



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 227 OF 2009

**AGENES WANJIKU KAMWETI.....PLAINTIFF**

**VERSUS**

**THAMIA INVESTMENT.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE DISTRICT LAND REGISTRAR NAIROBI....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The plaintiff presented a plaint dated 14<sup>th</sup> day of May 2009 and filed on 15<sup>th</sup> May 2009. The key averments are as follows:-

- She was lawfully allotted plot No. 465 situate at Jamhuri estate phase II in the city of Nairobi on 20<sup>th</sup> day of July 1992 vide an allotment letter reference number CV.1/3/5/7/19/1/JKM/awg.
- The offer was accepted by the plaintiff on the 31<sup>st</sup> day of July 1992 and paid Kshs. 44,000/= being the stand premium and the Annual rent.
- A lease agreement was executed between the two contracting parties being the plaintiff and the second defendant on the 31<sup>st</sup> day of March 1998 and stamp duty duly paid on it on the 1<sup>st</sup> April 1981.
- The said plot was subsequently registered as Nairobi/Block/63/738 and since then the plaintiff has dutifully been paying annual rent.
- On 22<sup>nd</sup> October 2001 the defendant colluded to defeat the plaintiffs' claim to the suit property. The particulars of collusion, fraud, illegality, unlawfulness, unreasonableness and breach of contract relied upon by the applicant are particularized in paragraph 12 of the plaint. The major one being that the plaintiff had been an allottee of the plot for over ten years before the 2<sup>nd</sup> defendant purported to illegally and unlawfully allot the same to the first defendant.
- The plaintiff filed CMCC 42111 of 2008 at Milimani Commercial court, seeking the same reliefs but the same was withdrawn upon discovery that the said court, had no jurisdiction to entertain the same.

- In consequence of what has been stated above the plaintiffs seeks:-

*(a) An order for temporary injunction barring the defendant from dealing, building, interfering, participating, alienating the said parcel of land known as Nairobi Block 63/738 while pending the hearing and determination of the suit.*

*(b) A permanent injunction to issue restraining the defendant, their agents, servants or any other person duly authorized by them to act on their behalf from selling, transferring, alienating, disposing partitioning, building, or dealing in any way with that parcel of land known as Nairobi/Block 63/738.*

*(c) An order directed to the land Registrar for rectification of the Register and certificate of lease to substitute the names of the 1<sup>st</sup> defendant with the plaintiffs name, And/OR in the alternative the 1<sup>st</sup> and 2<sup>nd</sup> defendant to compensate the plaintiff for the value of the land at the current market rate and refund the stand premium and rent, received, the quantum thereof to be determined by this court.*

*(d) A declaration that the plaintiff is the lawful owner of that parcel of land known as Nairobi/Block 63/738.*

*(e) Cost of this suit*

*(f) Any other relief that this Honourable court may deem fit and just to grant.*

On the basis of these averments and relief, the plaintiff/applicant has anchored an application by way of chamber summons. It is brought under order XXXIX rules 1, 2 and 3 of the CPR, section 3A of the CPA and all other enabling provisions of the law. It is dated and filed simultaneously with the plaint on the 15<sup>th</sup> day of May 2009. 4 prayers are sought:-

1. *Spent*

2. *That an urgent temporary injunction do issue restraining the 1<sup>st</sup> defendant/Respondent by itself, its servants, agent and or employees or otherwise who so ever from selling, disposing of, building/constructing and/or in any manner whatsoever dealing with the property known as L.R.No. Nairobi /Block 63/738 while pending the hearing and determination of this suit.*

3. *That the costs of this application be awarded to the plaintiff/applicant.*

4. *That such other and or further relief be granted as this honourable court might deem necessary in the unique circumstances of this matter.*

The grounds in support are set out in the body of the application, supporting affidavit, annexures and oral high lights. The major ones are a reiteration of the salient features of the plaint herein. But briefly these are:-

- She was allotted the suit plot as shown by annexures AWKI on 20<sup>th</sup> July 1992.

