



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

Civil Case 90 of 2007

BELDINA MOKAYA PLAINTIFF

VERSUS

1. ROBERT OMBASO NYARERU)

2. GUSII COUNTY COUNCIL) DEFENDANTS

RULING

The plaintiff filed an application by way of a chamber summons brought under **order XXXIX rules 1 & 2** of the **Civil Procedure Rules**. She sought an interim order of injunction to restrain the defendants, their agents and/or servants from trespassing upon her parcel of land known as **L.R. NO.KISII TOWN/BLOCK III/491** (hereinafter referred to as “*the suit premises*”) pending the hearing and determination of this suit.

In her affidavit in support of the application, the plaintiff deposed that she was the registered proprietor of the leasehold interest comprised in the suit land since 21st October, 2003. In July, 2007, the plaintiff realized that the first defendant had put up structures thereon allegedly on the second defendant’s permission. When the plaintiff approached the clerk of the second defendant with a view to discussing the issue, the council clerk declined to address the same. The plaintiff added that some building materials that she had deposited in the suit premises like ballast and sand were on the verge of being wasted by the first defendant who was cultivating a substantial portion of the same.

The second defendant through its clerk filed a replying affidavit and stated that it was the registered lessor of the suit land and the first defendant was using the same with its permission. The second defendant also averred that the plaintiff had improperly acquired a 99 years lease over the suit premises.

Mr. Oguttu for the plaintiff urged this court to note that even though the second defendant was alleging that the plaintiff had acquired the leasehold interest rightfully, it had not made any counterclaim against the plaintiff. He cited the Court of Appeal decision in **M’MUKANYA VS M’MBIJIWE** [1984] KLR 761. In that case, the appellant was in occupation of a parcel of land that had purportedly been allocated to him by a local authority. However, the land had, prior to that allocation, been leased to the respondent. The Court of Appeal held that even though the local authority was the legal owner of the land, it had no power to allocate the same to the appellant, the land having been leased to the respondent.

Mr. Bigogo for the defendants submitted that the second defendant as the lessor of the suit premises, it had not leased the same to the plaintiff. However, he could not explain how she acquired the certificate of lease. Counsel added that the plaintiff had not demonstrated that she paid any money to the lessor and in particular the rent of Kshs.2000/= shown on the certificate of lease. He further stated that the rules and procedures for granting a 99 years lease had not been followed but he did not stipulate what those rules and procedures were and how they had been flouted, if at all.

There is no dispute that the plaintiff is the registered proprietor of the leasehold interest comprised in the suit premises. The certificate of lease was issued to her on 21st October, 2003. There is also no dispute that the second defendant is the lessor of the suit premises. The clerk to the second defendant contended that there was no privity of lease between the council and the plaintiff and asserted that the certificate of lease was a result of works of forgery. That is a very strong averment, which required sufficient explanation and details. Unfortunately, the allegation was not substantiated and therefore it cannot affect the plaintiff's interest over the suit premises at this interlocutory stage. While this court appreciates that occasionally title deeds and certificates of leases may be issued fraudulently, where in an interlocutory application a party in a land dispute intends to challenge a document of title to any interest in land, he has to adduce sufficient evidence as would enable a court to see that **prima facie**, the document of title may have been obtained irregularly and in contravention of the law.

In this case, there is no evidence that the plaintiff did not acquire the certificate of lease lawfully.

Perhaps such evidence will be adduced during the hearing of the main case but at this interlocutory stage, the second defendant has not demonstrated that the plaintiff's certificate of lease was fraudulently acquired. The second defendant has also not filed any counterclaim against the plaintiff with a view to challenging the certificate of lease. The first defendant has not shown that he has any interest over the suit premises. In the circumstances, the plaintiff's rights over the suit premises as provided under **sections 27 and 28** of the **Registered Land Act** must be protected. The plaintiff has established a prima facie case with a probability of success and I am satisfied she will suffer irreparable loss unless the orders sought are granted, See **GIELLA VS CASSMAN BROWN & CO. LTD** [1973] E.A 358. I grant the interim orders of injunction as sought. The plaintiff will have the costs of the application.

DATED, SIGNED and DELIVERED at **KISII** this 11th Day of July, 2008.

D. MUSINGA.

JUDGE

Delivered in open court in the presence of:

Mr. Ochwangi for the plaintiff

Mr. Bigogo for the Defendant.

D. MUSINGA

JUDGE