



**REPUBLIC OF KENYA**

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

**Environmental & Land Case 138 of 2012**

**SAMUEL NJOROGE MURIU.....1<sup>ST</sup> PLAINTIFF**  
**JOSEPH GITHU IBAU..... 2<sup>ND</sup> PLANTIFF**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI .....1<sup>ST</sup> DEFENDANT**  
**PATRICK KAHONGE NGURE.....2<sup>ND</sup> DEFENDANT**

**RULING**

**1)** The plaintiff /applicant hereinafter referred to as the applicant has filed a notice of motion dated 20/3/2012 under section 3, 3A, 63(c) and (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, and Order 5 rules 17 and Order 51 rule 1 & 3 of the Civil Procedure Rules, 2010 Laws of Kenya and all other enabling provisions of the law, seeking the following orders;

i. Spent.

ii. Spent.

iii. That this Honourable Court do issue an order of injunction to restrain the defendants. Jointly and severally, by themselves, their officers, servants, workmen, agents or any other persons acting on their behalf from howsoever allocating, allotting, selling, subdividing, disposing, alienating, and or registering any dealings whatsoever plot no. 44 Kayole shopping centre extension, Nairobi, pending the inter partes hearing and final determination of this application.

iv. That this Honourable Court do issue an order of injunction to restrain the defendants, jointly and severally, by themselves, their officers, servants, workmen, agents or any other persons acting on their behalf from howsoever allocating, allotting, selling, subdividing, disposing, alienating and or registering any dealings whatsoever plot No. 44 Kayole Shopping Centre Extension, Nairobi until the full and final determination of the suit herein.

v. That the OCS Kayole Police station do ensure adherence to the orders so issued.

vi. That the costs of this application be in the cause.

The application is based on the following grounds.

a) The 1st plaintiff's is the rightful allottee of plot No. 44 Kayole Shopping Centre Extension, Nairobi vide a letter of allotment dated 17th July 2003 and has paid all the requisite payments as demanded by the 1st defendant.

b) 1st defendant by way a letter date 17th November 2011 wrote to the 1st plaintiff confirming his (1st Plaintiff) ownership of plot No. 44 Kayole Shopping Centre Extension Nairobi.

c) On or about the month of February 2012 the 2nd defendant purported to enter and develop the suit plot alleging that the same was allotted to him by the 1st defendant.

d) The plaintiffs have learnt that the defendants are colluding fraudulently to dispose off the suit property in sheer disregard of the plaintiff's interest.

e) That it is extremely important that the suit premises are preserved to avoid the illegal actions of the defendants herein and to protect the plaintiffs interests.

f) In any event, the balance of convenience lies in favour of the plaintiffs to have the suit premises preserved and protected by injunctive orders of the Court pending the hearing and final determination of the dispute giving rise to this suit.

g) That the defendants stand to suffer no prejudice if the orders prayed for are granted.

h) It is fair and just in the circumstances of this suit and the instant application for the Court to exercise its discretion in favour of granting the plaintiff the orders sought.

2) The application is supported by the affidavit of Samuel Njoroge Muriu date 20/3/2012. He avers as follows: That by a letter of allotment dated 17<sup>th</sup> July 2003 Nairobi City Council allotted him plot No. 44 Kayole Shopping Centre Extension, Nairobi. That he was allottee number 207 in the list of allottees of Kayole Shopping Center extension. That the said letter of allotment required that he make payments for survey, beacons ground rents, rates and stand premium. That the 2<sup>nd</sup> plaintiff approached him with an offer to buy his plot 28<sup>th</sup> May 2011 they entered into an agreement for sale. That he undertook to clear all the outstanding payments with the 1<sup>st</sup> defendant and got a letter confirming his ownership of plot No. 44 Kayole shopping centre extension, Nairobi. That on 26<sup>th</sup> May 2011 he made payments of kshs.3,000/- as rates and kshs.13600/- both in receipt No. 247232, Kshs.8000/- as stand premium under receipt No. 247233, kshs. 20,000/- survey fees and Kshs.5500 for beacons both under receipt No. 247234. In total he paid Kenya Shillings fifty one thousand one hundred (Kshs.51,100/-). That on 13<sup>th</sup> November 2011 he wrote to the Director, Housing Development Department and requested for a confirmation of ownership and paid the search fee of Kshs.1,000/-. That by a letter dated on 17<sup>th</sup> November 2011 the 1<sup>st</sup> defendant's deputy director, housing development department wrote to him and confirmed that he was the owner of plot No. 44 Kayole Shopping Centre Extension, Nairobi. That in February 2012 the 2<sup>nd</sup> defendant appeared and attempted to start developing the plot No. 44 Kayole shopping centre extension, Nairobi. That the 2<sup>nd</sup> plaintiff and he confronted him and demanded to know why he was trespassing on the property and he claimed that he had bought it from a councilor Okeyo Mbata in 2012. That they reported the matter to the police and but the 1<sup>st</sup> defendant wrote a letter claiming that there were issues with his allotment letter. That it will be a gross miscarriage of justice if the defendants are allowed to possess his plot after he has made payments and have been in possession or so many years. That he has faithfully performed his part of the obligations as the allottee and paid out all the required payments as demanded by the 1<sup>st</sup> defendant. That he stands to suffer irreparable loss should the defendant continue with their current course of action and therefore pray for an injunction against the defendants, their agents and or employees from interfering with his quite possession of the plot No. 44 as well as transferring, allotting or in any way dispossessing him of the same. That balance of convenience is in his favour and the defendants will not suffer any loss should the court grant the injunctive orders against them pending the hearing and determination of this application and suit.

