



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

Civil Suit 224 of 2006

REGINA WANJIKU MUREITHI.....PLAINTIFF

VERSUS

THOMAS RUHIU CHIRA.....1ST DEFENDANT

MUNICIPAL COUNCIL OF NAKURU.....2ND DEFENDANT

RULING

The plaintiff, Regina Wanjiku Mureithi filed suit against the defendants seeking to be declared to be the *bona fide* and the lawful owner of all that parcel of land known as *Nakuru Municipality Block 1/1322*. She has also prayed for an order of the court to cancel the certificate of lease which was issued to the 1st defendant. Contemporaneous with filing the suit, the plaintiff filed an application for injunction under the provisions of Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules seeking to restrain the 1st defendant either by himself, his recognised agents, servants or employees from entering, trespassing, remaining in or in any other way howsoever from interfering with the plaintiff's possession of the parcel of land known as *Nakuru Municipality Block 1/1322* (*hereinafter referred to as the suit land*). The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Regina Wanjiku Mureithi.

The application is opposed. The 1st defendant, Thomas Ruhui Chira, swore a replying affidavit in opposition to the application. The summary of this replying affidavit is that he avers that he is the registered owner of the suit land having purchased the same from the previous allottee, one James Kamau Kinyanjui, who had been allocated the same by the Municipal Council of Nakuru after the suit land had been repossessed by the said Municipal Council of Nakuru and the National Housing Corporation from the plaintiff after the plaintiff had failed to pay the loan that was advanced to her for the purchase of the said plot. The 1st defendant averred that after purchasing the suit land, he has developed the same and was at the point of completing construction of a residential house on the said parcel of land, when he was served with the orders of this court. He urged this court to dismiss the application with costs.

At the hearing of the application, Miss Njogu, learned counsel for the plaintiff reiterated the contents of the application filed by the plaintiff. She submitted that the plaintiff was allocated the suit land by the Municipal Council of Nakuru. She submitted that the plaintiff paid all that she was required to pay to the said council in respect of the said plot. She was therefore shocked and surprised when she learnt that the said suit land had been fraudulently repossessed and registered in the name of the 1st defendant. In her

view, the plaintiff argued that the registration of the 1st defendant as the owner of the suit land was fraudulent and irregular. She submitted that the purported repossession of the suit land by the 2nd defendant was not in accordance with the law and therefore the 2nd defendant could not purport to give any good title in respect of the suit land to the 1st defendant. She argued that the plaintiff had established a prima facie case and would further suffer irreparable loss which cannot be compensated by an award of damages because the subject matter of the dispute is land. The plaintiff reiterated that she was still the bona fide owner of the suit land. She urged this court to allow the application for injunction with costs.

Mr. Ngure, learned counsel for the 1st defendant opposed the application. He submitted that the plaintiff had not established a prima facie case that would make this court grant her the order of injunction sought. He submitted that the 1st defendant was a purchaser for value of the suit land from a person who was allocated the same by the Municipal Council of Nakuru after the suit land had been repossessed from the plaintiff. He submitted that the fact that the person who was allocated the suit land by the council was not joined in this suit means that the plaintiff did not have a cause of action against the 1st defendant. He submitted that the 1st defendant was legally registered as the owner of the suit land and had paid all the taxes required to have the said parcel of land legally belong to him. He submitted that the 1st defendant had already constructed a house on the said parcel of land and was about to occupy the same. In the circumstances of this case, the 1st defendant argued that he is the one who would suffer irreparable loss if the injunction is granted. The 1st defendant further submitted that he had borrowed money to construct a house on the said parcel of land. In his view, the plaintiff's application had been overtaken by events. Mr. Ngure argued that the plaintiff should pursue the issue of repossession of the property with the National Housing Corporation and not the 1st defendant. He urged this court to dismiss the application with costs.

