



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 272 of 2009

PETER NGUGI MWANGI

T/A MANG'U BUILDERS.....APPLICANT

VERSUS

DALICE INVESTMENTS LTD.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

RULING

The applicant **Peter Ngugi Mwangi**, has moved this court by an application dated 1st October, 2009 for orders that the respondent, **Dalice Investments Limited** and the **Commissioner of Lands** be restrained from selling, alienating, disposing of, dealing or interfering with the applicant's title to parcel of land No.NAIVASHA MUNICIPALITY BLOCK 5/225 on the grounds that he is the registered proprietor; that the 1st respondent has unlawfully acquired the suit property and the 2nd respondent has illegally issued it with the title to the suit property; that the 1st respondent instituted Nakuru HCCC No.48 of 2006 against the applicant in which the court ordered for the maintenance of *status quo*; that the 1st respondent violated the order and the applicant has moved the court to punish it

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for contempt of court; that after being unlawfully issued with the certificate of lease for the suit property, the 1st respondent has now threatened to sell the suit property.

In reply to these averments, the 1st respondent through a director, Daniel Kiplagat Kirui has deposed that it is the lawfully registered proprietor of the suit property while the applicant's title is a forgery; that in pursuit to obtain documents of title to the suit property, the 1st respondent engaged Mary Wangare and Francis Gachanja Mwangi – posing as property agents to process title documents; that the two colluded with the applicant and fraudulently obtained a forged registration of title in favour of the applicant; that the forgery has been confirmed by the Nakuru District Land Registrar, the Commissioner of Lands, the Chief Land Registrar; that it was only after the revelation of the forgeries that the 1st respondent withdrew Nakuru HCCC No.48/2006; that subsequently, the suit property was registered in the name of the 1st respondent; that following these events, the applicant (Peter Ngugi Mwangi), Mary Wangare Mwangi, Francis Gachanja Mwangi and Lawrence Maina were charged with the offence of **making a document without authority** contrary to **section 313** of the **Penal code** in Naivasha S.P.M.CR.C.NO.434 of 2006.

The 2nd respondent has denied any collusion with the 1st

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respondent and asserts that the records available in the Lands Office indicate the 1st respondent as the lawful registered owner of the suit property; that the certificate of lease exhibited by the applicant is a forgery as it did not emanate from the Land Officer; that no injunction can issue against the 2nd respondent.

I have considered these arguments, the written submissions and the authorities cited. Being an application for temporary injunction, it is imperative upon the applicant to demonstrate that he has a *prima facie* case with the probability of success at the trial; that an award of damages will not be adequate to compensate the loss he stands to suffer if an injunction is not granted. But should the court be in doubt the matter must be decided on the balance of convenience. See **Giella Vs. Cassman Brown & Company Limited** (1973) EA 358.

In determining whether there is a *prima facie* case, the court is not expected to make any definite finding of either fact or law. Secondly, the three considerations in granting a temporary injunction as enunciated in the **Giella** case is sequential. Either the court has to find that the applicant has a *prima facie* case or failing that, the applicant will suffer loss not capable of compensation by way of damages. It is only when the court is in doubt that it would consider

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the application on a balance of convenience. See **Hanna Wanjiru Wanganga Vs. Berco Auto Spares Limited**, Civil Appeal No. 321 of 2000. Courts in this country have, traditionally considered all the three principles in turn.

Both the applicant and the 1st respondent have each exhibited certificate of lease in respect of the suit property, the applicant's having been allegedly issued in 2005 and the 1st respondent's in 2006.

At the trial, it will be incumbent upon the applicant to prove on a balance of probability that his title is superior to that of the 2nd respondent. Put differently, the applicant must prove at the trial that he is the only lawfully registered proprietor of the suit land. Looking at the affidavit evidence *vis a' vis*, the applicable law without going into the merits of the case, has the applicant demonstrated that he has a *prima facie* case? I do not think so. The documents he has exhibited which he relies on to assert his title have been discredited by the very authority that is responsible for the issuance of those documents. They have confirmed that they did not emanate from the Lands Office; that they are a forgery.

Secondly, at the time the applicant filed this suit in 2009, the manner in which he obtained title to the suit land was being seriously challenged in a criminal court in which he was jointly charged with

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three others with the offence of making a document without authority. Although that case has not been concluded, its existence and the fact that this suit is brought during its pendency can only show that the applicant is undeserving of the equitable remedy of injunction. A *nolle prosequi* entered in that case did not affect the applicant.

Finally, no order of injunction can issue against the 2nd respondent. For the reasons stated, the application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 28th day of June, 2010.

W. OUKO
JUDGE