- She accepted the allotment on 31<sup>st</sup> July 1992 and made payment of all the required dues as per annexure AWKIA.

- A lease was drawn on 31<sup>st</sup> March 1998 and duly executed on 1<sup>st</sup> April 1998 annexure AWK2.

- The registration letter changed to Nairobi/Block 63/738 as shown on annexure AWK3

- When she learned that there was suspected encroachment on the same, she instructed her lawyers to place a caution on the same annexure AWK4.
- Upon inquiry, the plaintiff discovered that construction was being carried out on the said land by the first defendant, which first defendant had obtained title to the suit land from the lands office.
- The plaintiff through her advocate required the 1<sup>st</sup> defendant to stop the construction but declined to do so forcing the applicant to file Milimani CMCC No. 4214 of 2008 annexures AWK 5 but which was withdrawn because the lower court, had no jurisdiction to try the matter, hence the filing of the matter in the high court.
- A demand notice was complied with as shown by annexure AWK6.
- That the applicant has by demonstration brought herself within the ambit of the ingredients required to be satisfied for the grant of the reliefs being sought and she should be granted the same.

It is on record that the applicant appeared before the duty judge in the ELC on 18/5/09. The learned judge Osiemo J declined any interim relief and ordered the matter to be served. It is on record that the defendants were served as per R/S on record. Only the second respondent filed a notice of appointment of advocate and a replying affidavit. The replying affidavit sworn by one P.M. Kibinda on 3<sup>rd</sup> June and filed the same date. The grounds in the said replying affidavit as well as oral high lights are as follows:-

- Concede that on the 20<sup>th</sup> day of July 1992 the 2<sup>nd</sup> defendant did issue an allotment letter over the suit property to the plaintiff/applicant and the same was accepted vide a letter of acceptance dated 31<sup>st</sup> July 1992 and payment made on the same date of acceptance.
- They admit the content of paragraph 4, 5, 6 and 7 of the applicants supporting affidavit as being true.
- Concede that according to the records held by them regarding allocation of plots for Jamhuri Phase II plots, the plaintiff/applicant is the owner of all that property known as plot No. 465 (known as LR NO. Nairobi/Block 163/733 located at Jamhuri estate phase II as shown by annexure PMKI.
- By reason of what is stated above the 2<sup>nd</sup> defendant has instructed the concerned officer to recall and cancel any building plans that may have been in advertently approved.
- By reason of what has been stated above, the second defendant is of the view that its inclusion in these proceedings was unnecessary and it is only meant to embarrass the 2<sup>nd</sup> Respondent. There has been no response from the 1<sup>st</sup> and 3<sup>rd</sup> defendant.

On case law the court was referred to the case of **ALI AND 3 OTHERS VERSUS CITY COUNCIL OF NAIROBI 2003 KLR 596**, where it was held inter alia that, the city council of Nairobi is a local authority and just like the government no injunction can lie against it and its officers. A proper remedy in such course would be with an application for judicial review.

The case of **SIMON TOWETT MARITIM VERSUS JOTHERM MUIRUN KIBARU NAKURU CA NO. 292 OF 2005** decided by the CA on the 10<sup>th</sup> day of November 2006. In this case the CA, upheld the decision of the superior court, and disallowed the appeal because:-

*“The registration of the appellant as the proprietor of the suit land was tainted with fraud. There was no way the applicant could have been registered proprietor of the suit land when all the*

*necessary documents effecting the registration were all forgeries. No wonder the applicants counsel conceded that it would be difficult to sustain the registration of the appellant as the proprietor of the suit land”*

