



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ELC NO.215 OF 2010**

GREYSTON CONSTRUCTION COMPANY LIMITED..... PLAINTIFF

**VERSUS**

MICROTECH ACCESSORIES LIMITED..... 1<sup>ST</sup> DEFENDANT  
COMMISSIONER OF LANDS .....2<sup>ND</sup> DEFENDANT  
REGISTRAR OF TITLES .....3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL .....4<sup>TH</sup> DEFENDANT  
CITY COUNCIL OF NAIROBI .....5<sup>TH</sup> DEFENDANT

**RULING**

At The centre of this dispute is a parcel of land known as LR No. 209/12666 situate along Mombasa road Nairobi. This land is being claimed by both the plaintiff and the 1<sup>st</sup> defendant herein.

By dint of the plaint dated 5<sup>th</sup> May, 2010 the plaintiff /applicant has detailed its interest in the said parcel of land and also what is described as fraudulent and unlawful actions against the 1<sup>st</sup>,2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants intended to deprive it of the said property.

It is the plaintiff's case that on or about 22<sup>nd</sup> December 1992 it was issued with a letter of allotment by the Commissioner of Lands in respect of the said parcel of land. Thereafter the plaintiff accepted the offer and made payment in respect of stamp premium, conveyancing fees, and stand duty among other incidental payments in respect of that allotment. On or about 21<sup>st</sup> December, 1999 the 3<sup>rd</sup> defendant issued the plaintiff with a duly registered certificate alienating and conferring absolute proprietary rights of ownership of the said parcel of land under the Registration of Titles Act Cap, 281 Laws of Kenya.

It is the plaintiff's case that the said registration bestowed upon it an absolute and indefeasible title as provided within the meaning of Section 23 of the said Act. It is also its case that the 2<sup>nd</sup> defendant lawfully set up a land rent account whose particulars bear out the plaintiff as the legal owner of the said parcel of land.

It is also the plaintiff's case that in compliance with The Rating Act Cap 267 Laws of Kenya, the 5<sup>th</sup> defendant, that is, the City Council of Nairobi opened land rates account after it was satisfied that the plaintiff was the owner of the said parcel of land and therefore becoming ratiable owner.

There has been previous litigation in respect of the same parcel of land and in particular HCCC No. 835

of 2001 Imara Daima Development Group and Another Vs Greyston Construction Company, Commissioner of Lands and Registrar of Titles at Milimani Commercial Court. This matter was settled by a consent order recorded on 28<sup>th</sup> June, 2001. There was also High Court Miscellaneous Application No. 692 of 2007, Republic – Versus – Permanent Secretary Ministry of Lands and Commissioner of Lands Ex-parte Microtech Accessories Limited. This latter suit was discontinued by the applicant by a notice dated 30<sup>th</sup> October, 2008.

While the plaintiff rested on the assurance that the said parcel of land belonged to it, it later transpired that the 1<sup>st</sup> defendant also claimed to be the registered owner of the same parcel of land. To its surprise, it is the 2<sup>nd</sup> and 3<sup>rd</sup> defendant who issued the 1<sup>st</sup> defendant with a grant on the same parcel of land.

It is the plaintiff's case that in so doing, the 2<sup>nd</sup> defendant was in breach of statutory duty and also in contempt of a court order which had been duly served upon both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Several allegations and particulars of mistakes, misrepresentations, breach of statutory duties, bias and contempt of court among others have been set out in the particulars of the plaint and attributed to the 2<sup>nd</sup> defendant. It is also the plaintiff's case that the 5<sup>th</sup> defendant acted in a fraudulent manner and in breach of statutory duties, in declaring that the 1<sup>st</sup> defendant was the ratifiable owner yet the plaintiff had been confirmed by the Director of Legal Affairs in a letter dated 16<sup>th</sup> March, 2009 to be the ratifiable owner.

The 5<sup>th</sup> defendant is also accused of having fraudulently refused to issue the plaintiff with the land rates payment statements for the years 2005,2006,2007 and 2008 as the same would disclose that the plaintiff was the lawful ratifiable owner. As a result of the foregoing, the plaintiff says it has suffered loss and damage.

Accordingly, the following orders are sought in the said plain.

- A. A permanent injunction restraining the 1<sup>st</sup> defendant, its servants/or agents from erecting any structures, fencing, constructing, transferring, charging, alienating or in any other manner interfering with Land Reference No. 209/12666.
- B. A declaration that the plaintiff is the legitimate lawful ratifiable owner of Land Reference No. 209/12666 thus the lawful holder of land rates account No. V 4091210 in respect of the suit land and therefore the 5<sup>th</sup> defendant should rectify its records to show the plaintiff as the ratifiable owner forthwith.
- C. A declaration that the plaintiff is the *bona fide* title holder and proprietor of LR No. 209/12666 and the 1<sup>st</sup> defendant's title is null and void *ab initio*.
- D. Costs of the suit and interest at court rates.

Alongside the said plaint the plaintiff filed an application by way of Chamber Summons under Order XXXIX Rules 1a, 2 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking interim orders of injunction in line with the prayers in the plaint.

