



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

**Civil Case 124 of 2005**

**JANE KEMUNTO MAYAKA.....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF NAKURU.....1<sup>ST</sup> DEFENDANT**

**HON. MIRUGI KARIUKI.....2<sup>ND</sup> DEFENDANT**

**THOMAS OYANDO KHABEGA.....3<sup>RD</sup> DEFENDANT**

**ROSEMARY MUGURE KINYANJUI.....4<sup>TH</sup> DEFENDANT**

**JOHN M. WACHIRA.....5<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff, Jane Kemunto Mayaka has made an application under the provisions of **Order XXXIX rule 2A(1) of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking the orders of injunction to restrain the defendants by themselves or their agents from entering, building any public toilet or in any manner howsoever from interfering with the plaintiff's quiet possession use enjoyment and ownership of parcel number **NAKURU MUNICIPALITY/BLOCK 6/156** (*hereinafter referred to as the suit land*) pending the hearing and determination of this suit. The plaintiff has further prayed for this court to issue a demolition order of any structure that could have been built by the defendants on the said suit land. The grounds in support of the application are that the plaintiff contends that she is the registered owner of the suit land. She further states that the defendants had encroached into the suit land and purported to erect thereon a public toilet claiming that the suit land was a public utility property. She contends that the defendants action had deprived her of enjoyment of the suit land which she is entitled in law. She further stated that this court should issue her with the order of injunction sought so that her proprietary rights over the suit land could be upheld. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The 1<sup>st</sup> defendant has filed a replying affidavit. The 2<sup>nd</sup> to 5<sup>th</sup> defendants filed a replying affidavit through the 5<sup>th</sup> defendant John Wachiuri Mwangi. They also filed grounds of opposition to the application in form of a notice of preliminary objection.

At the hearing of the application, I heard the submissions made by Mr Juma, Learned Counsel for the plaintiff, Mr Mbeche Learned Counsel for the 1<sup>st</sup> defendant and Mr Kahiga Learned Counsel for the 2<sup>nd</sup> to 5<sup>th</sup> defendants. Mr Juma submitted that the plaintiff was the registered owner of the suit land. He submitted that without any colour of right, the defendants had invaded the suit land and erected thereon a public toilet. The plaintiff submitted that she had purchased the suit land and had paid valuable consideration for the same. She denied that the suit land was a public utility property as alleged by the defendants. She submits that she would suffer irreparable damage if the defendants were allowed to continue with the construction of the public toilet in the said suit land. She further submitted that she was a purchaser for value without notice and her title to the said parcel of land took precedence over any other claim equitable or otherwise that could be held by the defendants. She argued that the defendants had made no allegations that the said suit land had been transferred to her fraudulently. As a registered owner, she submits that she has established a prima facie case with a likelihood of success and therefore

should be granted the orders of injunction sought.

Mr Mbeche, Learned Counsel for the 1<sup>st</sup> defendant opposed the application. He submitted that the plaintiff had not established that the 1<sup>st</sup> defendant had done anything to interfere with her possession of the suit land. The 1<sup>st</sup> defendant denied that it was involved in any way with the construction of the public toilet on the suit land. He further submitted that the records held by the 1<sup>st</sup> defendant did not show that the plaintiff was the owner of the suit land. He argued that the fact that the plaintiff had failed to annex any documents to show how she came into ownership of the suit land raised suspicion as to the authenticity of the plaintiff's alleged title to the said suit land. He further submitted that this court could not restrain what had already taken place; *i.e.* the public toilets had already been constructed and were ready for use. He urged the court to dismiss the application with costs.

Mr Kahiga Learned Counsel for the 2<sup>nd</sup> to 5<sup>th</sup> defendants submitted that the application filed was incompetent because it had been filed without any leave of the court, the previous application for injunction having been withdrawn. The said withdrawal was not endorsed by the court. He supported the submission made by Mr Mbeche that the orders of injunction could not be granted as the public toilets had already been erected and completed. He further submitted that the orders of demolition could not be issued in the context of this application. He argued that the suit land was a public utility property which had been designated as a public toilet and which the 2<sup>nd</sup> to 5<sup>th</sup> defendants as members of the Constituency Development Fund (CDF) had allocated public funds for the construction of the same. He submitted that the registration of the plaintiff as the owner of the suit land was procured illegally as no consent of the Commissioner of Lands was sought before the said transfer was made. He submitted that the said suit land was and remains a public utility property which the plaintiff could not lay claim to. He urged the court to dismiss the application with costs.

I have read the rival pleadings filed by the parties to this application. I have also considered the rival submissions made in support and in opposition to the application. The issues for determination by this court is whether the plaintiff has established a case so as to enable this court grant her the orders of injunction sought. Certain facts appear not to be in dispute in this case. It is not disputed that the plaintiff is the registered owner of the parcel of land known as **NAKURU MUNICIPALITY/BLOCK 6/156**. The circumstances of her registration as the owner of the said suit land have been challenged by the defendants. Whereas the plaintiff contends that she is a purchaser for value without notice, the defendants have stated that the suit land is a public utility property which the plaintiff unlawfully acquired. The plaintiff further submitted that as a registered owner she was entitled to all rights of ownership including having quiet possession of the said suit property. She contended that the defendants had illegally moved into the said parcel of land and were in the process of constructing a public toilet on the same. It is the plaintiff's case that the defendants were constructing the said public toilets to deprive her of ownership of the suit land.

This is an application for injunction. Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant. Injunctions are not issued where such event allegedly causing injury has already taken place. In such cases the remedy for an aggrieved party is either to seek mandatory injunction or to ventilate his or her case in a full trial. In the present case, a dispute arose as to whether the public toilets were in the process of being constructed or had been completed. This court sought to resolve this issue by asking the Deputy Registrar of this court to visit the scene in the presence of the counsels for the parties in this suit. The Deputy Registrar of this court upon visiting the site confirmed that the public toilets erected had substantially been completed. At the time of the visit the said public toilets were not in use.

Having considered the arguments made and the situation on the ground, it is clear that this court cannot issue the orders of injunction sought. The "*thing*" sought to be restrained has already taken place. The plaintiff came to court too late in the day. The horse had already bolted out of the stable. The remedy available to her is therefore to ventilate her case in a full trial so that she can establish her claims of ownership of the suit land. Although there is no dispute that the plaintiff is the registered owner of the suit land, the allegations made by the defendants that the said parcel of land is a public utility land cannot

be peremptorily dismissed. In this era where issues of public accountability especially as regard public property is the vogue, it is incumbent upon the plaintiff to establish that she lawfully acquired title to the suit property. This court will say no more in that regard.

In the circumstances of this case therefore it is clear that this court cannot restrain what has already taken place. The status quo on the ground is that the public toilets have already been erected. The plaintiff's remedy lies elsewhere. Her application for injunction is therefore dismissed with costs.

**DATED at NAKURU this 17<sup>th</sup> day of February 2006.**

**L. KIMARU**

**JUDGE**