



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 66 OF 2010**

**MARY CHEPKIRUI .....PLAINTIFF**

**VERSUS**

**SOSIANI BUILDERS LTD.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

The plaintiff filed suit on the 11<sup>th</sup> May, 2010 seeking a declaration that she is the lawful and legal owner of all that piece of land known as ELDORET MUNICIPALITY 8/12 (suit land) as well as an order for mandamus requiring the 3<sup>rd</sup> defendant to cancel title issued in favour of the 1<sup>st</sup> defendant in respect of the 1<sup>st</sup> defendant and all entries pertaining thereto. She also seeks general damages for loss of opportunity to sell the said property to defray escalating bank loan(sic) and for trespass and mesne profits together with the costs of the suit.

Contemporaneously with the filing of that plaint she took out chamber summons expressed to be brought pursuant to the provisions of section 34 and section 63(c) and (e) of the Civil Procedure Act and Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules. The application was brought under a certificate of urgency the urgency being given as that the 1<sup>st</sup> defendant had started constructing a fence on the plaintiff's property and that that action would alter the status of the suit land irreversibly and that the 1<sup>st</sup> defendant may sell, transfer encumber or otherwise vest its interest in the property to a third party to defeat the plaintiff's claim thereto. The applicant's prayer was therefore that a temporary injunction be issued restraining the 1<sup>st</sup> defendant/respondent their employees, servants, agents and/or assigns from trespassing into, selling, leasing, encumbering, constructing upon, wasting and/or in any other way alienating and/or interfering with the whole of the suit land pending the hearing and determination of the suit. I granted an ex-parte order in the above terms.

The supporting affidavit sworn by the plaintiff stated that she was allotted the suit land on 1<sup>st</sup> April, 1996 by the commissioner of lands and she attached as exhibit MC/1 a copy of the letter of allotment. That she paid all requisite fees and a lease over the suit land was registered in her name on 12<sup>th</sup> April, 2005 and she attached a copy thereof marked MC/2 and MC/3 was the "Certificate of Lease" issued to her on the same date. She stated that she had had title over the suit land since then. She wanted to sell the suit land

and on 28<sup>th</sup> August, 2009 she entered into a sale agreement with prospective buyers and MC/6A was a copy of the sale agreement. That agreement fell through due to time dragging and she deponed further that soon thereafter in November, 2009 she gave copies of the suit land to one Mahendra of Sosiani Builders who had expressed serious interest in purchasing the suit land only for the said Mahindra to soon after say that he was no longer interested in purchasing the suit land and so the applicant went back to the original prospective buyers with whom they reconciled and she then paid all dues to the Eldoret Municipal Council. That the transfer could not be effected upon her taking the necessary documents to the District Land Registrar with the necessary fees. She said further that there were unexplained delays until 8<sup>th</sup> January, 2010 when she was told by a lands officer that the suit land had been allotted to Sosiani Builders Ltd, the 1<sup>st</sup> defendant herein and that title had indeed issued. She immediately suspected collusion and fraud in that registration as she still holds title which has not been cancelled or the suit land compulsorily acquired. She swore further that the suit land was her private property which was not available for re-allocation to another party by the Registrar or Commissioner of Lands. She believed that one Mr. Mahendra of Sosiani Builders Ltd. to whom she had given documents relative to the suit land used those documents to defraud her of the suit land and so she reported the matter to the Kenya Anti Corruption Commission who promised to take action. She concluded her affidavit that on 30<sup>th</sup> April, 2009(sic) she went to the suit land and found that the 1<sup>st</sup> defendant had began depositing construction materials thereupon and was constructing a fence and she feared that such construction if allowed to proceed was to her detriment and such interference will be difficult to reverse. She prayed that an injunction as sought do issue as she was registered as owner first in time and she had a superior claim.

