



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Application 64 of 2007**

**GRACE WAMBUI NDUNGU .....PLAINTIFF/APPLICANT**

**VERSUS**

**JANE WAMBUI GACHOMBA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EDWARD NJAU WAIHARO .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE HON. ATTORNEY GENERA .....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**LINUS NJUNG'E MUNGAI .....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before court is the Chamber Summons dated 15/01/2010 filed on the same date on behalf of the Plaintiff by the firm of Kamau Kinga & Company Advocates. The application which is brought under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of the law seek **ORDERS**:-
  - (a) ***THAT*** this application be certified urgent and be heard *ex parte* in the first instance.
  - (b) ***THAT*** this honourable court be pleased to issue an order for an injunction restraining the 4<sup>th</sup> Defendant/Respondent, his servants and/or agents from alienating, transferring, entering, charging or in any way interfering with L.R. No. KABETE/MWIMUTO/T.184 pending the hearing and determination of this application.
  - (c) ***THAT*** there be an order for an injunction restraining the 4<sup>th</sup> Defendant/Respondent, his servant and/or agents from alienating, transferring, entering, charging, or in any way interfering with L.R. No. KABETE/MWIMUTO/T.184 pending the hearing and determination of this suit.
  - (d) ***THAT*** the costs of this application be provided for.
2. The application is premised on grounds that the 4<sup>th</sup> Defendant/Respondent is trying to forcefully enter the suit property known as LR No. **KABETE/MWIMUTO/T.184** with the final intention of selling the suit property. The Applicant says that if the suit property is sold as envisaged by the 4<sup>th</sup> Defendant to **CHURCH OF RESTORATION (MWIMUTO)** then the Applicant's claim shall be defeated.
3. The application is also supported by the affidavit sworn by **Grace Wambui Ndungu** the Plaintiff/Applicant. The deponent says that

she brings this matter to court on behalf of her late husband, **Peter Ndungu Njoroge** who purchased half of LR No. KABETE/MWIMUTO/T. 23 from one **Mugo Kiarie** in or about 1985. The Applicant avers that the late **Peter Ndungu Njoroge** took possession of the land and constructed some semi-permanent houses thereon, a fact which the Applicant says is admitted by **Mugo Kiarie** in the latter's defence in Nairobi HCCC No. 617 of 2009. The Applicant avers further that the vendor's daughter, one **Jane Wambui Gichomba** illegally had the suit land registered in her names with the consequence that the title number was changed to LR No. KABETE/MWIMUTO/T.184. The Applicant says that she obtained injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, but that inspite of such orders the 2<sup>nd</sup> Defendant **Edward Njau Waiharo** sold the suit land to the 4<sup>th</sup> Defendant; and that the 4<sup>th</sup> Defendant now threatens to sell the same suit land to **CHURCH OF RESTORATION, MWIMUTO**, hence this application.

