



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 45 of 2007**

**NEBANGE LIMITED .....PLAINTIFF**

**VERSUS**

**BIRRE HUSSEIN MIRE .....DEFENDANT**

**RULING**

In an application dated 17<sup>th</sup> April 2007 and filed herein on 18<sup>th</sup> April 2007 the plaintiff sought an order of injunction to restrain the defendant his agents, servants or any other person claiming by interest through the defendant from entering, remaining on constructing or in other manner whatsoever interfering with the suit land *L.R. No. 36/1/766* pending hearing and determination of this application and the main suit. There was also a prayer for the costs of this application.

The application is based on grounds set out on the body thereof and the averments in the supporting affidavit. The grounds on the body of the application are that the plaintiff is the registered proprietor of the suit land known as *L.R. No. 36/1/766*, that the defendant has trespassed into the suit land, demolished the plaintiff's structures and is illegally erecting other structures; that the defendant has been unable to provide any document to prove any interest in the suit land and that the defendants agents are threatening the plaintiff's agents with violence should they enter the suit land.

In the supporting affidavit, the plaintiff avers that when it purchased the suit land it had a house thereon.

That the plaintiff subsequently rented the suit land to tenants until 1999 when they were asked to vacate it for the purpose of repainting and/or renovation because Nairobi City Council had issued notice of abatement of nuisance.

That the plaintiff commissioned an Architecture to draw plans for a new building but had never started construction to the date of filing suit but that it has been paying rates to Nairobi City Council.

That it was on 20<sup>th</sup> March 2007 when a neighbour to the suit land called the deponent to the supporting affidavit and informed him that some unknown people had entered into the suit land and started demolishing the house thereon.

That the deponent rushed to the suit land and confirmed that indeed some workers under the direction of the defendant, whose name he did not know were busy dismantling the house.

That the deponent reported the matter to the area Chief and his Assistant who went with him to the scene but that the defendant was not found there.

That the workers revealed the mobile number of the defendant which the Chief called and summoned the defendant to his office but in the meantime they stopped the workers from carrying out any activity on the land.

That later the defendant went to the Chief's office and when the Chief sought an explanation about the basis of the defendant entering the suit plot, the latter stated that he had purchased the land and had ownership documents; but in spite of the Chief asking him to avail the documents immediately, the defendant requested until 22<sup>nd</sup> March 2007 to do so.

That up to the time of filing this suit in Court, the defendant had not availed the documents as required by the Chief but that he was going on with the erection of the structures on the suit land.

That the plaintiff stands to suffer irreparable loss unless the defendant is stopped from the illegal activities as the plaintiff cannot now proceed to build the intended flats whose income may be difficult to quantify as it is determined by market factors.

That the defendant has issued a gang that has on two days threatened to beat the deponent up should he enter the suit land.

On this affidavit the deponent annexed annexures *RWG 1(a) and (b) to RWG 3(a) to (g)*.

When the plaintiff filed this application in Court on 18<sup>th</sup> April 2007 and sought a Certificate of Urgency which it got on 19<sup>th</sup> April 2007, it was ordered to produce through a further affidavit a current search of the title to the suit premises by the Duty Judge within seven (7) days dully certified by the Registrar or other authorized officer, such affidavit to be served together with the application.

This necessitated the deponent to swear another supporting affidavit which it filed into this court on 27<sup>th</sup> April 2007, but instead of annexing there to the search certificate for *L.R. No. 36/1/766*, he annexed thereto what he called a note from the Registrar of Titles showing contents of the Grey Register.

The defendant herein filed Notice of Objection and a replying affidavit on 2<sup>nd</sup> May 2007. In the replying affidavit, *Birre Hussein Mire* who deponed to it deponed that he was the defendant and the registered proprietor of the suit land *L.R. No. 36/1/766* having been issued with and holding the title documents duly registered under the Registration of Titles Act Chapter 281 Laws of Kenya

the said defendant took possession of the suit property from the vendor on 23<sup>rd</sup> December 2003 and that upon loss of the original title the defendant made an application to the Registrar of Titles to issue a replacement of the same which was done.

That the plaintiff had misrepresented facts and had no right whatsoever over the suit property.

He deponed further that he was in occupation of the property (suit premises) placed building materials on site and therefore in the process of constructing and had borrowed finances to construct and will suffer heavy losses in terms of penalty and interest for idle plant and equipment on site.

That the plaintiff had not explained why it did not take possession of the suit premises.

That since the defendant was in occupation of and constructing on the suit premises it was only equitable that the status quo be maintained.

That the defendant had invested substantial sums of money and entered into commitments in respect of the suit property and stands to suffer substantial irreparable damage if the orders of injunction are not discharged/or vacated immediately as the injunction restrain him from accessing his property.

That the injunction orders made on 19<sup>th</sup> April 2007 is unjust, and inequitable especially taking into

account subsequent conduct of the plaintiff.

