



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

Civil Suit 2002 of 2007

ROSE NJOKI KINGAU.....1ST PLAINTIFF

MICUGU WAGATHARA.....2ND PLAINTIFF/RESPONDENT

VERSUS

SHABA TRUSTEES.....1ST DEFENDANT/APPLICANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT/APPLICANT

RULING

1. The application before court is the Chamber Summons dated 16/11/2006. The same is brought by the 1st Defendant/Applicant under Order VI Rule 13(1)(b) and (d), Order XXXV Rule 1(1)(b) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. By this application, the 1st Defendant seeks the following ORDERS:-
 1. *THAT the Plaintiff's suit against the 1st Defendant be struck out.*
 2. *THAT summary judgment be entered against the Plaintiffs in terms of the prayers set out in the 1st Defendant's counterclaim*
 3. *THAT the costs of this application be borne by the Plaintiffs.*
2. The application is based on the ground that the Plaintiffs' suit against the 1st Defendant is scandalous, frivolous, vexatious and is otherwise a grave abuse of the court process and that the Plaintiffs are incapable of mounting any triable defence against the 1st Defendants' counterclaim and that it is in the interest of justice that judgment be entered in favour of the 1st Defendant. The application is also based on the sworn affidavit of Brian Kiptoo Kiplagat dated 16/11/2006.
3. It is the 1st Defendant's contention that the 1st Defendant is the registered proprietor of the land known as LR No. 209/9968 (hereinafter referred to as the suit land). The deponent has annexed to the supporting affidavit a copy of the title dated 30/03/2001 in the name of SHABA TRUSTEES LIMITED, the 1st Defendant herein. The suit land is said to measure about 0.1365 Ha according to the Ref. Map/R.I.M. S.A. 37/GII:dl (148/4) dated 6/10/1998. The 1st Defendant further contends that as holder of the title to the suit land, the said title is indefeasible and that if the Plaintiffs have any claims in respect of the suit land, such claims can only lie in damages against the 2nd Defendant. The 1st Defendant also contends that in the absence of fraud either pleaded or established against the 1st Defendant the Plaintiffs' suit against the 1st Defendant is frivolous and is otherwise an abuse of the court process and ought to be struck out.
4. The application is opposed. The Replying Affidavit is sworn by Rose Njoki King'au, the 1st Plaintiff herein. The deponent has annexed a number of documents to her Replying Affidavit, namely
 - (i) *P Exhibit 1 – being letter of Allotment – residential plot – Nairobi West off Langata road issued by City Council of Nairobi.*

- (ii) *PExhibit 2 – General Power of Attorney by Wilson Chebiegon Bowen registered on 31/12/1994*
- (iii) *PExhibit 3 – Receipt on premium and ground rent payment*
- (iv) *PExhibit 4 – Enforcement Notice by City Council of Nairobi*
- (v) *PExhibit 5, Payment Receipts as follows:-*
 - (5A) *Bill*
 - (5B) *Ground rent receipt*
 - (5C) *Transfer fee*
 - (5D) *Survey on plot receipt*
- (vi) *PExhibit 6 – Confirmation on Beacon Certificate*
- (vii) *PExhibit 7 – a letter from the City Council of Nairobi to the 1st Defendant to supply the council with the approved development plan, letter of allotment from the Commissioner of Lands and a survey map*
- (viii) *PExhibit 8 – Survey Plan.*

5. The deponent says in her Replying Affidavit that the 2nd Plaintiff was allotted “Plot B” by the 2nd Defendant, but the 2nd Defendant did not recognize both the 1st and 2nd Plaintiffs as legal owners of the suit land, hence the enforcement notice dated 01/09/2006. The Plaintiffs aver that despite what the 2nd Defendant wants others to believe they have continued to pay annual rent to the 2nd Defendant. The Plaintiffs want the 1st Defendant’s application dismissed for being fatally defective.
6. Before I proceed to consider the merits of the application, I find it necessary to summarize the pleadings. It is not disputed that the 1st Defendant is the registered proprietor of the suit land.
7. The Plaintiffs herein commenced this suit by way of a plaint dated and filed in court on 18/09/2006. The original plaint was amended on 25/09/2006 and by it the Plaintiffs seek the following reliefs:-
 - (i) *A declaration that the 1st and 2nd Plaintiffs are lawful and legal owners of property LR No. 209/9968 also known as Plot No. 209/10/94 Mai-Mai Road Nairobi to the exclusion of all and any other claimants;*
 - (ii) *A permanent injunction restraining the 1st and 2nd Defendants by themselves, their agents and/or servants from evicting, demolishing any structures on LR No. 209/9968 or in any way interfering with the Plaintiffs’ possession of LR No.209/9968.*
 - (iii) *Costs of this suit.*
8. The 1st Defendant filed its Defence and Counterclaim Filed Under Protest dated 7/11/2006 (sic) on the 8/12/2006. The 1st Defendant denies all the Plaintiffs’ claims against it and avers that it is the lawfully registered proprietor of the suit land pursuant to a grant issued by the President of the Republic of Kenya on 30/03/2001. The 1st Defendant also counter-claims against the Plaintiffs who the 1st Defendant says are trespassers on the suit land and according prays for judgment against the Plaintiffs jointly and severally for:-
 - (a) *An order of mandatory injunction compelling the Plaintiffs whether by themselves, their agents, servants and/or any other persons authorized by the Plaintiffs to forthwith vacate the property known as Land Reference Number 209/9968.*
 - (b) *An order of permanent injunction restraining the Plaintiffs by themselves, their agents, servants, and/or any other persons authorized by the Plaintiffs from encroaching constructing, erecting illegal structures upon or otherwise dealing in any other way with the 1st Defendants property known as Land Reference Number 209/9968.*
 - (c) *An order of eviction directed against the Plaintiffs by themselves, their agents, servants and/or any other persons authorized by the Plaintiffs to vacate the property known as Land Reference Number 209/9968.*
 - (d) *Costs of the counterclaim*
 - (e) *Any other or further relief which this Honourable Court may deem fit to grant.*
9. The 2nd Defendant entered appearance on 10/07/2007 but failed to file defence within the stipulated time, leading to the Plaintiff’s Request for Judgment dated 31/07/2007. From the record, there is no Reply to Defence and Defence to Counterclaim to the 1st

