



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 477 of 2008**

**NAPHTALI PAUL RADIER.....PLAINTIFF/APPLICANT**

**VERSUS**

**FOREST LANE ACADEMY LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The application before court is the Plaintiff/Applicant Chamber Summons dated 3/12/2008 by which the Plaintiff seeks the following orders:-

1. **THAT** an injunction be granted restraining the Defendant/Respondent whether by himself, his agents or otherwise from

(a) Trespassing on LR No. 1160/693 (original number 1160/54/2)

(b) Removal of such part of the fence and or gates that deny the Plaintiff access to his parcel of land, and

(c) From further publishing or causing to be published or distributing defamatory words about the Plaintiff

2. **THAT** the Officer in Charge of Karen Police Station do assist in providing the plaintiffs servants or agents the right of access to LR No. 1160/693 at the Defendants expense.

3. **THAT** costs of this application be awarded to the Plaintiff/Applicants advocate.

2. The application is premised on the grounds that the Plaintiff is the registered owner of LR No. 1160/693 (original number 1160/54/2) (hereinafter referred to as the suit land) and that the Defendant has trespassed onto the suit land and has also published and is distributing defamatory statements about the Plaintiff and the Plaintiff's agents and lawyer. In addition, the application is supported by the grounds found in the affidavit sworn by **Naphatli Paul Radier** on 3/12/2008. The Plaintiff gives a brief history of the suit land which he says he purchased from Paul Herbert Denis and Maria Magdalene on or about 11/06/1997 and which parcel of land the Plaintiff later subdivided and sold to third parties; but retaining LR No. 160/693 which he says has been encroached upon by the Defendant. The Plaintiff also says that on or about 10/10/2007, the Defendant published a notice at the gate of the suit land as follows:-

**“CAVEAT EMPTOR**

**LR NO. 1160/782 (formerly 1160/693)**

**TAKE NOTICE** that it has come to our knowledge that a person or persons have fraudulently obtained a freehold title to the above land at the lands registry or elsewhere and now is/are purporting to sell the land to unsuspecting purchasers.

**TAKE FURTHER NOTICE** that we are the legal owners of this land. Any purported sale of L.R. No. 1160/693 is fraudulent and of no legal effect. (see page 4 of the exhibit)”

The Applicant prays for the orders sought.

3. The application is opposed. The Replying Affidavit dated 16/02/2009 and the Further Affidavit in reply

are sworn by Wambui Njenga (Wambui) who describes herself as a Director of the Defendant. While admitting that the Plaintiff was once the registered owner of LR No. 1160/54 – Karen, Wambui says that the suit land no longer exists having been subdivided as follows:-

(a) LR No. 1160/693 (for surrender purpose)

(b) LR No.1160/694 (sold and transferred to David Njogu Gachanja)

(c) LR No. 1160/695 (sold and transferred to Quality Management Limited)

4. Wambui says further that LR 1160/93 which had been set aside and reserved for the purpose of a nursery school was subdivided in the year 2002. She says the Defendant/Respondent applied to the Commissioner of Lands on 16/04/2002 to be allotted with the said plot and that the allotment was done and a Deed Plan No. 22942 subsequently issued for surrender purposes to the Government of Kenya. The deponent also says a new deed plan No. 244588 was issued in respect of LR No. 1160/782 for the purpose of a new Grant in favour of the Applicant. The deponent says that the suit land effectively ceased to exist with the issuance of Deed Plan No.244588 and after due amendment of the area map in the year 2002. The deponent has annexed to her affidavit a letter of allotment dated 18/06/2002 in respect of the suit land.

5. In her Further Affidavit in reply, Wambui alleges fraud on the part of the Plaintiff in acquiring a new title deed to the suit land. In reply to the Further Replying Affidavit the Plaintiff swore another affidavit that is not dated but filed in court on 11/08/2009. The court finds that this affidavit offends the provisions of section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya which requires that such a document shall be dated apart from showing the place where it is made. That affidavit is null and void and of no effect in these proceedings.