3) The defendants were served. The 1<sup>st</sup> defendant's Counsel filed a notice of appointment. None of the defendants filed a replying affidavit to the application. At the hearing of this application Mr. Kinyuanjui reiterated what is deponed in the affidavit of the 1<sup>st</sup> plaintiff which I have set out in this ruling. M/s Mugusu for the 1<sup>st</sup> defendant stated that the plaintiff has no locus to file suit as he has not proved

ownership, that there is no interest to protect by way of an injunction, that the letter of allotment is not conclusive evidence of ownership, the letter was conditional and the 1<sup>st</sup> plaintiff did not fulfill the conditions. That the letter was drawn on the 17<sup>th</sup> of July 2003 the plaintiff paid the stamp premium in 2011, yet acceptance was 30 days from 17<sup>th</sup> of July 2003 and therefore the plaintiff cannot rely on the said letter. That the 1<sup>st</sup> plaintiff sold the property to the 2<sup>nd</sup> plaintiff and he has no interest in the property. That the special power of Attorney the 1<sup>st</sup> plaintiff has attached has no stamp duty and offends the provisions of section 19 of the Stamp Duty Act. Lastly the plaintiff has failed to establish a prima facie case with a probability of success nor has he met the other two conditions of granting an injunction order. In reply Mr. Kinyanjui stated that plaintiff has locus as shown in the allotment letters which confirms ownership, the plaintiff fulfilled the conditions of the allotment letter and the letter of 17<sup>th</sup> November 2011 confirms the ownership of the plot to the applicant. That the agreement states it's an agreement should transfer and it does not state the sale was concluded. On stamp duty Counsel argued that the document is a pointer to the adverse condition that the 1<sup>st</sup> applicant would be exposed to if the 2<sup>nd</sup> respondent is allowed to proceed. That the applicant deserves the orders.

4) I have considered what has been deponed by the 1<sup>st</sup> plaintiff, the annexures attached and the submissions made by Counsels. The 1<sup>st</sup> defendant did not file a replying affidavit in response to the documents annexed by the plaintiffs. It is the applicant's case that these documents were issued to him by City Council of Nairobi who has been sued as Nairobi City Council. The 1<sup>st</sup> plaintiff has shown an allotment letter dated 17<sup>th</sup> July 2003 that shows that plot No. C-44 Kayole shopping centre was allotted to him. That he sold the plot to Samuel Njoroge Muriu the 2<sup>nd</sup> plaintiff and that he has a special power of Attorney of the said plaintiff and he has authority to swear the affidavit on behalf of the 2<sup>nd</sup> plaintiff. He has shown payments received by the Nairobi City Council Housing Development Department for the said plot. He has annexed a letter dated 17<sup>th</sup> of November from City Council of Nairobi that confirms that the official record show that the plots were allocated to him. There is a letter also dated 14<sup>th</sup> February 2012 from City Council of Nairobi according to their records the 2<sup>nd</sup> defendant is the rightful owner of the plot. The 2<sup>nd</sup> defendant did not respond to this application. The 1<sup>st</sup> plaintiff relies on the special power of Attorney that has been annexed to state that they deserve the orders. M/s Mugusu raised the issue of the applicants non-compliance with the provisions of section 19 of the Stamp Duty Act. Section 19(1) of the Stamp Duty Act provides that such a document shall not be admitted as evidence unless it is duly stamped. The 1<sup>st</sup> plaintiff has not explained why he has not complied with the said section. I do agree with M/s Mugusu's submission that he has no locus to file suit in the absence of a valid power of Attorney and thus the application. I also note that in the plaint filed it is stated at paragraph 6 that the 2<sup>nd</sup> plaintiff was the beneficial owner of plot No. 44 Kayole Shopping Centre Extension, Nairobi as witnessed by a Sale agreement between him and the 1<sup>st</sup> plaintiff dated 28<sup>th</sup> May 2011. The 1<sup>st</sup> plaintiff cannot rely on the attached power of Attorney to claim he has a beneficial interest. I find that the plaintiffs have failed to establish a prima facie case with a probability of success in the absence of a valid power of Attorney. I therefore decline to grant the orders sought and dismiss the application dated 20<sup>th</sup> March 2012 with costs to the 1<sup>st</sup> defendant. No cost to the 2<sup>nd</sup> defendant.

Orders accordingly.

Dated, signed and delivered this 20th day of November 2012.

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

.....For 1<sup>st</sup> Plaintiff/Applicant

.....For 2<sup>nd</sup> Plaintiff/applicant

.....For 1<sup>st</sup> Defendant

.....For 2<sup>nd</sup> Defendant

.....Court Clerk