The 1<sup>st</sup> defendant/respondent's replying affidavit was sworn on its behalf by Mahendra G. Patel a director of the 1st defendant company who said that he had authority to swear the same. He swore that the ex-parte orders obtained by the applicant were so obtained without making material disclosures. That the lease over the suit land in favour of the previous owner Naunt Kumar Bhalla lapsed on or about 2<sup>nd</sup> August 2009 and the 1<sup>st</sup> defendant applied for allocation of the suit land on 12<sup>th</sup> October, 2009 and at no time at all was the suit land ever registered in the name of the plaintiff/applicant. That it was one Selina Kanda who attempted to "sell" the suit land to the 1<sup>st</sup> defendant in November, 2009 with what the deponent came to confirm to be a fake certificate of lease to the suit land but that the deponent was not interested in dealing with the said Selina as he had already applied for allocation of the suit land to his company the 1<sup>st</sup> defendant which allotment was on 4<sup>th</sup> December, 2009 done by the Commissioner of lands and thereafter all dues over the suit land were made and title issued to the 1<sup>st</sup> defendant and produced as MG5b was a copy of a certificate of lease and in January, 2010 the 1<sup>st</sup> defendant took possession and after obtaining the necessary approvals from Eldoret Municipal Council for the construction of a perimeter wall started such construction sometime in late April, 2010. He swore further that at no time did the plaintiff deal with him and that it was one Selina Kanda who had approached him to buy the suit land. He stated that he has never been invited by KACC to make any statement touching on the suit land. Further averments in the Replying affidavit are that the applicant did not disclose to court that there are criminal investigations against her and one Selina Chepkoech Kanda over the false documents over the suit land that they hold. That the plaintiff had not made out a prima facie case, that she could be compensated by an award of damages and the balance of convenience lay with the 1<sup>st</sup> defendant who was being occasioned a heavy financial loss and further that the applicant had not furnished a security for those losses being suffered by the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondents filed a Replying Affidavit which was sworn by one Tom Chepkwesi the District Land Registrar Uasin Gishu District. He swore that the relevant register and record at the registry showed that the lease in respect of the suit land was granted in favour of Shashi Kala Bhalla for a term of 99 years running from 1<sup>st</sup> August 1910 which lease was set to expire and which did expire on 31<sup>st</sup> July 2009. He swore further that there was no indication in the register that a lease was registered in favour of the plaintiff as alleged or at all and that no such registration could be effected prior to the expiry of the lease as per law provided and only for the unexpired term. Further averments in Tom Chepkwesi's replying affidavit were that the documents annexed to the plaintiff's affidavit in support of her application and purporting to have been presented to or obtained from the District Land Registrar's Office are fabricated as they were neither issued by the District Land's Office nor received thereat. He

concluded his replying affidavit that as per his records the suit land was on the 31<sup>st</sup> December, 2009 registered in the name of the 1<sup>st</sup> defendant and he produced as TC 1(a) and (b) copies of the white card and the certificate of lease over the suit land and that he has no knowledge of the plaintiff/applicant and any averments in her affidavit relative to the District Land Registrar Uasin Gishu are falsehoods.

At the hearing of the application Ms. Odede learned counsel for the plaintiff/applicant submitted that as both the plaintiff and 1<sup>st</sup> defendant claim ownership of the suit land and each has titles thereto then there is a prima facie case to determine the valid owner of the property and the injunction sought ought to issue so as to preserve the status Quo so that at the end of time the true owner does not have problems. Counsel added that there were no criminal proceedings against either party and dismissed the affidavit by the 3<sup>rd</sup> defendant saying that they must be disbelieved as the third defendant was on trial in this case and his averments in the Replying affidavit must only be verified at and after trial since the Land Registrar could not be a judge in his own trial as the authenticity of the documents in issue was in doubt. Relying on the authority of **ASSANAND –VS- PETTITT WLR 349 Nairobi Civil Case No. 2567 of 1977** counsel submitted that the object of a temporary injunction is to keep things in status Quo and that position must be maintained in this case.

Learned counsel Mr. Tuiyott for the 1<sup>st</sup> defendant and holding brief for Mr. Muiruri counsel for the 2<sup>nd</sup> and third defendants submitted that the plaintiff who seeks equitable orders must come to court with clean hands and in utmost good faith which is what this plaintiff did not do as she did not make material disclosures when she obtained the order of injunction ex-parte on 11/05/2010. These material non disclosures were that she knew as early as January, 2010 when she wrote her letter of 8<sup>th</sup> January, 2010 and marked MC/12 that the suit land was allotted to the 1<sup>st</sup> defendant. The other material non disclosures were that as at 12/04/2005 when she purported to have obtained a lease over the suit land there already existed a lease in favour of a third party one Naunt Kumar Bhalla and the applicant similarly never disclosed that she had never been in possession of the suit land which she alleged that she owned since 1996. Counsel then placed reliance on the authorities of **TIWI BEACH HOTEL LTD. –VS- STAMM C/A MSA. CIVIL CASE No. 63 of 1990** and also **BAO INVESTMENT & OFFICE MANAGEMENT SERVICE LTD. –VS- HOUSING FINANCE LTD. NRIB. CIVIL APPEAL No. 171 of 2006** and told the court that it must refuse to examine the application on its merits and immediately dismiss it on account of those material non-disclosures.