That the plaintiff had not complied with the terms of the order issued on 19<sup>th</sup> April 2007 by failing to avail a current official Search Certificate to the Court.

The deponent averred that the plaintiff were illegal invaders and/or trespassers to the suit property and had no any colour of right to occupy a private property without the defendant's consent and he therefore prayed that this Court do dismiss the suit in its entirety.

To this affidavit the defendant attached various documents marked as *BHM/1* to 3 – which I shall discuss about later in this ruling.

The preliminary objection counsel for the defendant filed together with the replying affidavit were that the procedure adopted by the plaintiff was totally wrong; that the plaintiff had totally failed to lay the basis of his claim, that the suit was bad in law and incompetent and that the same ought to be struck out; that the verifying affidavit was incurably defective and incompetent and that consequently the same ought to be struck out; that the supporting affidavit of *Raymond Waithanji Gethi*; was inadmissible in law and that the same should be expunged from the record; and that the application was incompetent and bad in law and that the same ought to be struck out.

After the replying affidavit was served upon the plaintiff, *Raymond Waithanji Gethi* swore and filed a supplementary affidavit on 16<sup>th</sup> May 2007 in which he deponed that he was aware that the suit land is situated in Eastleigh Estate where the series of Land Reference numbers starting with the Block 36 are fee simple (freehold) titles registered under the *G.L.A.* (Cap. 280) yet the purported grant *Number 90556* (Annexure *BHMI* is leasehold under the Registration of Titles Act (Cap. 281);

That as demonstrated in annexure *RWG1 (a)* and *(b)* the suit lands registration was in existence for much earlier than 2002 when the defendant's suspect title is alleged to have been issued as well as 1997 when the defendant's term of lease purportedly commenced, that it was not true that the defendant took physical possession of the suit land in 2003 as the plaintiff's old and condemned structures stood until this year when the defendant demolished them.

That the defendant's title documents are of questionable origin as can be attested by the lack of original title document which he claims got lost but he does not explain the circumstances or the date. That the alleged loss of the original title gives room for the defendant to table a mere provisional title which the authenticity of the real document cannot be confirmed.

That the plaintiff had tenants on the suit land until it was condemned in 1999.

That the defendant was hiding to evade Court process hence the plaintiff cannot be blamed for the late service which issue has in any case been overtaken by the order of 3<sup>rd</sup> May 2007.

That the defendant has failed to produce any receipt to support his alleged title which appears to spring out of the air.

That it is now a matter of notoriety that fake titles are being made in the streets then planted at the Lands Office while files for genuine owners go missing.

That the defendant appears to be a victim of conmen who took advantage of the fact that the plaintiff's suit land appears neglected and though that it did not have an owner hence forged title documents which were given to the defendant.

That the deponent challenged the defendant to avail in person or through affidavit (the deponent to be cross-examined) that the persons who sold the land to him, i.e. the Directors of *PHELSEYS ENTERPRISES LIMITED*, the sale agreement as well as the transfers they signed and also the evidence of the payment of the purchase price, and that he had reported this matter to the Police for investigations of

the existence of the defendant's documents and will further seek this Court's order to commission the Chief Land Registrar to report back on the authenticity of the two sets of the ownership documents.

This supplementary affidavit was served upon the defendant who filed a further replying affidavit on 19<sup>th</sup> July 2007. In it, he annexed an agreement of sale of the suit property dated 2<sup>nd</sup> April 2003 marked as *BHM1* to confirm the purchase of the same from *Phelseys Enterprises Limited*.

That while he has been in possession of the suit land investing substantially therein and entering into commitments in respect to the constructions going on there, the plaintiff has not explained where it has been all this time.

That he had vacated (I think he means evicted) illegal occupants from the suit premises and taken possession of the same immediately upon acquiring rights therein that on advise from his advocate which he believes to be true, there is no logical premise upon which the plaintiff can question the sanctity the defendant's title when it is holding a useless title as it has been unable to produce an official search to confirm its ownership.

That the interim order to maintain the status quo is causing considerable loss to the defendant.

On this further replying affidavit the defendant annexed building plans which have been submitted to Nairobi City Council; that the defendant has also annexed to this further replying affidavit a Gazette Notice to confirm how he petitioned the Registrar of Titles to issue him with a provisional copy of title on loss of his original title.

That the defendant also annexed on the further replying affidavit photographs showing the developments he has made on the suit property (*BHM 4*) which had cost him about Kshs.4,000,000/= (four million shillings).

That the plaintiff was enjoying the interim order unlawfully because it had not convinced the Court on the issue of ownership.

That a search had been carried out where the Registrar of Titles confirmed the defendant as an absolute owner of the suit plot.

That the injunction order made on 19<sup>th</sup> April 2007 is prejudicial to the defendant, unjust and inequitable.

