



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

**Civil Case 34 of 2006**

**JOSEPH KIRAGU.....PLAINTIFF**

**VERSUS**

**LONDIANI TOWN COUNCIL.....1<sup>ST</sup> DEFENDANT**

**JOHN KAMANDE MWANGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff has filed an application under the provisions of **Order XXXIX rule 1, 2 & 3 of the Civil Procedure Rules** seeking the order of this court to restrain the defendants by themselves, their servants or agents from interfering with the plaintiff's possession and use of *plot number 108 (old 42) Londiani* pending the hearing and determination of the suit. The grounds in support of the application are that the plaintiff contends that he has been in occupation of the suit land since 1956. He states that the defendants have threatened to demolish the plaintiff's developments thereon. The application is supported by the annexed affidavit of Gladys Wanjiru Kiragu, the wife of the plaintiff. The application is opposed. The 1<sup>st</sup> defendant through its Town clerk, Joseph Mwangi has sworn a replying affidavit in opposition to the application. The 2<sup>nd</sup> defendant has filed grounds in opposition to the application. He has also sworn a replying affidavit in opposition to the said application.

At the hearing of the application, Mr. Ikua, learned counsel for the plaintiff submitted that the defendants had encroached into the plaintiff's parcel of land without any legal basis. He submitted that it was the plaintiff's case that the parcel of land which the 2<sup>nd</sup> defendant was claiming, and which was adjacent to the plaintiff's parcel of land, was a public road and has been so since the plaintiff took occupation of his parcel land in 1952. It is the plaintiff's submission that his parcel of land which was allocated to him under licence as provided for by **Section 149 of the Government Land Act**, measures 50ft x 100ft. He submitted that the subsequent allocation of the parcel of land to the 2<sup>nd</sup> defendant, which is a public utility property, was illegal and had resulted in the plaintiff's parcel of land being reduced and now measures 40ft x 80ft. The plaintiff took issue with the manner in which the 2<sup>nd</sup> defendant was allocated the said parcel of land and has argued that the allocation process being flawed, then the subsequent title which was obtained by the 2<sup>nd</sup> defendant was illegal. The plaintiff therefore prayed for the order of this court to grant him injunction to enable the integrity of his parcel of land on the ground to be maintained. He further submitted that the 2<sup>nd</sup> defendant had not occupied the suit land and therefore the balance of convenience tilted in his favour. He urged this court to allow his application with costs.

Miss Chege, learned counsel for the 1<sup>st</sup> defendant opposed the application. She submitted that the parcel of land in dispute was not public utility in the nature of a road, but was legally allocated to the 2<sup>nd</sup> defendant under the **Government Land Act**. She submitted that the plaintiff did not object to the said

parcel of land being allocated to the 2<sup>nd</sup> defendant. It was the 2<sup>nd</sup> defendant's argument that the plaintiff had not proved that the allocation of the suit land had resulted in the reduction of his parcel of land and therefore cannot claim that he has established a *prima facie* case so as to entitle him to the orders of injunction sought. She further submitted that the 2<sup>nd</sup> defendant had been issued with a title by the government and therefore if the plaintiff had any claim as regard the issuance of the said title of the 2<sup>nd</sup> defendant, then he ought to have enjoined the Attorney General as a party to this suit. She submitted that it the plaintiff who had encroached on the suit land and erected thereon illegal structures and had therefore prevented the 2<sup>nd</sup> defendant from occupying it. She urged this court to dismiss the application.

Mr. Kagucia Jnr, learned counsel for the 2<sup>nd</sup> defendant submitted that the 2<sup>nd</sup> defendant was issued with a title of the suit land by the government of the suit land under the **Registration of Titles Act** whereas on his part the plaintiff had no title but only an occupation licence. He submitted that the suit filed by the plaintiff was incompetent in that the plaintiff had not sworn a verifying affidavit in support of his plaint. He argued that the plaintiff had not established any legal basis for challenging the title of the 2<sup>nd</sup> defendant because no allegation of fraud had been made against the 2<sup>nd</sup> defendant. He submitted that the true state of affairs as exists on the ground is that it is the plaintiff who had encroached onto a public road by building structures thereon. He further submitted that the plaintiff incited members of the public to prevent the 2<sup>nd</sup> defendant from developing and occupying his parcel of land. He submitted that the plaintiff had not established that the 2<sup>nd</sup> defendant had either encroached on his parcel of land or had alternatively encroached onto a public utility plot. He submitted that the plan of the area which he annexed to his replying affidavit, shows that the 2<sup>nd</sup> defendant's parcel of land was a distinct plot from that of the plaintiff and further that there is a public road which is provided for and which the 2<sup>nd</sup> defendant had not encroached onto. He therefore submitted that the plaintiff had failed to establish a *prima facie* case to enable this court grant him the orders of injunction sought. He therefore urged the court to dismiss the plaintiff's application for injunction.

