



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CASE NO. 489 OF 2010

JOANES OOKO AKUMU 1ST PLAINTIFF
PHILISTER AOR AKUMU 2ND PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI 1ST DEFENDANT
IRENE KAMAU 2ND DEFENDANT
AND
DANCAN MAINA MWANGI INTERESTED PARTY

RULING

The plaintiffs are the administrators of the estate of Wilson Okumu Mambla who is said to have purchased a parcel of land known as LR No. 34/2 and 34/4 Umoja Innercore and particularly known as plot No. A 163. It is their case that the deceased made all the requisite payments as stipulated in the sale agreement and took possession.

Sometimes in the month of June 2010 the plaintiffs noticed that someone had trespassed onto the suit premises and was carrying construction thereon. Investigations revealed that it was the 2nd defendant who was carrying out those activities.

This suit then was filed to claim among other things, that the allotment by the City Council of Nairobi to Ireen Kamau be canceled and the subsequent sale to the Interested Party be also cancelled. There is a prayer that there be an injunction restraining the defendants from carrying out any construction or remaining on the said property which is owned by the estate of the deceased. The plaintiffs filed an application by way of Chamber Summons Under Order XXXIX Rule 1 of the Civil Procedure Rules and Section 3A of the Civil procedure Act seeking interim orders in line with the prayers in the plaint.

The reasons advanced for the said orders are:

- a) The suit plot belonged to the deceased and the City Council has purportedly allotted it to the 2nd defendant who has in turn allegedly sold it to the Interested Party.
- b) The interested party has started and is continuing with construction on the plot.
- c) The deceased's estate shall be denied ownership possession and use of the plot unless this application is granted.

The application is opposed and there are replying affidavits sworn by the defendants herein. The thrust of the defence is that the original allottee Wilson Okumu Mambla did not comply with the attached conditions of the allotment. This led to the repossession of the plot by the City Council which then allocated the same to Irene W. Kamau the 2nd defendant and who subsequently sold it to the Interested

Party.

The plaintiffs are supposed to show at this stage, that they have a *prima facie* case with a probability of success, and that if the order is not given, then they are likely to suffer irreparable loss which may not be adequately be compensated by an award of damages. If the court is in doubt it shall decided the matter on a balance of probability.

I have seen annexure “MCI” to the Affidavit of Mr. Mwangi Chiera who was the acting Director Housing Development Department of the City Council of Nairobi as at the time of swearing this affidavit, that is 29th October, 2010. This annexure is headed advertisement and it is addressing the allottees who have not developed their plots and reminding them that, payment should be made and developments proposals received within one month failure of which the allocations will be nullified without reference to the allottees. It is said that this Notice was advertised in the Daily Nation of 12th July, 2002. Subsequently, this plot was repossessed as I have observed and then allocated to the 2nd defendant.

Whereas it may be true that this Notice may have been intended for all allottees, there is no reason why the same was not posted to the deceased whose address the City Council had in their records. Good practice would demand that this be done because of the attendant circumstances that may follow. The deceased continued to pay rates to the City Council as evidenced by the annexure to the Chamber Summons in the form of receipts. The acceptance of this payment by the City Council gave an legitimate expectation on the part of the deceased that the property was his.

As at the time the property was allegedly allocated to the 2nd defendant, the records at the City Council still bore the name of the deceased. Had the 2nd defendant and the Interested Party conducted due diligence they would have noticed that there was an allottee of the property according to the records of the City Council of Nairobi. And therefore my observation is that, the said property was repossessed apparently without notice from the City Council to the deceased.

On the material before me I am satisfied that the plaintiffs have presented a *prima facie* case with a probability of success to warrant the injunction orders they are seeking from this court. Accordingly, their application dated 12th October, 2010 hereby succeeds and the interim orders given on 14th October, 2010 confirmed until the final determination of this suit. The plaintiffs however shall file an undertaking as to damages within 7 days of today, failure of which this order shall be discharged automatically. The plaintiffs shall also have the costs of this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of June, 2011

**A. MBOGHOLI MSAGHA
JUDGE**