land.

(e) That the applicant claims ownership of the land and denies having ever transferred the same to the 1st defendant.

(f) That since the said claim by the applicant is currently pending for hearing and determination by this Honorable Court, the 1st defendant's acts of construction of structures on the suit land will render the outcome of the said determination nugatory and the applicants cause of action.

(g) That the 1st defendant's action if unrestrained will expose the applicant to the risk of substantial loss and damage.

(h) That it is in the interest of justice and fair play the applicant be granted the orders sought to enable him not only safeguard the status quo but also ensure that the outcome of the suit herein is not rendered nugatory.

2. The applicant filed a supporting affidavit dated the 14/6/2011 and a supplementary affidavit dated the 19<sup>th</sup> July 2012. This is what he depones in the said affidavits; that on 6th November 2007, Joreth Limited executed a transfer of the suit land L.R. No. 13330/389 in his favor and he subsequently obtained a certificate of title for the suit land. That on or around 29th June 2009, his then advocates Kimani Kahiro & Associates wrote to the Chief Lands Registrar and complained that the purported transfer on the suit land to the 1st defendant was illegal and requested the Chief Lands Registrar to forbid any dealings with the said piece of land and the said letter was copied to the 1st defendant. That his advocates on record served statutory notice on the Attorney General on 2nd September 2010 giving notice of Intention to sue with a view to revoke the transfer of L.R. No. 13330/389 in favor of the 1st defendant. On 10th June 2011 he came to learn that the 1st defendant had started excavating the suit land with a view to construct structures thereon. That the person shown as the vendor of the suit land in the Transfer marked as Exhibit JC1 is not himself and the said transfer bears an identity number purporting to be his but does not bear his pin number and his signature was forged. That he has never appeared before an advocate called Mugo Ngunda on 22<sup>nd</sup> October 2007 at all nor does he know him. That his correct pass port size photograph, pin number and ID card number are as shown in the transfer executed by himself and marked as exhibit, FNK. He knows of his own knowledge that the person whose photograph appears on exhibit JC1 as the vendor is Antony Njoroge Ciera who was charged in Kibera CM Criminal case No. 4234 of 2009, with the offense of forging land title to land parcel number 13330/349 IR 108794 in the name of Francis Ndungu Kimani contrary to Section 350(1) of the Penal Code plus 5 other counts related to making a document without authority with regard to his identity card Number 3347773 contrary to section 357 (a) of the Penal Code among others that the accused jumped bail and the case was subsequently withdrawn on 14th June 2010 under section 87 (a) of the Criminal Procedure code. That the 1st defendant bought the suit property from fraudsters without ascertaining whether he was the vendor and as such the 1st defendant cannot acquire a good title and he owns the property.

3. Mr. Josiah Chege a director 1st defendant/respondent company of the 20th June 2011 averred as follows. That the suit piece of land was lawfully transferred to the 1st defendant/respondent. That the plaintiff/applicant's claims of illegality in the transfer of the suit property are baseless and misguided since the transfer of the suit property by the 2nd defendant/respondent was done in accordance with the provision of the relevant laws governing transfer of such land. That the sale was untainted by any irregularity fraud or any other impropriety as alleged by the plaintiff/applicant and no particulars for fraud or illegality have been set out to require the 1st respondent to so respond. That the 1st defendant/respondent is the bonafide registered owner of the suit premises and it is entitled to protection set out under section 31 of the Registration of Titles Act Cap 287 Law of Kenya. That the plaintiff/applicant is not likely to suffer any or any substantial loss or damage from the 1st defendant/respondent's action for which an atonement in damages if the plaintiff/applicant's application is

granted as it will be denied user of the suit property purchased by it in good faith in an open market for value from the property's rightful owner.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants chose not to participate in this application. They did not file any response to the application. Parties filed written submissions. I have read and considered them. Counsel for the applicant reiterated what is deponed in the plaintiff's affidavit and submitted the applicant has a case with overwhelming chances of success. The applicant relied on the case of ***Geilla vs. Cassman Brown & Company (1973) E. A. 357 and Parkview Arcade vs. Kangethe & 2 Others***.

