



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 18 of 2008**

**SIMON MURIITHI MAINA (suing on his behalf and on behalf of 33 others.....PLAINTIFF/RESPONDENT**

**VERSUS**

**1. ANTONY NZUKI**

**2. EMMANUEL KAKULA(both being sued in the capacities as administrators of the estate of the late RAPHAEL KAKULA NZUKI)**

**3. DIVISIONAL INTERGRATED DEVELOPMENT PROGRAMMES COMPANY LIMITED (DIPS).....DEFENDANTS**

**R U L I N G**

Before me is an application by way of **Notice of Motion** dated 8<sup>th</sup> April 2011 filed by the 1<sup>st</sup> defendant Antony Nzuki under **Order 40 Rules 1 (a) 2, and 4 (1) of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act (Cap 21)**. It has six (6) prayers three (3) of which have been spent as follows:-

**1. (Spent).**

**2. (Spent).**

**3. (Spent).**

**4. THAT an injunction be issued pending the hearing and determination of this suit restraining the plaintiff/respondents, their agents, servants, contractors and all each of them whether by themselves or otherwise howsoever from entering all that parcel plot of land known as LR No. 12715/197 or any part thereof and constructing or putting up any form of structures thereon, or in any other way interfering with the said land.**

**5. THAT the plaintiff/respondents do pay the costs of this application.**

**6. THAT such further or other orders be made as may seem just to the Honourable Court.**

The application has grounds on the face of the Notice of Motion. The grounds are, in summary, that the land belonged to the late **Raphael Kakula Nzuki** (deceased) who had entered into a sale agreement in

2002 with the third defendant; that the 3<sup>rd</sup> defendant materially breached the agreement by failing to pay the agreed purchase price and in 2005 the deceased filed **Nairobi HCCC No. 1157 of 2005** seeking to evict the 3<sup>rd</sup> defendant from the subject property; that the deceased died in 2007 before conclusion of the said suit; and that the plaintiffs herein, claimed to have bought the suit property from the 3<sup>rd</sup> defendant and had wrongfully and unlawfully commenced hurried construction of permanent buildings/houses on the suit property.

The application was filed with an affidavit sworn by **Anthony Nzuki**, the 1<sup>st</sup> defendant on 8<sup>th</sup> April 2011. The said affidavit gives the background information to the application. A further affidavit sworn by the same deponent on 14<sup>th</sup> April 2009 was filed. This further affidavit annexes photographs of the land and housing developments made thereat.

The application is opposed. A replying affidavit sworn on 19<sup>th</sup> April 2011 by **Simon Muriithi Maina**, the 1<sup>st</sup> plaintiff was filed. It was deponed, *inter alia*, that the 3<sup>rd</sup> defendant sold the plots to him and 33 other people; that the 3<sup>rd</sup> defendant informed the lawyers acting in the sale transaction that he possessed the original grant to the property which was deposited with him by the deceased; that innocent purchasers had invested heavily on the plots; that the suit that is **Nairobi ELC No. 1636 of 2007** which had been filed by the deceased against the 3<sup>rd</sup> defendant had been dismissed on 22<sup>nd</sup> March 2007 for non-attendance; that the orders sought herein were late and belated; that the plaintiffs (as purchasers) had taken possession of the land since 2002 and it was therefore not true to say that there was hurried construction of houses on the land.

A replying affidavit sworn on 18<sup>th</sup> April 2011 by **Boniface Mutua**, the Managing Director of the 3<sup>rd</sup> defendant, was also filed. It was deponed that in 2002 the deceased (**Raphael Kakula Nzuki**) entered into a sale agreement with the 3<sup>rd</sup> defendant at an agreed price of Kshs.1,600,000/=; that the purchase price was subject to the **Law Society Conditions of Sale (1989)**; that until the time of the death of the deceased, he had not signified his readiness to complete the sale transaction or supply the completion documents to allow the 3<sup>rd</sup> defendant pay the balance of the purchase price; that it was the deceased who breached the sale agreement though the 3<sup>rd</sup> defendant had paid him Kshs.957,500/= as part payment of the purchase price; that since the 3<sup>rd</sup> defendant had purchased **LR No. 12715/197**, he subdivided the same and sold portions thereof to the plaintiffs; that it was not true that the plaintiffs herein had wrongfully and unlawfully entered into the suit property; that according to the sale agreement between the deceased and the 3<sup>rd</sup> defendants a remedy of payment of 3% interest by a defaulting party was provided; that the houses were constructed over a period of five (5) years; and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants' counterclaim herein had no chance of success.

