IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.205 OF 2010

JOHNSON MACHINI MARITA…….....…….1ST
APPLICANTS/PLAINTIFF
PHILIP ONDIEKI NYABOGA…….....……..2ND
APPLICANT/PLAINTIFF

VERSUS

PATRICK CHEGE GATHUKIA…….....…...1ST
RESPONDENT/DEFENDANT
LUCY NJUHI GATHUKIA…….....…….2ND
RESPONDENT/DEFENDANT
STEPHEN NGARI KIMARU…….....…...3RD
RESPONDENT/DEFENDANT
MARY WANJIKU KOGI…….....……...4TH
RESPONDENT/DEFENDANT
MUNICIPAL COUNCIL OF NAKURU……5TH
RESPONDENT/DEFENDANT
NATIONAL HOUSING CORPORATION……..……..6TH
RESPONDENT/DEFENDANT

RULING

The two applicants, one being administrator of the estate of the late Scholastica Masitsa Machini (the deceased) and the other a purchaser of the deceased person's parcel of land (plots A283 Race Track) respectively, have brought the present motion dated 26th January, 2011 for a temporary injunction to restrain the respondents from building, developing, evicting or trespassing on the said plot No.A283 Race Track now registered as NAKURU MUNICIPALITY BLOCK 1/1435, pending the hearing and determination of this suit.

It is the 2nd applicant's contention that the suit property was allotted to the deceased by the Municipal Council of Nakuru (the 5th respondent); that the deceased met all the conditions of allotment and was issued with a clearance certificate; that the 2nd applicant subsequently purchased the property from the deceased; that later, he learnt that the property had been sold to the 1st and 2nd respondents by the 4th respondent without any colour of right; that the 1st and 2nd respondents further purported to sell the property to the 3rd respondent; that the applicants' interest in the property notwithstanding, the 3rd respondent has began to construct on the suit property hence this action.

The respondents have filed statements of defence, replying affidavits and grounds of opposition, the

combined effect of which is that indeed plot No. A283 was originally allocated to one Macharia K. Ngure, who could not be traced and consequently the plot was allocated to the deceased; that the deceased having failed to fully fulfill the conditions of the allotment, the 5th respondent was at liberty to allot the property to the 4th respondent who equally had the right to dispose it to the 1st and 2nd respondents, who on the other hand sold the property to the 3rd respondent, that the 3rd respondent has a certificate of lease in his favour.

I have considered these rival arguments and the authorities cited by counsel representing the parties in this matter. Being an application for interlocutory injunction, the applicant must show not only that he has a *prima facie* case with a probability of success upon trial, but also, that unless he is granted an injunction, he will suffer such damage or injury unlikely to be compensated in damages. Where the court entertains a doubt in either of the above principles, it is required to consider whether the balance of convenience will favour the grant or refusal of the injunction. See **Giella** Vs. **Cassman Brown and Company Limited** (1973) EA 358.

The applicants will have to prove at the trial that they have the right over the plot in question, or conversely that the 3rd respondent's title was unlawfully obtained. No doubt the deceased was granted a conditional letter of allotment on 15th June, 1988. It is also not in dispute that she sold to the 2nd applicant the plot on 6th May, 1996. She died on 2nd January, 1999. I suppose because of her death, there was default in the payment of some charges on the plot, prompting the National Housing Corporation (the 6th respondent) to address a letter to her on 23rd June, 2008 and issue a newspaper publication on 31st July, 2008 calling upon defaulters, including the deceased, to settle the outstanding arrears.

It would appear that the arrears were settled as the 6th respondent wrote to the clerk to the 5th respondent confirming settlement of infrastructure loan for the suit plot. As all these were happening, the plot had been allotted to the 4th respondent in 2003 and a certificate of lease issued to her. In 2009, the plot was transferred to the 1st and 2nd respondents and another certificate of lease issued to them.

Finally on 7th July, 2010 following a transfer to the 3rd respondent, the present certificate of lease was issued in favour of the 3rd respondent. Without going into the merit of the applicants' claim, it is clear that although the deceased had a letter of allotment, she did not proceed as the letter advised, namely to obtain the lease documents and to make the requisite payments within a specific period.

In the case of **Caneland Limited** Vs. **The Commissioner of Lands & 5 others,** Civil Application No. NAI.311 of 1998, the Court of Appeal stated in circumstances similar to those obtaining in this matter as follows:

"Though the applicant obtained a letter of allotment over the same property several years back it did not perfect it into a title and the 2nd, 3rd, 4th and 5th respondents who obtained another letter of allotment on 14th March, 1996 proceeded to obtain and transfer title in favour of the 6th respondent."

Earlier in the case of **Wreck Motor Enterprises** Vs. **Commissioner of Lands and 3 others,** Civil Appeal No.71 of 1997, the Court of Appeal stated the law thus:

"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of title document pursuant to provision held."
(Emphasis supplied)

For these reasons, it is clear that the applicants have not discharged the burden to show that they have a *prima facie* case. Regarding the 2nd principle for granting interlocutory injunction, the 2nd applicant purchased the plot at Kshs.140,000/= which can be reimbursed. Furthermore, since he purchased it in

1996, he had not taken possession until the 3rd respondent began to develop it 14 years later. The balance of convenience tilts in favour of the 3rd respondent who holds the title to the plot and is in possession.

For these reasons, the application fails and is dismissed with costs.

Dated, Delivered and Signed at Nakuru this 15th day of June, 2011.

W. OUKO
JUDGE