5. The 1<sup>st</sup> defendant submissions are that the applicant has failed to prove that he has a prima facie with a probability of success because he failed to show that the 1<sup>st</sup> defendant fraudulently acquired the title. That 1<sup>st</sup> defendant was a party to the fraudulent activities of the alleged fraudster Antony Njoroge Ciera and that this is a prerequisite for the rectification and or cancellation of a title under Section 143 (1) and (2) of the Registered land Act Cap. 300. That this position has been reaffirmed by Section 23 (1) of the Registration of Titles Act which states that a title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. That the applicant has failed to prove the nexus between the 1<sup>st</sup> defendant and the alleged fraudster. On this proposition he relied on the case ***John Karanja Warui vs. Vincent Mungai Mbugua and others Nrb. HCCC No. 415 of 2009 and the case of Parkview*** also cited by the applicant. The 1<sup>st</sup> defendant also relied on the provisions of Section 39 (1) of the Registered Land Act . Cap. 300 which he argued protects person like the 1<sup>st</sup> defendant which states that *no person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned to inquire or ascertain the circumstance in or the consideration for which that proprietor or the previous proprietor was registered.*

6. That the 1<sup>st</sup> defendant therefore was not under any legal obligation to inquire or ascertain the circumstance of the proprietor's registration and therefore cannot be held liable for any fraudulent activities. That the applicant should join the Commissioner of Lands now that he seeks to cancel the title and failure to do so disentitles him of the said orders, For this argument he relied ***C. A. No. 138 of 1997 Pashito Holdings & Another vs. Ndungu & Others***. On the 2<sup>nd</sup> principle of irreparable damages it was submitted that the applicant has not proved that he will suffer irreparable injury which cannot be compensated by an award of damages neither has he demonstrated that the 1<sup>st</sup> defendant is incapable of paying him any damages incurred in the unlikely event that his suit is successful. That section 24 of Cap. 281 provides that a party deprived of land through fraud or error can claim damages (see *Parkview Shopping Arcade vs. Kangethe & 2 Others*). On the 3<sup>rd</sup> principle of balance of convenience it was submitted that if the Court is in doubt in whose favor it should grant the orders the balance of convenience should tilt in the 1<sup>st</sup> defendant favor as it has demonstrated that it is a purchaser for valuable consideration who is in possession of the suit property as shown in exhibit "FNKVI" and that the applicant has not shown that he is in possession (***Masinde Maruti Kukai vs. Edward Peter Ongongo & Another – Bungoma HCCC No. 14 of 2003***).

7. I have read and considered the affidavits filed the submission and cases referred to. The parties have corrected submitted that the principles of granting an injunction are well settled, that the applicant has to show that he has a prima facie case with a probability of success, that he will suffer irreparable loss unless the injunction order is granted and if the Court is in doubt it shall decide the case on a balance of convenience. From what is annexed there are two transfers on L. R. No. 13330/389 one in the applicants name dated the 18<sup>th</sup> July 2007 and the other exhibited by the 1<sup>st</sup> defendant is dated the 22<sup>nd</sup> October 2008. According to the applicant he did not transfer his property to the 1<sup>st</sup> defendant. He argues that the said transfer was fraudulent and illegal. I agree with the 1<sup>st</sup> defendant's submissions that the applicant has failed to show how the 1<sup>st</sup> defendant was a party to the fraud. On the surface as it is the 1<sup>st</sup> defendant is a purchaser for valuable consideration and the provisions of the law cited under Registration Land Act Cap. 300 ( now repealed) support the 1<sup>st</sup> defendant's case. However on the other hand the applicant has demonstrated that there could have been some fraud committed in the way the property was transferred to the 1<sup>st</sup> defendant. He referred the Court to the criminal case. None of the parties have exhibited the final

decision of the case against Antony Njoroge Ciera alias Francis Ndungu Kimani which would have shed light on the fraud alleged. From the pleadings filed the plaintiff and the 1<sup>st</sup> defendant are each claiming ownership of the suit land. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants in their defence deny that there was fraud or illegality on their part. With this in mind my considered view is that this matter should go to full hearing so that the Court can determine whether the plaintiff owns the land or that the 1<sup>st</sup> defendant is a purchaser for valuable consideration. Granting the injunction or dismissing the application will not assist any of the parties. In the meantime to preserve the status quo I order that neither the plaintiff nor the defendant shall undertake any construction on the suit land or transfer it to another party. The parties in this suit shall comply with the provision of order 11 the Civil Procedure Rule 2010 and fix the suit for hearing . Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 29<sup>th</sup> day of November 2012

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

In the Presence of:-

..... For the Plaintiff/ Applicant  
..... For the 1<sup>st</sup> Defendant/ Respondent  
.....For the 2<sup>nd</sup> Defendant/ Respondent  
.....For the 3<sup>rd</sup> Defendant/ Respondent  
..... Court Clerk