When the learned counsel for the plaintiff first appeared before Okwengu J, on 6<sup>th</sup> May, 2010 the learned Judge observed that she was not persuaded that this was an appropriate case for issuing an ex -parte injunction.

Subsequently however, on 25<sup>th</sup> May, 2010 the learned counsel for the plaintiff appeared before this court for an application for substituted service and in addition asked for preservation orders based on the allegations that the records in respect of the suit property were being interfered with.

An interim order to maintain the status quo was granted which has been extended from time to time. Upon service of the pleadings and application herein, the respondents filed their replying affidavits.

Counsel on record have filed written submissions to address the application and cited several authorities. These I have read.

The main contest in this application is between the plaintiff and the 1<sup>st</sup> defendant. In the supporting affidavit annexed to the application, Mr. Godfrey Mbuuri Gachura who is said to be a Director of the plaintiff/applicant has given a chronology of steps that were taken by the plaintiff to secure the said parcel of land.

In reply to the said application one Mr. Said Ahmed said to be a Director of the 1<sup>st</sup> defendant also gives a chronology of events leading to the acquisition of property by the 1<sup>st</sup> defendant. What is apparent on the face of this dispute is that, there are competing interests in respect of the same parcel of land. Both the plaintiff and the 1<sup>st</sup> defendant claim to have followed the right steps and procedures in acquiring the said property.

I bear in mind that these are interlocutory proceedings and the parties are yet to give evidence and be subjected to cross- examination at the opportune time. I must therefore guard against making any observations that may prejudice the interests of the parties herein.

I must however observe that, the words “valid title” or “ratable owner” in litigation involving land in this country are no longer bywords of ownership of any land in dispute. I say so because, the records held by the relevant authorities are no longer reliable for reasons that, parties are now prepared to go to any length to secure land in this country. However, it is possible in many cases to resolve and make determination at interlocutory stages in respect of orders that are sought by the parties.

Having said so, I wish to make the following observations. The parcel of land LR NO. 209/12666 appears to have two different sizes according to the documents filed by the parties herein. In annexure No. GMG 1 annexed to the supporting affidavit of Mr. Geoffrey Mbuuri Gachura sworn on 5<sup>th</sup> May, 2010, this being the letter of the allotment dated 22<sup>nd</sup> December 1992, the area given is 9.5 hectares. This is also the same in annexure No. GMG 3 being the title given to the plaintiff. This title is dated 21<sup>st</sup> December, 1999.

The 1<sup>st</sup> defendant holds a title dated 27<sup>th</sup> April, 2007 where the area of the parcel of land is given as 7.636 hectares. This appears as annexure No. SA 8 to the replying affidavit of Mr. Said Ahmed sworn on 7<sup>th</sup> June, 2010. The said affidavit has annexure No. SA 12 which shows that the plaintiff herein Greyston construction holds a title to the same property measuring 7.636 hectares. This title is dated 6<sup>th</sup> February, 2002. To the same affidavit there has been annexed yet another title in the name of the plaintiff which has an acreage of 9.5 hectares. In effect therefore, the plaintiff has two titles to the same property. One is dated 21<sup>st</sup> December, 1999, this being grant No. 54654 which shows the acreage has 9.5 hectares and the other being grant No. 74153 dated 6<sup>th</sup> February, 2002 which shows an acreage of 7.636 hectares.

Whereas the supporting affidavit of Mr. Godfrey Mbuuri Gachura has placed reliance on the title dated 21<sup>st</sup> December, 1999 being grant No. 54654, he has denied any knowledge of the title dated 10<sup>th</sup> April, 2002 annexed to the affidavit of Mr. Said Ahmed. What is clear however is that, in terms of acreage the title held by the plaintiff and that held by the 1<sup>st</sup> defendant are markedly different.

There is also evidence on record that title No. LR 209/12666 has been subdivided to create three new titles these being No.s LR No. 209/19713, LR No. 209/19714 and LR No. 209/19715. The cumulative acreage of the subdivisions is 7.636 hectares. This is in agreement with the size of the title held by the 1<sup>st</sup> defendant. The three deed plans have been annexed to the affidavit of Mr. Said Ahmed and if that be the case, then title LR No. 209/12666 does not exist anymore. These allegations have been countered by the

plaintiff who in the supplementary affidavit of Mr. Gachura aforesaid sworn on 23<sup>rd</sup> September, 2010 states that, the purported illegal subdivisions are fraudulent and intended to cover up the acts of the 1<sup>st</sup> respondent. This is because it is the plaintiff's case that, there was no legitimate certificate of title upon which such subdivisions could originate. They were also carried out before clearance certificate were issued. They were clearly intended to deprive the applicant of the suit land.

There is a letter dated 12<sup>th</sup> March, 2009 addressed to the director of the 1<sup>st</sup> defendant by the Commissioner of Lands in respect of the suit property. It is annexures SA 10 to the affidavit of Said Ahmed aforesaid. That letter reads as follows,

“The Director,  
Microtech Accessories Ltd,  
P. O. Box 62860-00200,  
**NAIROBI.**

**REF: L.R. 209/12666 – VILLA FRANKA – NAIROBI**

We refer to your letter dated 5<sup>th</sup> March 2009 on the above plot.