In reply, Miss Njogu argued that although the person who was allocated the parcel of land after the same was repossessed was not joined as a party to this suit, that was no bar to this court granting the orders sought by the plaintiff. The said person would be joined as a party to the suit at a later date. She submitted that the application had not been overtaken by events because the plaintiff came to court immediately she learnt of the developments on the ground. She urged this court to find that the plaintiff has established that there was fraud in the transfer of the suit land to the 1st defendant.

I have carefully considered the pleadings filed by the parties in this suit in support of their respective positions in this application. I have also considered the submissions made before me by the learned counsels for the opposing parties to this application. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant her the order of injunction sought. The principles to be considered by this court when deciding whether or not to grant the application of injunction are well settled. In Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society [2001]1E.A. 86 at page 89

“the sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella -vs- Cassman Brown and Co. Ltd 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the 1st one is satisfied and when the court is in doubt then the third condition can be addressed.”

In the present application, it is the plaintiff's case that she is the bona fide owner of the suit land. It is her case that the said parcel of land was allocated to her by the Municipal Council of Nakuru. She paid the requisite charges and was given possession of the suit land. She was shocked and surprised when she visited the suit land and found that it had been allocated to someone else. The person, i.e. the 1st defendant, had even constructed a house on the suit land. It is the plaintiff's case that the purported repossession of the suit land was unlawful. The plaintiff did not however point out any section of the law that was breached when the Municipal Council of Nakuru in conjunction with the National Housing

Corporation repossessed the suit land. The fact that the plaintiff had not been issued with a certificate of lease in respect of the suit land is prima facie proof that the plaintiff had not paid all that was due to the National Housing Corporation and the Municipal Council in respect of the suit land. This court is not prepared to make a definitive finding that the repossession procedure adopted in respect of the suit land was up to scratch. Maybe the plaintiff has a case considering the fact that the suit land, a parcel of land worth more than Kshs 500,000/= could be repossessed and sold for a debt of Kshs 33,000/=.

On the other hand the 1st defendant has argued that he is the registered owner and therefore the lawful owner of the suit land having purchased the same from one James Kinyanjui who was allocated the same by the Municipal Council of Nakuru after the said parcel of land had been repossessed from the plaintiff. It is the 1st defendant's case that he has paid all the taxes due in respect of the suit land and has thus had the said parcel of land legitimately and legally transferred to him. He has even borrowed money to construct a house on the said parcel of land. The construction of the said house is about to be completed. He has annexed photographs of the said house in his replying affidavit. He has urged this court to find that the plaintiff has not established a prima facie case that would entitle this court grant her the order of injunction sought.

I have carefully evaluated the facts of this case. There is no dispute that the 1st defendant is the registered owner of the suit land. He was registered as the owner of the same after he had purchased the same from one James Kinyanjui. The said James Kinyanjui was allocated the suit land after the same had been repossessed from the plaintiff. Although questions have been raised by the plaintiff on the manner in which the said repossession was effected, this court is of the opinion that the plaintiff has failed to establish a prima facie case. The 1st defendant, as the registered owner, is already in possession of the suit land. He has even commenced construction of a house on the said suit land. Even if the plaintiff manages to convince the court that the said repossession was fraudulent, the fact that the 1st defendant is a first registered owner of the suit land, means that the only remedy that could be available to the plaintiff is in form of damages. The value of the suit land is quantifiable. The plaintiff was not in possession of the suit land at the time it was repossessed. She would not therefore suffer irreparable damage which would unlikely be compensated by an award of damages. I do further hold that the balance of convenience in this case tilts in favour of the 1st defendant who is already occupying the suit land and has commenced expensive development on the same.

The upshot of the above reasons is that the plaintiff's application for injunction cannot be granted. She came to court when it was already too late. She has not established a case to enable this court exercise discretion in her favour. Her application for injunction consequently lacks merit and is dismissed with costs.

DATED at NAKURU this 23rd day of January, 2007.

L. KIMARU

JUDGE