The case of **CHAUHAN VERSUS OMAGWA (1985) KLR 656**, also a court of appeal decision. It was held inter alia that *“the brief facts are that the registered proprietor of the suit land entered into agreement for its sale to two separate persons, first to the respondent who immediately went into possession and then about a year later to the applicant who was registered as the absolute proprietor and issued with a land certificate in a suit filed by the respondent against the vendor and the appellant, the trial judge granted the respondent a declaration that the sale to the appellant was null and void and made a declaration under section 143 of the Registered land Act (cap 300) for the rectification of the land register to show the respondent as the absolute proprietor. The appellant appealed arguing that the learned judge had erred in ordering the rectification of the register by holding that he was not a bona fide purchaser for valuable consideration and without knowledge of the previous sale and in not considering that the plaint did not disclose a cause against him.*

On appeal it was held inter alia that:-

1. *Two pre-requisites to the immunity of a party from the rectification of a land registered under section 143 of the Registered land Act (cap 300) are that the registration of that party was a first registration and that the party is in possession of the land having acquired it for valuable consideration and without knowledge of any omission, fraud or mistake. In this case, the transfer in favour of the appellant had not been a first registration and the appellant had not been in possession of the land.*

2. *Once the court, was satisfied that the registration in favour of the appellant was made by fraud by the vendor, it was authorized by section 143 to order rectification of the register even if the plaint did not disclose a cause of action against the appellant. It was the registration made by the fraud of the vendor which permitted an order for rectification to be made by the court.”*

The case of **LYDIA WANJIKU NDUBA VERSUS MARY WANJIRU KAMAU, NEW ROYSAMBU HOUSING LIMITED KIBE KINYITA, NAIROBI HCCC NO. 214 OF 2004** decided by Ojwang J on the 15<sup>th</sup> day of April 2005. The brief facts are that *“a suit had been filed namely HCCC NO. 750 of 2001 whose subject was plot No. Nairobi/Block 116/233 but later changed to be in respect of transfer of plot No. Nairobi/Block 116/53. The proceedings ended with the recording of a consent on 21/5/01.”* The finding of the learned judge are that:-

- *The consent entered into without consulting her as the owner of the plot.*
- *The order had been signed by the Deputy Registrar*
- *On the basis of that order, the plot was transferred, to the 1<sup>st</sup> defendant*
- *The transfer was also signed by the Deputy Registrar.*
- *While the questionable transaction were going on, the plaintiff was ill and un available, a matter well known to the officials of the 2<sup>nd</sup> defendant who participated in the transfer.”*

Upon assessment of the facts on the record, the learned judge arrived at the conclusion that *“the evidence was clear and un ambiguous, and gave a specific message which could not be reconsidered with any hypothesis but that of a major fraud committed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants for the purpose of confiscating the plaintiffs’ property.”* On the basis of that reasoning the learned judge made orders for:-

(a) Declaration that the suit plot namely L.R. No. Nairobi Block 116/53 is in law the property of the plaintiff herein Lydia Wanjiku Nduba.

(b) The Land Registrar Nairobi shall forth with, any in any event within 15 days of the date hereof, cancel and revoke the registration in the name of the 1<sup>st</sup> defendant, of the title to the suit plot L.R. NO. Nairobi/Block 116/53.

(c) The 1<sup>st</sup> and 2<sup>nd</sup> defendant shall jointly bear the costs of the suit.

The case of **OMAR SAID MWATAYARI VERSUS BHARAT KUMAR NATHALAL SHAH AND OTHERS MOMBASA HCCC NO. 276 AND 277 OF 2004** decided by Mwera J on the 16<sup>th</sup> day of September 2005. The brief facts are that the plaintiff sought to have the cancellation of title number Kwale/Gulu/Kinondo 733 and 734 which the defendants had allegedly subdivided from title number Kwale/Galu/Kinondo 55 which had been in the name of the plaintiff, and had them shared out in their names. The plaintiff moved to challenge the two transfers alleging that the original title had been subdivided by strangers who had the resultant titles transferred into their names. The defendants' were served through substituted service but no appearance and defences were filed. There was no explanation from the land registrar how the transfers had been effected .

