



REPUBLIC OF KENYA

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

**Environmental & Land Case 653 of 2009**  
**DANEVA LIMITED ..... PLAINTIFF**

**V E R S U S**

**1. LAWRENCE GIKONYO**

**2. FRANCIS KIRIMA M'IKUNYUA,  
EDWIN G. ODALLO & JAMES MBURU NUTHU  
(being the Chairman, Secretary & Treasurer respectively  
of ZIMMAN SETTLEMENT SCHEME ..... DEFENDANTS**

**R U L I N G**

The Plaintiff, a limited liability company, is the registered proprietor of land parcel **L.R. No.NBI/BLK 123/61** situated along Nairobi – Thika Road. Its case is that it bought the land from ROBERT WAMITHI MUTAHI in July 2008 and was issued with a Certificate of Lease. About May 2009, it was alleged, the 2<sup>nd</sup> Defendant fraudulently and illegally sold the land to the 1<sup>st</sup> Defendant purporting to have taken over the same. The 1<sup>st</sup> Defendant then begun to construct on it, and refused to vacate even when he was shown the title documents by the Plaintiff. It is the alleged trespass and claim that the Plaintiff seeks to permanently restrain by this suit. It also seeks a declaration that it is the rightful owner of the land. Lastly, the Plaintiff seeks the eviction of the 1<sup>st</sup> Defendant from the land.

With the suit was filed a chamber application under **Order 39 rules 1 and 2** of the **Civil Procedure Rules** for a temporary injunction to restrain the Defendants, and all those acting under them, from trespassing, alienating, selling, transferring, wasting, leasing, disposing of, sub-dividing, damaging, constructing and/or erecting any structures on the land pending the hearing of the suit.

FRANCIS KIRIMA M'IKUNYUA is the chairman of the 2<sup>nd</sup> Defendant and swore a replying affidavit. Their case is that the purported sale agreement between ROBERT WAMITHI MUTAHI and WILLIAM WANJOHIMUREITHI, and not the Plaintiff, was neither registered nor stamped. There was no consideration for the transaction. He stated that ROBERT WAMITHI MUTAHI was their member but never owned the suit property, and therefore could not have sold it to WILLIAM WANJOHI MUREITHI. The parcel, he stated, belongs to KANYI GATHAITA. He annexed a copy of their register as "**FKI**". His contention is if ROBERT WAMITHI MUTAHI obtained any title to the land that was fraudulent.

The application was supported by the affidavits of HELLEN NJERI WANJOHI and WILLIAM WANJOHI MUREITHI who are

wife and husband and co-directors of the Plaintiff's company. They stated that after WILLIAM bought the land from ROBERT at KShs. 3.4 million they resolved to have it registered in the name of the Plaintiff.

The application was argued between Mr. Mungai for the Plaintiff and Mr. Kanyi for the Defendants. Several authorities were cited by Mr. Mungai in support of the Plaintiff's case.

The principles governing the grant of an interlocutory injunction are well settled. (See **GIELLA –VS- CASSMAN BROWN & CO. LTD [1973] EA 358**). The applicant has to demonstrate a *prima facie* case with probability of success, and show that if the injunction is not granted he will suffer irreparable injury that cannot be compensated in damages. If the court is in doubt, it should decide the matter on balance of convenience.

The Plaintiff is the registered proprietor of the leasehold interest in the disputed property. Copy of the Certificate of Lease ("**WWM 4 (a)**") and Certificate of Official Search ("**WWM 4 (b)**") were annexed to the supporting affidavit by WILLIAM WANJOHI MUREITHI. Under **sections 27 and 28 of the Registered Land Act (Cap. 300)** such registration would give the Plaintiff a *prima facie* absolute and indefeasible claim to the land. Such a registered interest would also establish a *prima facie* case with a probability of success. (See **Kenya Finance Company Ltd. –vs- Afraha Education Society & Others [2001] IEA 86**). However, the Defendants are attacking this title on basis of that it was fraudulently obtained. According to the Plaintiff, this land was bought for KShs. 3.4 million in July 2008 from ROBERT WAMITHI MUTAHI. WILLIAM WANJOHI MUREITHI who bought it then transferred it to the Plaintiff Company. The 2<sup>nd</sup> Defendant is a society registered under the **Societies Act (Cap. 108)** and has been sued through its officials: - FRANCIS KIRIMA M. KINYUA (Chairman), EDWIN G. ODALLO (Secretary) and JAMES MBURU MITHU (Treasurer). FRANCIS KIRIMA M'KINYUA states that this land belonged to the society. The society had many other plots which it was allocating to its members. The person allocated this plot, FRANCIS states, was KANYI GATHAITA. The Chairman further stated that ROBERT WAMITHI MUTAHI who allegedly sold the land to WILLIAM WANJOHI MUREITHI was in fact their member but this land was not allocated to him. His parcels were several but this was not one of them. He produced the list of members and their respective plots as "**FKI**". It is certified by the area District Officer. The defence case is that if ROBERT WAMITHI MUTAHI sold the land in question to WILLIAM WANJOHI MUREITHI that was a fraudulent transaction as ROBERT did not own such land in the first place. It is notable that the Plaintiff did not respond to these averments.

The very essence of the Plaintiff's title is being attacked by the Defendants. The court will have to subject the case of either side to oral testimony and cross examination to be able to decide which side has a valid claim to the land. At this stage, I find, the Plaintiff has not demonstrated a *prima facie* case with a probability of success.

The Plaintiff claims the 1<sup>st</sup> Defendant is on the land and constructing; that he came to the land because it was purportedly sold to him by the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant swore no affidavit in response, but the 2<sup>nd</sup> Defendant denies that it sold the land to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant states that the land belongs to KANYI GATHAITA. However, the fact of construction, of what would appear from annexure "**WWM7**" to be storey building, does not appear to be in dispute. If the 1<sup>st</sup> Defendant is the one constructing, it is not clear how he came onto the land now that the 2<sup>nd</sup> Defendant states there is a 3<sup>rd</sup> party whom it allocated it. Did that party sell it to the 1<sup>st</sup> Defendant? If the building is allowed to continue to completion and the court ultimately determines the suit in favour of the Plaintiff, it will be left with a structure that it did not plan for and the Defendants may be forced to pull it down, etc. Either way there will be great expense and inconvenience. The land was bought for KShs. 3.4 million. It is a commodity for sale whose loss can be adequately compensated by an

appropriate order of damages. (See **PAUL MUHORO KIHARA –VS- BARCLAYS BANK (K) LTD H.C. (MILIMANI) C.C. No. 33 of 2002**). However, in order to avoid the wastage of this land until the case is finally determined, an order of interlocutory injunction is hereby granted in terms of prayer 3 of the chamber application. It is ordered that costs will await the resolution of the case.

**DATED AND DELIVERED AT NAIROBI**

**THIS 19<sup>TH</sup> DAY OF MARCH 2010**

**A. O. MUCHELULE**

**J U D G E**