This is to confirm that L.R. 209/12666 registered as IR 105980 is registered in the names of MICROTECH ACCESSORIES LIMITED for a term of 99 years with effect from 1<sup>st</sup> February 1999 and measures 7.636 Ha.

Other details are as contained in the Memorandum of Registration of Transfer (Copy of which is attached herewith).

Signed  
**OCHIENG .G.O.**  
**FOR: COMMISSIONER OF LANDS”**

As a rejoinder the plaintiff states in the supplementary affidavit of Mr. Gachura aforesaid, that the said letter has no statutory relevance as it cannot purport to confirm ownership of the suit property and/ or authenticity of the title. On the other hand the 5<sup>th</sup> defendant, the City Council of Nairobi, holds the valuation and supplementary valuation rolls where the details of all properties within the jurisdiction of the 5<sup>th</sup> defendant are contained. The ratiable owners' particulars as indicated in the said rolls are derived from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are the registering authorities in the country.

With that information, I must now address the principles upon which interim injunction orders may be granted. Learned counsel have cited the case of Giella Vs Cassman Brown & Co. Ltd (1973) EA 358. The plaintiff/ applicant is supposed to present a prima facie case with a probability of success. The applicant is also required to show that if the order is not granted, it may suffer irreparable loss that may not be adequately compensated by an award of damages. Lastly, where the court is in doubt it shall decide the matter on a balance of convenience.

These principles have withstood the test of law and time and are therefore applicable in this particular case. No party shall be a beneficiary of court orders based on the weakness of the opponent's case but on the strength of the case presented by that litigant. Most of the material presented by the parties in their affidavits and written submissions belong to the province of the main trial. I say so because, most of it is canvassed as if the parties are giving evidence yet such evidence must be scrutinized and subjected to cross-examination. As of now it is the case of the plaintiff as against that of the defendants.

The question that presents itself is whether or not the court can determine the matters on the evidence so

far laid before it. The Commissioner of Lands and the Registrar of Tittles are two Government Officers bestowed with the responsibility of issuing all the tittles relating to land in this country. They are also the custodians thereof and all things being equal, their records should be the final authentication of any contested document. Where the Commissioner of Lands pens a letter as to the position of any tittle, *prima facie*, the information contained therein is proof of the said details.

With respect therefore, no party can say that a letter whose source and author is the Commissioner of Lands can be wished away summarily. It is important to note that the letter I have referred to above has not been said to be a forgery. That being the case, *prima facie* the 1<sup>st</sup> defendant is the registered proprietor in the records that are held by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Those records are said to tally with those held by the 5<sup>th</sup> defendant, thereby re-enforcing the position of the 1<sup>st</sup> defendant.

It will be noted that the said letter was written before the plaintiff herein came to court. It cannot be said that the 1<sup>st</sup> defendant anticipated the suit against it by the plaintiff or any other party for that matter.

When one goes beyond this stage and considers the averment that tittle No. LR. 209/12666 has now been subdivided, the subject matter no longer exists and therefore, logically the subtratum has collapsed. The plaintiff's case therefore has no pillars upon which to stand. The three sub divisions have been said to have been sold to third parties. Those parties have not participated in the present proceedings and therefore if any orders were to be granted they will affect adversely parties who have not been heard. And therefore, I must ask myself; has the plaintiff established a *prima facie* case with a probability of success? My positive answer is no. I am informed by the material before me that the plaintiff's case has not met the threshold of the principles set out in the **Giela** case.

The conditions for granting an interlocutory injunction are sequential and therefore the second condition can only be addressed if the first one is satisfied- See **Kenya Commercial Finance Co. Limited Vs Afraha Education Society (2001) 1 EA 86**. In this case the first one has not been satisfied. However I may be wrong and therefore it is my duty to consider whether or not damages would be adequate compensation if the plaintiff were to succeed in this matter.

Whereas I agree that land is an emotional issue and very close to the hearts and lives of Kenyans, it is a subject matter that has been commercialized such that the same can be valued with mathematical precision. If therefore the plaintiff were to succeed against the defendants herein, or any other party, then damages can be assessed and would be adequate compensation. I am not in any doubt in what I have found hereinabove but even if I were, I would hold the balance of convenience tilts in favour of the 1<sup>st</sup> defendant whose interest has been re-enforced by the 2<sup>nd</sup> defendant.

I observe however, that whereas there are several allegations against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants no specific orders have been sought against them in the prayers set out in the plaint.

I believe I have said enough this far and anything beyond this may be prejudicial to the parties. Suffice to say, the plaintiff has not persuaded the court that the orders sought in the Chamber Summons dated 5<sup>th</sup> May, 2010 should be granted. Accordingly, the application is dismissed with costs to the defendants. It follows that any previous interim orders are hereby vacated.

I note that pleadings have been closed in this matter, and going by the new Civil Procedure Rules, the parties should go ahead and comply with Order 11 of those Rules to facilitate expeditious disposal of this case.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of February, 2011.***

**A. MBOGHOLI MSAGHA**  
**JUDGE**