6. Together with the Chamber Summons application the Plaintiff filed plaint on 2/10/2008 alleging that the Defendant has encroached on the suit land by erecting a fence around it and that as a result thereof, the Plaintiff has suffered loss and damage. The Plaintiff seeks the following reliefs:—

(a) *An injunction requiring the Defendant forthwith to remove such part of the fence that lies within the line marked A-B-C on the deed plan.*

(b) *An injunction restraining the Defendant whether by himself his servants or agents or otherwise howsoever from entering or using LR. No. 1160/693 (original number 1160/54/2) as a drive way or entering the plot.*

(c) *An injunction restraining the Defendant whether by himself, his servants, or agents or otherwise, from further publishing or causing to be published the said words defamatory to the Plaintiff.*

(d) *General damages for trespass and defamation.*

(e) *Cost of this suit.*

(f) *Interest on (d) and (e).*

7. The application proceeded by way of both written and oral submissions. Mr. Okulo of M/S Okulo & Company Advocates appeared on behalf of the Plaintiff. It is contended that the Plaintiff is the previous owner of LR No. 1160/54 (original number 1160/24/2 and that on 14/12/2000 he registered against the title a subdivision certificate of LR No.1160/54 into two subplots A and B which were sold and transferred to the persons hereinabove named. The Plaintiff says that on 12/07/2007, a subdivision certificate was issued by the Clerk of Nairobi City Council further subdividing plot number 1160/54 into subplot C and a certificate of title IR No. 106927 was issued under Section 70 of the RTA known as LR No.1160/693 (original number IR 1160/54/2). It is contended on behalf of the Plaintiff that in light of the provisions of Section 23 of the RTA, which provisions were discussed at length in **Park View Arcade v Kangethe & 2 Others KLR (E & L)1** the Plaintiff's title herein is indefeasible. Section 23 of the RTA provides —

23. (1) *The Certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that misrepresentation to which he is proved to be a party.*

(2) *A certified copy of any registered instrument, signed by the registrar and sealed with his seal of*

office, shall be received in evidence in the same manner as the original.

8. In the **Park View case**, Ojwang J held that “in political civilization the sanctity of private property is a virtue”, and that where a person is recognized as the registered owner of a parcel of land, on the face of it, that claim of ownership is indefeasible. Plaintiff’s counsel also relied on **Maathai & 2 Others –vs- City Council of Nairobi & 2 Others** KLR (E & L) 1 at p. 193 in which Ole Keiwua J (as he then was) held that a title issued under Section 23 of the RTA cannot be challenged in the absence of matters set out in the section and these matters are:—

- (i) fraud or
- (ii) misrepresentation

to which the title holder is held to be a party.

As provided under subrule (2) of section 23 of the RTA, a “certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original”.

9. Learned counsel for the Defendant Mr. Kangatta, holds a different view. In the submissions filed on behalf of the Defendant on 23/09/2009, it was submitted that the suit land ceased to exist by virtue of condition number 5 on surrender of the same and consequent upon the issuance of the new Deed Plan No.244588, so that any Certificate of Title purporting to be in respect of LR No.1160/693 is spurious void and of no consequence. The Defendant also contended that the Certificate of Title exhibited by the Plaintiff in respect of the suit land is even more spurious taking into account the fact that the same was issued in 2007, some seven years after completion of the subdivision of LR 1160/54 in the year 2000. Finally, counsel submitted that the Commissioner of Lands has confirmed to the Director of City Planning that the subdivision of Certificate No.4752 which purportedly created the suit land in 2001 does not exist in the records at Lands office, thus confirming that the sanctity of ownership of the suit land is founded on impropriety and therefore defeasible. The Defendant wants the court to dismiss the Plaintiff’s application with costs to itself.