10. I shall now move on to consider the case law relied upon by the parties before I consider the merits of the application which proceeded by way of written submissions. The 1st Defendant Applicant relied on the provisions of the Registration of Titles Act, Cap 281 Laws of Kenya to support the 1st Defendant's contention that the Plaintiffs suit ought to be struck out. The relevant sections of the RTA are the following:-

"S.20. After the commencement of this Act and subject to the provisions of subsection (2) of Section (1) thereof, all land which is comprised in any grant issued after the commencement of this Act shall be subject to this Act and shall not be capable of being transferred transmitted, mortgaged, charged or otherwise dealt with expect in accordance with the provisions of this Act and an attempt to transfer, transmit, mortgage charge or otherwise deal with it, except as so provided, shall be void and of no effect.

S. 22(3) The title of the proprietor under each fresh Certificate of title shall be as valid and effective in every respect as if he had been the original grantee in the grant of the land contained in the certificate.

S. 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 therein as proprietor of the land is absolute and indefeasible owner thereof subject to the encumbrances easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge, except on ground of fraud or misrepresentation to which he is proved to be a party."

S. 24. Any person deprived of land or any interest in land in consequence of fraud or through the bringing of that land under operation of this Act or by the registration of any other person as a proprietor of land or interest or in consequence of any error or misdescription in any grant or certificate of title at any entry or memorial in the register or any certificate of search, may bring and prosecute an action at law for recovery of damages against the person upon whose application the land was brought under the operation of this Act or the erroneous registration was made or who acquired the interest through fraud, error, misdescription.

S. 32. No instrument until registered in the manner hereinabove described shall be effected to pass any land or any interest therein or render the land liable as security for the payment of money but upon the registration of an instrument in the manner hereinbefore described the land specified in the instrument shall pass or as the case may be, shall be liable as security and contingencies set out and specified in the instrument or declared by this Act to be implied in the instrument of similar nature."

11. In light of the above provisions counsel for the 1st Defendant submit that the only way the Plaintiffs' case against the 1st Defendant can succeed is if there are allegations of fraud or misrepresentation against the 1st Defendant. Counsel say that there are no such allegations of either fraud or misrepresentation against the 1st Defendant. At paragraph 9(e) of the Amended Plaint dated 25/09/2006, the Plaintiffs state:

"9(e) that alternatively and without prejudice to the foregoing paragraph, the 1st Defendant fraudulently caused the Commissioner of Lands to issue them with a Grant over LR No.209/10/94 (the 1st and 2nd Plaintiffs shall crave leave of the court to join the Commissioner of Lands as a Defendant at the opportune time).

(Particulars of fraud to be supplied)".

12. The 1st Defendant contends that in the absence of such particulars of fraud, and when there is no prayer for cancellation of the 1st Defendant's title, the Plaintiffs' suit against the 1st Defendant stands no chance of success and that the same should be struck out.
13. The 1st Defendant also says that the Plaintiffs have not challenged the applicability of the provisions of section 23(1) of the RTA to the 1st Defendant's title and that by their own pleadings, by which they are bound, the instruments of ownership allegedly held by the Plaintiffs have not been registered in accordance with section 32 of the RTA and accordingly that such instruments are invalid. Further, the 1st Defendant's counsel argues that even if such instruments had been registered the same cannot override the mandatory provisions of the law.
14. As regards the 1st Defendant's counterclaim to which the Plaintiffs have filed no answer the 1st Defendant urges the court to apply the provisions of Order XXXV Rule 1(1) of the Civil Procedure Rules and to grant the reliefs sought by the 1st Defendant in its counterclaim.
15. The 1st Defendant cited a number of authorities for the guidance of the court. In **HCCC No. 79 of 2005 – Damisha Building Contractors Ltd. –vs- Auto Spring Manufacturers Ltd.** the Defendant conceded that the Plaintiff was the registered owner of

the suit land. The court struck out the Defendant's defence which was that the suit land was a road reserve which had been irregularly allocated to the Plaintiff. Though this authority was issued by a court of concurrent jurisdiction, I am nonetheless persuaded by it.