A supplementary affidavit sworn by **Anthony Nzuki** on 3<sup>rd</sup> May 2011 was filed in response to the affidavits in opposition of the application. It was deponed that the affidavits of **Boniface Mutua Musyoki** and **Simon Muriithi Maina** contained falsehoods and were misleading. That the 3<sup>rd</sup> defendant had not yet completed payment of the agreed purchase price. That the 3<sup>rd</sup> defendant had not shown that he had paid any amount over and above Kshs.160,000/=. That in 2005, the deceased **Raphael Kakula Nzuki** filed **Nairobi Civil Suit No. 1157 of 2005** seeking the eviction of the 3<sup>rd</sup> defendant from the suit land. That despite the filing of the said suit, the 3<sup>rd</sup> defendant, went ahead and subdivided the land. That the plaintiffs had not told the court whom, among them, was a resident in the structures which were unlawfully constructed on the land. That **Anthony Nzuki** (the 1<sup>st</sup> defendant) was not privy to any agreements between the 3<sup>rd</sup> defendant and the plaintiffs.

The 1<sup>st</sup> defendant filed written submissions on 12<sup>th</sup> October 2011 through counsel **Nzei & Company Advocates**. The plaintiffs filed their submissions on 24<sup>th</sup> November 2011 through their counsel **M/s Kuloba & Wangila Advocates**. The 3<sup>rd</sup> defendant filed written submissions on 26<sup>th</sup> October 2011 through counsel **M/s Mbindyo & Company**. The 1<sup>st</sup> defendant also filed a reply to the submissions on 10<sup>th</sup> May 2012. I have perused all the written submissions filed.

On the hearing date, both **Ms. Menya** for the 1<sup>st</sup> defendant, and **Mr Mbindyo** for the 3<sup>rd</sup> defendant addressed the court. **Mr Mbindyo** also held brief for **Mr Kuloba** for the plaintiffs.

I have also considered the written and oral submissions.

This is an application for an interlocutory injunction pending the hearing and determination of the suit. The suit was filed by 34 plaintiffs who are the respondents in the application. The applicant is the 1<sup>st</sup> defendant in the main suit. The prayers sought in the application are against the plaintiffs. The 3<sup>rd</sup> defendant who sold land to the plaintiffs has filed an affidavit and has been represented by counsel in support of the plaintiffs' position against the 1<sup>st</sup> defendant.

The parameters for consideration by a court in an application for an interlocutory injunction are well settled. In **Giella –vs- Cassman Brown Ltd (1973) EA 358**, the **Court of Appeal for East Africa** gave three requirements. Firstly, an applicant has to demonstrate a *prima facie* case with probability of success. Secondly, an injunction will not normally be issued unless the applicant will otherwise suffer irreparable loss which cannot be adequately compensated in damages. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

The applicant, who is the 1<sup>st</sup> defendant in the case, is the administrator of the estate of the deceased **Raphael Kakula Nzuki**, who was the registered owner of the land in question. The deceased entered into an agreement for sale of the subject land with the 3<sup>rd</sup> defendant which was not completed until the deceased died. The 3<sup>rd</sup> defendant took possession of the land during the lifetime of the deceased. He later subdivided the land and sold the smaller plots to the plaintiffs, some of whom are currently developing the plots. The letters of administration in the estate of the deceased were actually confirmed on 9<sup>th</sup> June 2009. The subject land formed part of the assets of the estate, and same was distributed among beneficiaries. The plaintiffs are purchasers of portions of the subject land from the 3<sup>rd</sup> defendant. The purchase arises from an incomplete sale agreement between the 3<sup>rd</sup> defendant and the deceased. The 1<sup>st</sup> defendant who has been sued by the plaintiffs in the matter herein, now wants a temporary injunction to issue against the plaintiffs who have brought him to court in the same matter.

In my view, the 1<sup>st</sup> defendant has demonstrated a *prima facie* case with probability of success. A *prima facie* case is one that may or may not succeed. It is an arguable case. I find from the facts disclosed to me that the 1<sup>st</sup> defendant has an arguable case. I therefore find that the 1<sup>st</sup> defendant has satisfied the 1<sup>st</sup> requirement in an application for an interlocutory injunction.

Will the 1<sup>st</sup> defendant suffer irreparable loss if an injunction order is not granted? My answer is yes. Once the subject land is fully developed with expensive houses, it will never return to the same previous state. The damage caused will not be reversible. It is not possible to compensate that loss in damages, if for example the case is determined in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Therefore, in my view, if the injunction is not granted, the 1<sup>st</sup> defendant as administrator and beneficiary will suffer irreparable loss which is not capable of being compensated in the form of damages.

In my view also, the balance of convenience is in favour of the 1<sup>st</sup> defendant. He and the other administrator currently have the documents of title in their favour. The said titles devolved through succession. Unless the court subsequently decides otherwise, the pendulum is in the 1<sup>st</sup> defendant's favour.

Taking into account the totality of the matter, I am persuaded that the 1<sup>st</sup> defendant has satisfied the requirements for the grant of a temporary injunction. Consequently, I allow the application and grant **prayer 4**. The costs of the application however, will be in the cause.

Dated and delivered this **22<sup>nd</sup>** day of **November** 2012.

**George Dulu**

**Judge**

**In the presence of:**

Both 1<sup>st</sup> and 2<sup>nd</sup> Defendants present in person

Plaintiff absent

N/A for 3<sup>rd</sup> Defendant/Applicant

Nyalo – Court clerk