In Court on 10<sup>th</sup> July 2007 counsel for both parties appeared and submitted on the application. They were *Gichigi* for the applicant and *Osundwa* for the respondent. Both relied on their respective affidavits.

The applicant referred the Court to the conveyance (*RWG 1(a)*) and the transfer form (*RWG 1(b)*) to show ownership of the land with annexure (a) showing that this was freehold title issued by the Government in 1902.

That when the plaintiff purchased the property there were some tenants who were told to vacate it when the Nairobi City council issued a notice dated 17<sup>th</sup> February 1999, declaring the premises a nuisance. That the tenants were being removed with a view to putting up a new building but that this had not been done when this dispute started.

That the plaintiff has been paying rates to Nairobi City Council.

All the arguments by counsel for the applicant were in similar manner as the supporting and supplementary affidavit except that the purported grant to the replying affidavit is registered under Chapter 281 Laws of Kenya in Eastleigh where ownership documents were issued before this Act came into force.

That block 36 under which the suit land falls belongs to the Government Land Act registration regime. Counsel question lack of original title to the defendant hence no evidence to authenticate that provided on the provisional title.

That the defendant had not shown any single receipt for payment of rents to Nairobi City Council.

Counsel also questioned construction going on or the suit land without approved plans from Nairobi City Council and asserted that the Town Planning Committee of Nairobi City Council will never approve the defendant's plans because according to its records it is the plaintiff who owns the property and pays rent.

That on the face of the defendant's documents, they are superimposed on the already existing ownership documents of the plaintiff.

That since the Court is faced with two sets of documents it would be fair for any on going constructions to be stopped until the Lands Department and Criminal Investigation Department (*C.I.D.*) investigate and submit a report of their finding to this court under *Order 27 Rule 9 and 10* of the Civil Procedure Rules.

Counsel submitted that the plaintiff had made out a prima facie case by showing it has ownership documents which precede in time those of the defendant.

That the defendant had not produced primary documents and that it was clear the ongoing constructions are not sanctioned by the Nairobi city council.

That the plaintiff will suffer irreparable loss if the defendant completes the constructions because it will be denied a chance to put up its own building.

That the balance of convenience tilts in favour of the plaintiff to be granted an order of injunction and that it is easier to deal with the defendants partial construction than to deal with a third party tenant who is innocent who may be carrying on business on the suit premises if the defendant completes the said construction.

Counsel for the responded submitted in opposition to the applicant's application and relied on the replying affidavit, grounds in the notice of preliminary objection and a further replying affidavit. He submitted that the defendant is the registered proprietor of the suit land under the Registration of Titles Act and that he took possession thereof on 23<sup>rd</sup> December 2003 and a provisional title was issued on 23<sup>rd</sup> March 2006 wondering where the plaintiff was all this time.

That since occupying he suit plot the defendant had incurred finances putting up structures on the same and that the plaintiff's were invaders on the suit land.

According to counsel the plaintiff was in breach of the court order of 19<sup>th</sup> April 2007 which required him to produce an official search of the title to the plot within seven (7) days from that date because it had not done so.

That paying council rates alone was not enough as this does not confer proprietary right in the suit land to the plaintiff.

That the annexure to the defendant's further replying affidavit shows he lawfully bought the suit land.

That the title got lost and this was advertised in the Kenya Gazette and that for constructions to be carried out on the suit land the defendant petitioned Nairobi City Council. That these have been going on until the Court had order of injunction stopped the exercise.

That according to the Search Certificate the defendant is the absolute owner of the suit land.

That a letter from Nairobi City Council to the plaintiff for abatement of nuisance (*RWG 2*) does not

confer right to the property to it.

That the failure by the Plaintiff to produce a search certificate shows it has not established a prima facie case as to ownership of the suit land.

That the interim order issued is a waste on the defendant on money and materials as he is incurring huge interest in funds borrowed to carry out constructions.

That the plaintiff should have enjoined the Commissioner of Lands to this suit and he cannot dictate which property is governed by *RTA* or which one by the Government Lands Act.

That the defendant will suffer irreparable loss/prejudice if the interim order continues to remain in place.

Counsel prayed for the application to be dismissed and the interim order discharged.

In the first place, I do not know what the document annexed to the supporting affidavit as *RWG 1(a)* is. It looks to me to be a sale agreement between the vendor and purchaser where some kind of debt was involved which was not paid. I see this was something like Kshs.100,000/= but that the vendor – Continental Credit Finance Limited exercising its power of sale sold the suit property to the plaintiff/applicant herein who was the highest bidder on 20<sup>th</sup> day of March 1985.

Then there is a document described as “*PROPERTY TRANSFERS*” which gives the full names of the Transferee as Nabange Limited and that of the Transferor as *Mwangi Maguru (RMG (b))*.

