



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Case 43 of 2009**

**FRANCIS GITONGA -----  
PLAINTIFF/APPLICANT**

**VERSUS**

**KAKAMEGA MUNICIPAL COUNCIL----- DEFENDANT/RESPONDENT**

**R U L I N G**

The Plaintiff is the registered proprietor of a leasehold property known as KAKAMEGA TOWN/BLOCK I/241. This property is a lease granted by the respondent herein. The Plaintiff bought the property from the previous tenant, one SUNIL SANDIP PATEL. The Plaintiff filed his application dated 31<sup>st</sup> March 2009 seeking a mandatory injunction against the defendant for immediate removal from the suit property all fencing and construction material or otherwise plus removal of a pit latrine erected on the plot. The plaintiff is also seeking an injunction restraining the defendants from erecting any structures or fences, working on or interfering with the suit property in any manner whatsoever pending the hearing and determination of this suit.

Mr. Samba, Counsel for the applicant, submitted that the defendant unlawfully invaded the suit property on 27/3/2009 and erected a pit latrine thereon without the consent of the Plaintiff. He relied on the applicant's supporting affidavit sworn on 31<sup>st</sup> March, 2009 and a supplementary affidavit of 7<sup>th</sup> May 2009.

The Applicant's counsel urged the court to uphold the sanctity of a title deed and that the respondent's contention that they were under pressure from the Public Health Department to build pit latrines for fish mongers in Kakamega is not a valid reason for the invasion of the applicant's property. The lease on the property was issued on 1/11/1991 and that the respondent cannot challenge the validity of that lease 18 years later. Counsel relied on the case of *SHELL & BP (MALINDI) KENYA LTD. VS KINGS MOTORS LTD. HCCC NO. 265 OF 2004 (NAKURU)*. The Applicant's counsel argued that the plaintiff's suit is quite clear by virtue of his title and that this is a case where mandatory injunction can be granted.

Mr. Kraido, Counsel for the Respondent opposed the application. He relied on the replying affidavit of PAUL MANDILA INJENDI sworn on 22<sup>nd</sup> April, 2009. Counsel submitted that the defendant is the owner of the suit property and the plaintiff is a lessee. The lease is governed by the Registered Land Act and is subject to certain special conditions. He submitted that Section 38 (1) and 4 of the Registered Land Act was breached as the applicant obtained registration without the defendant's consent. Further, the Plaintiff ought to have submitted plans for approval by the defendant within six (6) months after registration. This ought to have been done by 5<sup>th</sup> March, 2009 as the Plaintiff was registered on 5<sup>th</sup>

September, 2008.

Counsel for the defendant further submitted that the defendant has been in occupation and use of the property which is a fish market. The defendant exhibited a statutory notice by the Public Health Office requiring compliance with certain health conditions. This matter ended up in court and in the process of complying the defendant had to erect the pit latrines. Further, the respondent argued that the ground survey on the plot had not been done.

From the pleadings herein, the plaintiff acquired his ownership on 5<sup>th</sup> September, 2008 having bought the property from the previous tenant for an undisclosed consideration. The applicant paid rates for the year 2009 on 9<sup>th</sup> March, 2009 but the receipt still bears the name of the previous tenant, SUNIL S. B. PATEL. On the Restriction part of the title it is indicated that section 48 of the Registered Land Act had to be complied with, that is to say, no disposition by the proprietor was to be registered without the written consent of the lessor. Section 48 allows the registrar to dispense with the consent if certain circumstances prevail. The respondent is contending that it did not give its consent for the transfer. Since the Registrar went ahead and registered the transfer it can be taken that the registrar had good reasons for doing so and that he exercised his powers under the exceptions provided in section 48 of the Registered Land Act.

Section 53 of the Registered Land Act provides as follows:-

*“S. 53 Save as otherwise expressly provided in the lease and subject to any written law governing agricultural tenancies, there shall be implied in every lease agreements by the lessor with the lessee binding the lessor.*

*(a) that, so long as the lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease and on his part to be observed and performed, the lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the lessor or any person rightfully claiming through him.*

I have read the defendant's defence which states in paragraph 4 that the land on which its servants erected a pit latrine is owned by the defendant and is designated as an open market since 1970. The defendant seems to be disputing that the plot claimed by the applicant is the one where the pit latrine was erected. The defendant further states that it has been in occupation of the property claimed by the applicant.

It is not in dispute that Plot No. KAKAMEGA/TOWN BLOCK/241 is a valid title having been opened on 1/11/1991. The property has changed hands two times. Initially, the lease was granted to KENNEDY KHALISIA SHIKOMERA who transferred his interest to SUNIL SANDIP B. PATEL on 18.3.1998. On 5.9.2008 Sunil Sandip B. Patel transferred his interest to the Plaintiff herein. The respondents have been receiving land rates for the above property. That being the case, the respondent cannot therefore claim to be in occupation of the same property which it had leased out. One cannot lease out a property and at the same time retain it for own use.

The Registered Land Act, (Cap 300) defines a lease as *“The grant, with or without consideration, by the proprietor of the land of the right to the exclusive possession of his land, and includes the right so granted and the instrument granting it, and also includes a sub-lease, but does not include an agreement for a lease.”*

The applicant herein is the holder of a lease granted by the Respondent. The applicant is entitled to exclusive possession of the leased property and the respondent has no right to interfere with the applicant's enjoyment of the lease. I do find that this is a clear case where a Mandatory Injunction can be granted. The defendant ought to have known the implication of creating a lease on its property and has no right to encroach on the same property.

In the end, I do grant the Plaintiff's application as follows:-

a) A temporary Injunction is hereby issued against the defendant, its servants or agents restraining them

jointly and severally from erecting any structures or fences or working on or interfering with Plot NO. KAKAMEGA TOWN/BLOCK I/241 in any manner whatsoever pending the hearing and determination of this suit.

b) A temporary mandatory injunction is hereby issued compelling the defendant, its agents or servants to remove all fencing and construction material and the pit latrine erected on Plot KAKAMEGA TOWN/BLOCK I/241 within Fourteen days hereof and in default the Plaintiff is hereby allowed to remove all the construction and fencing materials together with the Pit Latrine from the property at the defendant's costs.

Delivered, Dated and signed at Kakamega, this 23<sup>rd</sup> day of July, 2009

**SAID J. CHITEMBWE**

**J U D G E**