4. The application is opposed. The 2<sup>nd</sup> Defendant filed Grounds of Objection dated 27/01/2010 on the same date. The application is opposed on grounds:-
  1. **THAT** the application is bad in law and an abuse of the court process.
  2. **THAT** the application is malicious and an afterthought meant to confuse this court and delay the hearing of the previous suits.
  3. **THAT** the Applicant has filed multiple suits which it seems are not disclosed to the court and to the parties herein.
  4. **THAT** the Applicant has failed to annex documents in support of her claim.
  5. **THAT** the 2<sup>nd</sup> Defendant/Respondent shall request the court to dismiss the application in the first instance.
  6. **THAT** the Applicant only cause of action lies on a refund of consideration,(sic) if any paid out by the initial vendor, **Mugo Kiarie**, if at all the money was not refunded as there was no contract on the face otherwise unless stated.
5. The 1<sup>st</sup> Defendant did not file any papers in opposition to the Applicant's application but at the hearing, Mr. Kuloba, counsel for the 1<sup>st</sup> Defendant said that he was leaving the matter to the court as the application did not affect his client. The 3<sup>rd</sup> Defendant, though served, did not appear.
6. At the hearing of the application, Mr. Kamau Kinga advocate for the Applicant submitted that despite the injunctive orders granted by Osiemo J on 27/02/2007, against the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant still went ahead and sold the suit property to the 4<sup>th</sup> Defendant. Mr. Kinga submitted that the Applicant, had fulfilled all the conditions for the granting of injunctions as set out in the **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. Counsel also asked the court to disregard the grounds of opposition raised by the 2<sup>nd</sup> Defendant on grounds that the said 2<sup>nd</sup> Defendant is in contempt of orders of court.
7. Mr. Kahuthu, counsel for the 2<sup>nd</sup> Defendant vehemently opposed the application, saying that the Applicant's application is baseless and malicious. Mr. Kahuthu also argued the Applicant has not demonstrated that she was ever in possession of the suit property.
8. Mr. Mwangi advocate, appeared for the 4<sup>th</sup> Defendant and relied on the 4<sup>th</sup> Defendant's Replying Affidavit dated 27/01/2010 and the annexures thereto including annexure "PMK 1" being the 4<sup>th</sup> Defendant's Replying Affidavit dated 22/12/2009 sworn and filed in ELC No. 617 of 2009. Mr. Mwangi submitted that all the evidence on record shows that the 2<sup>nd</sup> Defendant bought the suit land from the 1<sup>st</sup> Defendant on 8/11/2006 free from any encumbrance and that on 23/01/2008, the suit land was sold to and registered in the name of the 4<sup>th</sup> Defendant as absolute owner. Mr. Mwangi submitted that the 4<sup>th</sup> Defendant was an innocent purchaser for value and that since he is in physical possession and use of the suit land, any orders issued against him in terms of the prayers sought would be in vain.
9. Mr. Mwangi also submitted that the Applicant is a vexatious Applicant who has filed a total of five cases on this same suit property namely HCCC Nos. 155/02; 480/03; Misc. Application No. 191/06; 64/07 and HCCC No. 617/2009, the latter which is said to be still pending in court.
10. The court has now considered the application and the objections raised thereto. The question for determination at this stage is whether the Applicant has satisfied all the three conditions for the granting of an injunction. It is the considered view of the court

that the Applicant has not demonstrated that she has a prima facie case with a probability of success against the 4<sup>th</sup> Defendant. It is admitted that the 4<sup>th</sup> Defendant has a title to the suit property and all indications seem to suggest that the 4<sup>th</sup> Defendant is an innocent purchaser for value.

11. Secondly, the Applicant has not demonstrated what, if any substantial loss she is likely to suffer if the orders sought are not granted. By another application dated 9/01/2010, the Applicant intends to file for general damages against the proposed 5<sup>th</sup> Defendant Mugo Kiarie and for general damages against the 2<sup>nd</sup> Defendant for illegal demolition of private property. In my view therefore, the Applicant's remedy lies in damages and not in an order of injunction. In any event, if the earlier orders granted to the Applicant have not been complied with the best course of action was to bring contempt proceedings and not to file this application.
12. Thirdly, if I were to decide this case on a balance of convenience, I think that the same would tilt in favour of the 4<sup>th</sup> Defendant who has exhibited a title in his name in respect of the suit property.
13. I also find that the Applicant is a vexatious litigant and from what has happened so far in this matter, it is not clear how many other applications the Applicant is likely to file as she seeks to amend the plaint or seek this or that order.
14. In the premises, the Applicant's application dated 15/01/2010 has no merit. The same is dismissed with costs to the 2<sup>nd</sup> and 4<sup>th</sup> Defendants.

Orders accordingly.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of March, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mrs. Kipingor for Mr. K. Kinga (present) for the Plaintiff/Applicant

No appearance For the 1<sup>st</sup> Defendant

No appearance For the 2<sup>nd</sup> Defendant

No appearance For the 3<sup>rd</sup> Defendant

Mr. Muturi for Mwangi (present) For the 4<sup>th</sup> Defendant

Weche Court clerk