16. The 1st Defendant also relied on **Muchendu –vs- Waita [2003] KAR 1**. In the case, the Defendant averred that she was the registered owner of the suit premises under the RTA and exhibited a copy of the Certificate of Title to that effect. The court held and I agree with the court's finding that under section 23(1) of the RTA, the Defendant's title to the suit premises was absolute and indefeasible.
17. In **Njilux Motors Ltd. –vs- Kenya Power & Lighting Co. Ltd. [2000] 2 EA 466**, the court held that where there were two grants, one of which was not registered, the grant that is registered is to be preferred to the unregistered one.
18. The other case relied on by the 1st Defendant is **Jaj Super Power Cash & Carry Ltd. –vs- Nairobi City Council & 2 Others – Court of Appeal Civil Appeal No. 111 of 2002**. In the case, the superior court had refused to grant a mandatory injunction seeking eviction of trespassers on to the land of a registered proprietor. The Court of Appeal set aside the superior court's dismissal orders and substituted them with an order granting a prayer for a mandatory injunction against all the Respondents in respect of the portion of the suit land occupied by the 3rd Respondent, **Seemore Cars Ltd**. The reasoning behind the court's finding on appeal was that section 23 of the RTA gives the registered proprietor an absolute and indefeasible "interest in the suit land, and that such a registered proprietor would be entitled to resist successfully the advances of a trespasser thereon."
19. The Plaintiffs on the other hand have relied on the letter of allotment and the various exhibits annexed to the Replying Affidavit of the 1st Plaintiff, Rose Njoki King'au. As to the law, counsel for the Plaintiffs argues that the 1st Defendants' application is fatally defective because it is not clear who of the two authorities, namely the Commissioner of Lands and the City Council of Nairobi was the original grantee of the suit land. Counsel for the Plaintiffs also contends that the Plaintiffs have pleaded fraud against both the 1st and 2nd Defendants.
20. I have now considered the facts of this case. I have also carefully considered the submissions made by both parties. I have also considered the law, both statutory and case law. On the basis of the above, I am persuaded that the 1st Defendant's application has merit. On the basis of section 23(1) of the RTA and the holding in **Jaj Super Power Cash & Carry Ltd. (above)**, the 1st Defendant's title issued to him on 30/03/2001 is absolute and indefeasible. It is admitted by the Plaintiffs that the 1st Defendant is the registered owner of the suit land. It is also not in dispute that the Plaintiffs' documents of title (read allotment letter) are not registered in accordance with section 32 of the RTA. It is also clear from the amended plaint that the Plaintiffs have not pleaded any particulars of fraud against the 1st Defendant. I am persuaded that if there were such particulars, the same would not have escaped the mind of the Plaintiffs on an amendment of their plaint.
21. Further, the Plaintiffs have offered no answer to the 1st Defendant's claims that they are trespassers who ought to be evicted from the suit land. The Plaintiffs contend that the 1st Defendant fraudulently caused the Commissioner of Lands to issue them with the grant over the suit land, but the Plaintiffs have not placed any evidence before me to support their claims. In the circumstances and applying the principle of law set out in the **Jaj Super Power Cash & Carry Ltd. case (above)**, I would agree with the position taken by the 1st Defendant that the Plaintiffs herein are trespassers onto the suit land and ought to be evicted by an order of this court.
22. It is to be further noted that failure to give an answer to the 1st Defendant claims of trespass, the Plaintiffs have confirmed to this court that they have no defence to the said claims. It thus follows that the prayer for a declaratory order ought by the Plaintiffs to the effect that the Plaintiffs are the rightful owners of the suit land has no basis.
23. In the premises, the Plaintiff's suit against the 1st Defendant be and is hereby struck out. Accordingly, I enter judgment for the 1st Defendant as against the Plaintiff's jointly and severally in the following terms:-
 - (a) *The Plaintiffs, whether by themselves, their agents, servants and/or any other persons authorized by the Plaintiffs be and are hereby compelled to forthwith vacate the property known as Land Reference Number 209/9968.*

(b) The Plaintiffs by themselves, their agents, servants and/or any other persons authorized by the Plaintiffs be and are hereby restrained from encroaching constructing erecting illegal structures upon or otherwise dealing in any other way with the 1st Defendants property known as Land Reference Number 209/9968.

24. The 1st Defendant shall have the costs of both this application and of the suit.

It is so ordered.

Dated and delivered at Nairobi this 29th day of April, 2010.

R.N. SITATI

JUDGE.

Read and Delivered in the presence of:-

Mr. Kyalo for J.N. Njenga (present) for the Plaintiffs/Respondents

Mr. Masinde for Bundotich (present) for the 1st Defendant/Applicant

Weche - court clerk