Upon due consideration of the facts, the court, arrived at the conclusion that:-

*“ The court, was satisfied that the plaintiff had proved her case that Plot No. 55 was adjudicated and her rights noted over it..... the plaintiff did not authorize the collection of the title, application for subdivision, and transfer. In the absence of any explanation from the defence, the transfers to the defendant was in valid and the Registrar was ordered to rectify the register so that the original plot No 55 is reflected as the property of the plaintiff.”*

On the courts', assessment of the facts herein, there is no doubt that the interim relief that is being sought by the plaintiff is nothing but an injunctive relief. This being the case, it is imperative to the applicant to bring herself into the ambit of the ingredients required to be demonstrated before one can be availed the said relief. It is now settled and or crystallize law that the yard stick applicable by the courts' of this jurisdiction is that which has been provided by the CA in the now famous decision in the case of **GIELLA VERSUS CASSMAN BROWN (1973) EA 358**. These principles are;

(i) *The Applicant has to prove that he has a prima facie case with a probability of success.*

(ii) If an injunction is not granted, the applicant will suffer irreparable loss which cannot be compensated for by way of damages.

(iii) Where (i) and (ii) are not applicable the court will decide the matter on a balance of convenience to both parties.

These ingredients have to be applied to the salient features of the plaint, averments in the plaint, and the grounds in support of the interim application. All that the applicant is saying is that, she was allotted the suit properly and she accepted the allotment, paid the requisite fee, executed the lease agreement, the transfer effected as per the documents displayed by the applicant. The applicant has been supported in that assertion by the 2<sup>nd</sup> defendant who has confirmed on oath that according to the records held by them, the applicant is the allottee and registered owner of the suit land. It is not known how the 1<sup>st</sup> defendant came to be the registered owner of the suit land. This far the applicant has an arguable case with a probability of success. This is so because, once the applicants' claims is backed up by the allotting authority and once the disposition by the plaintiff herself has been ousted, then the 1<sup>st</sup> defendants anchor is eroded. This ingredients has therefore been established.

As for the second, indeed the value of the land can be computed and paid for in monetary terms. However this has to be looked at in the light of the qualification to that ingredient, which qualification has also been developed by case law. These are that, a party cannot be allowed by a court, of law to trample on another peoples' rights with impunity at the pain of ability to pay damages. In such circumstances an injunctive relief is inevitable.

Applying this to the facts herein, indeed the 1<sup>st</sup> defendant can compensate the plaintiff by way of damages. However in a situation where the mode of acquisition of the said property is suspicious and cannot be defended, allowing payment of damages, will be tantamount to condoning an illegality a task a court, of law cannot be party to. This ingredient therefore cannot be employed to shield wrong doing. This is a proper case where an injunctive relief should issue as opposed to an order for damages.

As for the 3<sup>rd</sup> ingredient on the facts before court, the balance of convenience of convenience tilts in favour of the plaintiff/applicant by reason of the fact that the documentation favour the plaintiff/applicant as the title holder (owner).

Before winding up, it is important to mention about the issue raised by the 2<sup>nd</sup> defendant that on the basis of the decision by Ang'awa J in the case of **ALI AND 3 OTHERS VERSUS CITY COUNCIL OF NAIROBI (SUPRA)** This courts' opinion is that a ruling on this cannot be part of this ruling. It is an attack on the act of the plaintiff filing suit against them. It is a matter to be tackled in an appropriate application by the 2<sup>nd</sup> defendant to the effect that either they have been sued wrongly or that on the basis of applicable law, the plaintiff has no cause of action against them.

For the reasons given in the assessment prayer 2 of the plaintiff/applicant application dated 15<sup>th</sup> day of May 2009 and filed on the same date is granted as prayed.

(2) Costs in the cause.

**DATED, READ AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE 2009**

**R.N. NAMBUYE**

**JUDGE**