

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

Environmental & Land Case 138 of 2010

**FLORENCE MUTHONI NJAU (SUING AS ATTORNEY
FOR & ON BEHALF OF JOHN MBURU KARANJA).....PLAINTIFF/APPLICANT**

V E R S U S

**SAMUEL WANJOHI WAHOME1ST DEFENDANT
MICHAEL WAWERU MBUGUA2ND DEFENDANT
ANASTASIA KIMEU MUTHIKE3RD DEFENDANT**

R U L I N G

There is no dispute that the leasehold interest in Parcel No. Nairobi/Block 82/1910 is registered in the name of the 3rd Defendant. She has both the Certificate of Lease and possession of the suit property. The property was sold to her by the 2nd Defendant for KShs. 1,600,000/= and transferred on 14th August, 2007. The 2nd Defendant had bought the property from the 1st Defendant for KShs. 120,000/= and had it transferred on 23rd February, 1994. On his part, the 1st Defendant had bought the property from Continental Developers Limited for KShs. 100,000/= and they had transferred it to him on 6th May, 1993. The documents showing these transactions are annexed to the supporting affidavit of the Plaintiff.

The Plaintiff has a Power of Attorney donated by her brother John Mburu Karanja which was registered on 23rd February, 2010. Her case is that on 17th August, 1988 Continental Developers Limited sold the suit property to Karanja for KShs. 69,500/=. Karanja then developed the property by putting up a residential bungalow which he leased out to a monthly tenant. In 1989 he migrated to USA, leaving the property to be managed by an estate agent. The company had not transferred the property to Karanja. He kept urging for transfer. On 22nd April, 1992 the company wrote to Karanja that the documents were ready. He in turn wrote to it ("FM3") asking that the documents be given to his advocate Antony Gikaria in Nairobi. In 2007 the estate agent informed Karanja that the tenant had vacated and that he was looking for another one. A new tenant was found about September 2007, but, before he could enter, Karanja was informed that someone, the 3rd Defendant, had forcefully taken over the property and was claiming it was hers. Karanja contacted his advocate in Nairobi who conducted a search and found the property had been registered in the name of the 3rd Defendant through the process indicated above. He reported to police (CID) who are investigating the matter. In the meantime, on 23rd March, 2010, he filed this case through the Plaintiff. It is claimed the suit property belongs to Karanja and that all these transactions were fraudulent. The suit sought a declaration that the suit property belongs to Karanja; that the transactions transferring the suit property to 1st, 2nd and 3rd Defendant be reversed, Certificate of Lease to the 3rd Defendant be cancelled and the land register be restored to its original position; a permanent injunction be issued against the Defendants and all those acting under them; and a mandatory injunction to issue compelling the 3rd Defendant, her servants and/or agents, including he tenant currently in occupation, to deliver vacant possession of the suit property to the Plaintiff.

The Plaintiff filed a chamber application under Order 39 rules 1 and 2 of the Civil Procedure Rules and section 3A and 63 of the Civil Procedure Rules for a temporary injunction to restrain the Defendants from trespassing, developing, alienating, selling, charging, transferring and/or in any other manner whatsoever dealing with or interfering with the suit property until the suit is heard and determined. Also prayed for

was mandatory injunction to:-

- a) compel the 3rd Defendant to deliver vacant possession, and
- b) order the 3rd Defendant to deposit the Certificate of Lease in court until the suit is heard and determined.

The court received written submissions from Mr. Gikaria for the Plaintiff and Mr. Macharia for the 3rd Defendant. I have considered the material on record and the submissions.

An interlocutory mandatory injunction can only be sought by motion under section 3A of the Civil Procedure Rules, and not by summons or under Order 39 (Belle Maison Ltd. –Vs- Yaya Towers Ltd, NBI HCCC No. 2225 of 1992). Secondly such an injunction can only be granted in exceptional circumstances and where the applicant has an unusually strong and clear case, or where the guilty party has undertaken a blatantly illegal course of action which the court needs to remedy. (See Kamau Mucuha –Vs- the Ripples Ltd, Civil Application NO. NAI 186 of 1992 and Locabail International Finance Ltd –Vs- Agroexport [1986] (All ER 901).

Regarding an interlocutory injunction, the principles are as set out in Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358. The Applicant has to show that he has a prima facie case with a probability of success; that if the injunction is not granted he will suffer such loss or injury that damages may not adequately compensate; and, if the court is in doubt, it will decide the matter on the balance of convenience.

It has been stated in the foregoing that the 3rd Defendant has a registered lease and she is in occupation, through her tenant, of the suit property. Under sections 27 and 28 of the Registered Land Act (Cap. 300), she has a prima facie absolute and indefeasible claim to the property. Such claim gives her the right to possession, occupation, use and quiet enjoyment. It is unusual to injunct such a claimant.

It is material that the Karanja has only a letter (“FM2”) dated 22nd April, 1992 from Continental Developers Ltd to say that they are holding title documents to the suit property and were calling on him to go and complete them. Then there is a letter dated 19th November, 2007 from the company’s advocates (Rach & Co. Advocates) replying to an inquiry from the Plaintiff’s advocates over the property. The company responded that they had never sold the suit property to the 1st Defendant on 27th April, 1993, or at any other time. The Plaintiff did not, however, make the company, through its officers, to swear an affidavit in reaction to the transactions that have occurred to the title. Why is the company not alarmed that the lease it held has been transferred from it, as it were? Is it not still interested in the suit property? All that the court wants to say is that at this stage the 3rd Defendant has a better claim to the suit property. There was no attempt to show that if interlocutory injunction is not granted the Plaintiff will suffer irreparable damage. In any case, the suit property has known value and is therefore compensable. The balance of convenience should tilt in favour of a registered proprietor who is in occupation. The result is that the application dated 20th March, 2010 and filed on 23rd March, 2010 is dismissed with costs.

DATED AND DELIVERED AT NAIROBI
THIS 18TH DAY OF OCTOBER 2010

A. O. MUCHELULE
J U D G E