10. In reply to the submissions made on behalf of the Defendant, Mr. Okulo for the Plaintiff submitted that section 22 of Cap 299 talks about Deed Plans and not area map, and that in any event, certain amendments that were not approved were made on the area map. Mr. Okulo also submitted that the suit property still exists, the only dispute being ownership of the same. Mr. Okulo submitted that from the documents available on record, there is no doubt that the Plaintiff is the registered owner of the suit property and that it is to him that the City Council of Nairobi directed the demand note from the City Council of Nairobi for rates, referring to annexure NPR3 at page 3 being a demand dated 30/01/2008 addressed to Mr. Naphtali Radier calling for payment of Kshs.758,828/50 being rates in respect of Plot No. 1160/693.

11. The court must point out at this stage that the annexures to the Plaintiff’s affidavits are not properly marked. The Court of Appeal has held in many of its decisions touching on annexures to affidavits that the markings on annexures must be directly on the document intended to be marked not on some separate paper that is stuck or pasted on the intended document(s). In the instant case, all the Plaintiffs annexures are preceded by a full-scrap paper on which the annexure number for example “NPR1” is affixed. The Court of Appeal held that such documents are mere pieces of paper that are worthless and of no probative evidential value. What this means is that the Plaintiff’s case is supported by mere pieces of paper and not validly marked documents that can assist the court to confirm one or the other point.

12. The court has now considered the application, the submissions and the law. The question that arises for determination is whether on the facts before the court, the Plaintiff has established a prima facie case with a probability of success to warrant the granting of the injunction sought. While the Plaintiff says so, the Defendant does not think so. The undisputed fact here is that the Plaintiff is the registered owner of the suit property. The only issue raised by the Defendant is that the Certificate of Title issued to the Plaintiff in respect of the suit property was issued a long time after the title had undergone some major changes and allotted to the Defendant in the year 2002.

13. Based on the cited authorities, I am of the view that the dispute over the issuance of the title to the Plaintiff in 2007 to the suit property can only be resolved between the Defendant and the Commissioner of Lands and/or the City Council of Nairobi. According to Section 23(1) of the Registration of Titles Act, the Plaintiff herein, who is named as the proprietor in the Certificate of Title to the suit land is the “absolute and indefeasible” owner thereof and the title is thus not subject to challenge. In its Statement of Defence dated 7/11/2008 and filed in court on 10/11/2008, the Defendant does not allege fraud or

misrepresentation on the part of the Plaintiff. I therefore find that the Defendant has trespassed on the Plaintiff's suit property by putting up a fence around the same. The Defendant has not shown that it is a Government Agency empowered to acquire the suit property by force. That being the case, the Plaintiff's proprietary rights as enshrined in section 23(1) of the RTA and section 75(1) of the Constitution must be protected until he is proved to have obtained the title through fraud or misrepresentation. For the issue of the "late" issuance of title to be resolved, the Defendant must bring on board both the Commissioner of Lands and the City Council of Nairobi who will shed some light on the issue.

14. From the foregoing I am satisfied that the Plaintiff's case is, on the face of it, likely to succeed and accordingly I make the following orders:—

(1) *The Defendant, whether by himself, his agents or otherwise is restrained from trespassing on LR No. 1160/693 (original number 1160/54/2) pending the hearing and determination of this suit.*

(2) *The Defendant shall remove such part of the fence and or gates that deny the Plaintiff access to his (Plaintiff's) parcel of land.*

(3) *The OCS Karen Police Station do assist in providing the Plaintiff's servants or agents the right of access to LR No. 1160/693 at the Defendant expense.*

(4) *The Plaintiff shall have the costs of this application.*

14. I decline to grant prayer 1(c) of the application on grounds that the Plaintiff did not place any evidence before the court to support the prayer.

Orders accordingly.

**Delivered and Dated at Nairobi this 25<sup>th</sup> day of January, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Okulo (present) for the Plaintiff/Applicant

Mr. Kangatta (present) for the Defendant/Respondent

Weche – court clerk