There was further submission that should the court be minded to consider the application on its merits then it must find that no prima facie case has been made out as the plaintiff even doubts her own documents and further that the mandatory provisions of the Government Lands Act Cap. 280 of the Laws of Kenya were not complied with as the applicant did not show that she issued the mandatory notice before suing. That in any event any loss as might be suffered by the applicant was capable of being compensated by damages and further the applicant had not provided security for damages that may be suffered by the 1<sup>st</sup> defendant and she should therefore not be entitled to the injunction sought. The balance of convenience was said to lie with the 1<sup>st</sup> defendant.

In an appropriately short reply learned counsel Ms. Odede for the applicant submitted that a prima facie case had been made out and that there were no material non-disclosures and that the applicant held documents of title which can only be decided upon at a trial. Counsel added that they had given the requisite notice to the Attorney General and that they would produce it at trial as they were not obliged to produce it at this state since the present was not a Preliminary Point which if it was they would have been ready to respond to the same appropriately. As for damages she said that the applicant would abide by any orders of the court given in that regard and that in this case the balance of convenience lay with the plaintiff/applicant in that the status Quo now maintaining must be preserved.

This is now the appropriate place for the court's consideration of this application. I will first consider the issue taken as concerns material non-disclosures. This I find to be a matter of priority because should I find that such non disclosures as complained of are of such materiality that go to the root for the sustainability or otherwise of the application, or that they were so not disclosed because the motive of such non-disclosure was to conceal something that of necessity must have been placed before the court

for its determination and/or knowledge, or that by such material non-disclosure the court had been misled or even that due to it the applicant has gained some advantage unfairly over the respondents by failing to disclose the existence of those material facts, then I would be entitled to protect the dignity and honour of the court and dismiss the application without more for in those circumstances;-

***“It matters not whether the applicant was entitled .....*”**

if she misled the court she would suffer the discharge of the injunction obtained *ex parte* – see **TIWI BEACH HOTEL LTD. --VS- STAMM** and also the following similar authorities. **THE OWNERS OF THE MOTOR VESSEL LILLIAN S (1989) KLR I and R. V. KENSINGTON INCOME TAX COMMISSIONER *ex parte* PRINCES EDMOND DE POLIGNAC(1917)IKB 486.**

I find that it is true that the issue of the 1<sup>st</sup> defendant having obtained title was a fact known to the applicant as early as January, 2010 as that is quite clear from her letter of the 8/01/2010 to KACC. Was that then a material non-disclosure? I think that the argument that the very fact of annexing that letter to her affidavit was an act of disclosure was a valid argument and I accept it as such.

What about the fact of a lease pre-existing the applicant’s one of 2005, was that a material non-disclosure? Unless the applicant wanted to give the impression that she was the first allottee of the suit land during 2005 or that prior allottee(s) was/were of no consequence or that hers was the only lease worth mentioning then surely she was obliged to state one fact, whether or not there was in existence as at the year 2005 a valid lease. That she did not mention that fact is a material/non-disclosure, to my mind. The question that I must then ask is the materiality of that non-disclosure. I am advised on this position by the following passage picked from **Ralph Gibson LJ in BRINKSMAT LTD. V. ELCOMBE (1988)3 ALL ER 188 a pg 192;-**

***“Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to issues which were to be decided by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.”***

The applicant found it only necessary or is it expedient, to let the court know that she got a lease over the suit land in 2005. She perhaps did not consider it important and or necessary to let the court know that there existed a lease over the suit land valid as at the time, 2005, and that can easily be explained. Firstly her only point was that only she had a lease over the suit land and secondly if her lease is due to forgery and fraud as alleged by the 1<sup>st</sup> defendant then she must have thought that such forgery and fraud were so perfected that they were not detectable but again the issues of fraud and forgery alleged by both sides are matters for determination at trial. Did the applicant make all proper inquiries over the suit land? And was her application so presented as to mislead the court? The fact that she was not in possession of the suit land and further that that fact was not made known to the court, did those two factors work on the mind of the court so as to grant her the *ex parte* injunction granted on 11/05/2010? I was the court that heard that *ex parte* application and I can categorically state that those factors did not operate on my mind so as to grant the injunction, *ex parte*, as I did. And I am not fully convinced at this stage that those factors were not disclosed to me so as to deceive me – as was the case in the **KENSINGTON** case (*supra*) where Lord Reading said;-

***“The power (to refuse to proceed) should only be used in cases which bring conviction (emphasis provided) to the mind of the court that it has been deceived.”***

I do not find that I was treated to such deceit, if at all, as would empower me to refuse to examine this application on its merits.