If I can remember well this Mwangi Maguru is described in the conveyance *RWG 1(a)* as the Mortgagor.

*RWG 1(b)* has collection date stamp for cash but other information thereon is not legible.

The transferor did not sign this document though an advocate acting for the transferee, one *Waithaka Kiarie & Company* signed it on 25<sup>th</sup> April 1985 but there is no advocates stamp as is the normal practice.

The conveyance has some Government Stamp – Government of Kenya, Government Lands Registry Nairobi, showing this document was registered on 27<sup>th</sup> March 1985, a certificate that this document is a true copy of the original and payment of stamp duty and copying fees. The date of the certificate is 30<sup>th</sup> January 2001.

Then there is a stamp of Registrar of Government Lands Kenya – twice with the name of *Jane Kanja* at one of them.

Then there is a letter in form of notice dated 17<sup>th</sup> February 1999 with the number of the land 36/1/766 from Nairobi City Council for the abatement of existing nuisance on the plot all of which were explained there as well as receipts for payment of rates to Council.

Can one call these documents of title? I do not think so.

The property transfer form (*RWG 1 (b)*) was not acted upon at the Lands Registry as it has no Government stamp thereon and I think because it was not executed by the transferor.

Then there is the case for the defendant that he bought this premises from *Phelseys Enterprises* to whom a grant had been issued by the President of the Republic of Kenya on a lease term of 99 years from the 1<sup>st</sup> day of April 1997 (see *BHM 1*). This lease is properly stamped and sealed. It has a deed plan for land reference No. 31/1/766.

This lease, according to the Defendant was transferred to the defendant after a sale agreement dated 2<sup>nd</sup> April 2003 (see *BHM 1*. of further replying affidavit).

The transfer is reflected on the last page of the lease agreement but it is to the defendant and one *Dakame Abdullahi Ali* for Kshs.4,000,000/= (four million shillings) as tenants in common in equal shares.

*BHM 2* annexed to the replying affidavit is a document dated 23<sup>rd</sup> December 2003 showing that one of the joint purchasers of the suit plot *Ali Dakane (Dakame)* has taken possession of the suit plot and that the balance of the purchase price should be paid to the advocates firm Lutta & Company.

And annexure *BHM 3* to the replying affidavit is a provisional certificate of title from the Department of Lands stating that by reason of loss of grant registered as *I.R. 90556/1*

*“this provisional certificate of title issued under Section 71 shall serve and be valid for all purposes in lieu of the lost grant”.*

Whichever registration regime the plot falls under is not for this Court to discuss at the moment.

Whoever issued the plaintiff with the annexure *RKK 2* to the plaintiff's further supporting affidavit dated 20<sup>th</sup> and filed in Court on 27<sup>th</sup> April 2007 is not really sure of what he/she is talking about or that he wanted to deliberately mislead the plaintiff and this Court.

The conveyance is not a title document and with the properly transfer form not signed by the transferor and therefore not presented to the Lands Registry for action no title could be issued to the plaintiff over the suit land.

Unless there is other document not disclosed to the Court at this stage, I wish counsel was bold enough to explain to the plaintiff the true position in this matter.

On the other hand since the plaintiff purportedly bought this plot at what I see as a public auction what prevented it from taking possession? Or where are receipts to show there were tenants on the suit plot paying rent to the plaintiff from 1985 to 2007, March?? This would amount to some form of possession by the plaintiff! There are none.

Annexure *BHM 3* is a provisional certificate. It is signed by the Registrar of Titles. This provisional grant must have been issued following legal notice Number 9986 dated 16<sup>th</sup> December 2005.

The plaintiff does not seem to have taken notice of this gazette notice.

Then when the Defendant has started constructing, on the suit plot the plaintiff rushes to this Court to file the suit and the application for an injunction to halt the constructions as shown in *BHM 4*.

Surely this is most unjust and prejudicial to the defendant who seems to have entered into purchase transaction, possession and started construction with no knowledge of the plaintiff on the scene.

In my view the documents of ownership produced by the defendant outweigh those of the plaintiff and I am satisfied the said plaintiff has not satisfied the conditions required as per *Giella v. Cassman Brown & Company Limited [1973] E.A. 358* to be entitled to an order of injunction.

From the facts of the case the damages to be incurred by the plaintiff if it wins the case can easily be quantified and paid by the defendant I cannot call these irreparable.

Even on a balance of convenience, this tilts heavily in favour of the defendant. *I dismiss this application with costs and order the discharge of the order of injunction made on 19<sup>th</sup> April 2007.*

In view of the lapses I feel the Lands office committed in handling this matter I do not think the case can properly and successfully be completed without bringing the Commissioner of Lands on board.

*Delivered, dated and signed* at Nairobi this 19<sup>th</sup> day of July 2007

**D. K. S. AGANYANYA**

**JUDGE**