



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Case 49 of 2010**

**LUCIA WAITHERA MAINA.....APPLICANT**

**VERSUS**

**JAMES GAKURE KAMAU.....RESPONDENT**

**RULING**

The applicant, **Lucia Waitthera Maina** has brought the instant application for temporary order of injunction against the respondent, **James Gakure Kamau**, her brother in law. The applicant's case is that in the 1960s with her late husband, they purchased shares with Ndeffo Company Limited.

In 1983 her husband was issued with share certificate. In the same year after a ballot, plot No.BAHATI/KABATINI BLOCK 1/1494 (the suit property) was allocated to him. After taking possession, the respondent began to claim the suit property. The matter was referred to a chief by the name Kinyua who after failing to force the applicant's husband to surrender the suit land to the respondent erased the applicant's name and replaced it with that of the respondent. Subsequently, he obtained the title deed. Upon the death of the applicant's husband, the respondent made a reference to the Land Disputes Tribunal. The applicant finally avers that she has been in possession of the suit property throughout this period. Responding to these averments, the respondent has maintained that, being the registered proprietor of the suit property, the orders sought in this application cannot issue against him; that he has also disposed of the suit property to a third party; that the applicant has not been in possession of the suit property since 1984. The respondent has pointed out that the applicant brought a similar application as the present one in which she claimed the suit property on behalf of her late husband. That suit, Nakuru HCCC No.116 of 2008 was struck out. That the Bahati Land Disputes Tribunal Case No.25/2005 resolved the dispute in favour of the respondent.

I have considered these averments and submissions by counsel. Being an application for injunction, it is incumbent upon the applicant to demonstrate that she has a *prima facie* case with a probability of success at the trial and that an award of damages will not be adequate compensation. But in case the court is in doubt, the matter will be decided on a balance of convenience.

In the main suit, the applicant claims the suit property on the basis of a trust. That the respondent is registered to hold the suit property in trust for the applicant and her deceased's husband's estate; that the registration was obtained by fraud. Is this claim likely to succeed at the trial? Without determining the merits of the suit, it is evident that there is a decree in the **C.M.C. Land Dispute No.27 of 2007** which has decreed that:

**“.....land parcel No.BAHATI/KABATINI BLOCK 1/1494 belong to JAMES GAKURE KAMAU, who is the title holder.”**

A decision in this matter in favour of the applicant will result in an absurdity as there will be two decrees.

In this regard, the applicant having submitted to the jurisdiction of the Tribunal ought to have exhausted the appellate system or sought judicial review of the award or decree. Having failed to follow this procedure whether or not the tribunal had jurisdiction cannot be challenged in this suit. Secondly, there is an uncontroverted averment that the suit property has changed hands and is now the property of a third party, Normal P. Muhoro Muchori. Therefore, I find that the applicant has not demonstrated a *prima facie* case and that he can be awarded damages.

On the balance of convenience, the applicant having disposed of the suit land and the purchaser having not been

properly brought in these proceedings, the scale of justice tilts in favour of the respondent.

In the result, the application is dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 25<sup>th</sup> day of June, 2010**

**W. OUKO**

**JUDGE**