What is the position of the application on its merit. The starting point in this kind of application is always the principles set out in the now famous case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973)EA 358** which are that for an applicant to entitle himself to a grant of an order for interlocutory injunction he must show that he has a *prima facie* case with a probability of success at trial,

secondly that an injunction will normally not be granted if damages would be adequate compensation for any loss incurred by the applicant and finally that where the court be in doubt then the application would be decided on the balance of convenience.

In the instant case the dispute is as to ownership of the suit land. The applicant states that she was allotted the suit land on 1<sup>st</sup> May, 1996 and during the year 2005 a lease in her favour issued over the suit land. The 1<sup>st</sup> defendant on its part states that it was allotted the suit land and a lease was issued in its favour in 2009. The District Land Registrar Uasin Gishu swore that as during 1996 and 2005 there existed a third party in whose favour a valid lease subsisted and therefore no other lease could be registered while the first one was unexpired. He produced documents from the relevant register to prove that point. He thought that any other documents as produced by the applicant to prove the contrary must be forgeries. His such contentions were not countered by way of a further affidavit and even the Replying affidavit filed in answer to the 1<sup>st</sup> defendant's application dated 17<sup>th</sup> May, 2010 and which raised the same issues of the validity of the plaintiff's documents did not quite address itself to the issue. The plaintiff scarted round the fact of a lease prior to hers and said nothing about its validity as at 1996 and 2005. It was not doubted that no lease can issue over the same land while a prior one subsists. The validity of the lease to Sashi Kala Bhala and later by transmission to Naunt Kumar Bhalla was not challenged. I am sufficiently warned that this is an interlocutory application and care must be exercised to obviate expressing concluded views on matters which are to be canvassed at trial before the said court. That notwithstanding this court must satisfy itself that the applicant has made out a prima facie case before the injunction can issue. In other words this court must satisfy itself that there is a claim which is not frivolous or vexatious, that is to say, there is a serious question to be tried see **AMERICAN CYNAMID COMPANY –VS- ETHICON LIMITED (1975) ALL 504; 2KLR 316**.

One issue that has entertained a query in this court's mind is if the applicant got allocated the suit land during 1996 and during 2005 and a lease in her favour was registered, then in what capacity was one **Selina Chepkoech Kanda** purporting to sell the suit land on 28<sup>th</sup> August, 2009 where in the relevant sale agreement produced as **MC/6A** she is described as "**Seller**"? What title did she hold and hence purport to pass over in the parcel of land known as Eldoret Municipality Block 8/12? Is the applicant herein one and the same person as **Salina Chepkoech Kanda**? That is a matter for the trial court to sort out.

The ownership of this suit land is contested. The applicant states that she holds title. And so does the 1<sup>st</sup> defendant/Respondent. Each party produced what they called the genuine title. Each party described the other parties title document and other relevant documents as fake and forged obtained by means of fraud and collusion. These are weighty matters which require evidence to prove. I am unable, at this stage of the proceedings, to determine which of the title documents shown to me are forgeries and that cannot be done without further evidence. I am therefore not in a clear position now, where I could say that the plaintiff's is the genuine title and therefore she makes out a prima facie case. Similarly I am not in a clear mind as shown by documentary evidence to say that the 1<sup>st</sup> defendant is the genuine title so that I may refuse the injunction. In a situation such as the prevailing one surrounded by allegations and counter allegations as to which title is the genuine one and minded that at this stage I must not make conclusive declarations, I find that the most appropriate orders to make are as I herebelow do:-

1. THAT the status Quo now maintaining over the suit be and shall be maintained.
2. THAT preliminaries be undertaken and concluded within one month and this suit be heard as a matter of priority to alleviate any losses either of the parties herein may incur due to passage of time. The suit to be set down for hearing within sixty (60) days of today.
3. THAT whether or not the Notice required under Cap. 280 of the Laws of Kenya is a matter to be determined in a Preliminary Objection appropriately taken if so desired and not in the instant application.
4. THAT the costs of this application shall abide the outcome of the suit.

It is so ordered.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 20<sup>TH</sup> DAY OF DECEMBER, 2010.**

**P.M. MWILU**

**JUDGE**

**In the presence of;**

Odede - Advocate for Plaintiff/Applicant

Songok - Advocate for 1<sup>st</sup> Defendant/Respondent

Andrew Omwenga - Court Clerk

Absence of Advocates for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

**P.M. MWILU**

**JUDGE**