I have carefully considered the rival arguments that were made before me by the parties to this application. I have also read the pleadings filed by the parties in support of their respective positions. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant him the order of injunction sought. The principles to be considered by this court when considering whether to grant an interlocutory injunction or not are now well settled. In **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A. 86**, the Court of Appeal held at page 89 that:

***“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 1<sup>st</sup> one is satisfied and when the court is in doubt then the third condition can be addressed.”***

In the instant application, the plaintiff claims that the 2<sup>nd</sup> defendant had encroached on his parcel of land which is adjoining a public road. It is his case that the 2<sup>nd</sup> defendant was allocated parcel number LR. No. 584/119 Londiani Township unprocedurally because the said 2<sup>nd</sup> defendant had not complied with the law before the said title was issued to him. The plaintiff further states that the said parcel of land which was allocated to the 2<sup>nd</sup> defendant had resulted in his parcel of land which was 50ft x 100ft being reduced to 40ft x 80ft. The plaintiff averred that he was the legal owner of parcel number 108 Londiani Township on which he had constructed a permanent building. His ownership of the said parcel of land is predicated upon a licence of occupation which was issued to him in 1956 by the Colonial government under the provisions of what is now known as the **Government Land Act**.

On his part, it is the 2<sup>nd</sup> defendant's case that it was lawfully allocated the said parcel of land by the government and was issued with title number IR 99248 under the **Registration of Titles Act**. The 2<sup>nd</sup>

defendant denies that his said parcel of land has encroached on a public utility land or on the plaintiff's parcel of land. The 2<sup>nd</sup> defendant complains that the plaintiff had incited members of the public who had prevented him from taking occupation of his said parcel of land. The 2<sup>nd</sup> defendant's submission as to the actual position of the said parcel of land is supported by the 1<sup>st</sup> defendant, the Local Authority where the said parcels of land are situate. The 1<sup>st</sup> defendant has submitted that it is the plaintiff who has encroached on the 2<sup>nd</sup> defendant's parcel of land by erecting illegal structures on it.

I have assessed the facts of this case. The plaintiff's ownership of the parcel of land which is currently in occupation of is a licence of occupation which was issued by the colonial government under the provisions of **Section 40 of the Government Land Act**. The 2<sup>nd</sup> defendant on his part has been issued with a title of the suit land which the plaintiff claims in this suit to have been encroached. The plaintiff has no title superior to that of the 2<sup>nd</sup> defendant. His right of occupation of the parcel of land which is adjoining the 2<sup>nd</sup> defendant's parcel of land is just but a licence. A licence is just that; it is a licence by the government which allows a person to occupy a certain piece of land and can be withdrawn at any time. **Section 40 of the Government Land Act** provides that:

***“(1) Licences to occupy unalienated government land for temporary purposes may be granted by the commissioner.***

***(2) Unless it is expressly provided otherwise, a licence under this Section shall continue for one year and thenceforward until the expiration of any three months notice to quit:***

***Provided that the notice to quit may be served upon the licensee at any time after the expiration of nine months from the date of the licence.”***

The plaintiff's occupation of the said parcel of land is therefore by its very nature, temporary. On the part of the 2<sup>nd</sup> defendant he has acquired title to the said parcel of land and according to **Section 23(1) of the Registration of Titles Act**:

***“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on grounds of fraud or misrepresentation to which he is proved to be a party.”***

The Court of Appeal has held that a party who has been issued a title to a parcel of land is the owner thereof unless it can be shown that he fraudulently obtained it. See **Dr. Joseph N. K. Ng'ok –vs- Justice Moijo ole Keiwua & Anor Civil Appeal No. 60 of 1997 (unreported)** and **Wreck motors Enterprises – vs- Commissioner of Lands Civil Appeal No. 71 of 1997 (unreported)**.

The plaintiff in this case, a licensee, is claiming that the 2<sup>nd</sup> defendant, a registered owner has encroached into the parcel of land that comprises his licence. The plaintiff has however failed to prove by affidavit evidence the extent to which he claims the 2<sup>nd</sup> defendant has encroached on his parcel of land. From the submissions made, it is clear that the plaintiff utilised the parcel of land which has now been alienated and allocated to the 2<sup>nd</sup> defendant. When the 2<sup>nd</sup> defendant sought to take occupation of the land, the plaintiff was naturally not happy. He has come to this court. Unfortunately the basis of his case is not recognised by the law. Once the 2<sup>nd</sup> defendant established to this court that he was registered owner of the said parcel of land, his title to the same cannot be challenged except on the grounds allowed by the law. In that regard, the plaintiff has failed to establish a *prima facie* that would enable this court to grant him the said order of injunction sought.

The upshot of the above is that the plaintiff's application fails. It is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

**DATED at NAKURU this 19<sup>th</sup> day of May 2006.**

**L. KIMARU**

**JUDGE**