



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

**Civil Case 1239 of 2005**

**MARTHA WAMBUI MUCHIRI.....**

**PLAINTIFF**

**VERSUS**

**KANARD MIRITI .....1<sup>ST</sup>  
DEFENDANT/RESPONDENT**

**MARTIN NKONGE NJAGI.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**JOSEPH MACHARIA MAINA.....3<sup>RD</sup>  
DEFENDANT/RESPONSENT**

**CITY COUNCIL OF NAIROBI.....4<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**COMMISSIONER OF LANDS.....5<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**RULING**

Parties to this suit appeared before me on 15<sup>th</sup> March 2005 wishing to argue two applications as follows:

1. The Plaintiff’s Chamber Summons application dated 13<sup>th</sup> October 2005 seeking injunctive orders against the Defendant
2. The 3<sup>rd</sup> Defendant’s Chamber Summons dated 5<sup>th</sup> December 2005 seeking an order to strike out the Plaint as against the 3<sup>rd</sup> Defendant

The Court directed that the 2<sup>nd</sup> application be argued first as the same would affect the proceedings in regard to the Plaintiff’s injunction application and orders to be made therein. This Ruling therefore relates to the 2<sup>nd</sup> application brought by the 3<sup>rd</sup> Defendant.

The grounds upon which the 3<sup>rd</sup> Defendant’s application is based are that he is the sole legally

registered owner of the suit property known as Nairobi Block 63/457 having acquired the same from the 1<sup>st</sup> Defendant who, according to the 3<sup>rd</sup> Defendant was a holder of an indefeasible title to the suit land and whose registration as owner was effected on 17<sup>th</sup> October 2001. The 3<sup>rd</sup> Defendant claims protection of the law under section 27 of the Registered Land Act for the reasons that the allotment of the suit land to one Elias Njagi Njoka on 7<sup>th</sup> February 1992, who later sold the suit property to the Plaintiff accords the plaintiff no legal interest in the suit land as would defeat the 3<sup>rd</sup> Defendant's title. For this reason the 3<sup>rd</sup> Defendant argues that the Plaintiff discloses no cause of action against him and should therefore be struck out.

I have perused the Plaintiff cited herein and have noted that the same challenges the 3<sup>rd</sup> Defendant's Title on grounds that the same was acquired through fraud perpetrated against the Plaintiffs "**predecessor in title**" by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with the connivance of the 4<sup>th</sup> Defendant. The term "**predecessor in title**" is used loosely since the said Elias Njagi Njoka was never registered as owner.

The 3<sup>rd</sup> Defendant is shown in the copy of the Register produced herein as annexure "**MWM2**" to the Plaintiff's further Affidavit of 8<sup>th</sup> November 2005 as the registered proprietor of the suit land as from 29<sup>th</sup> July 2005 when a certificate of lease was issued to him. The Property had previously been registered in the names of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant in that succession. As rightly put by the counsel for the plaintiff in his submissions herein this court has power under section 143 of the Registered Land Act to cancel any registration other than a first registration of ownership and rectify the register accordingly where the court is satisfied that such registration was obtained, made or omitted by fraud or mistake. The reverse is that in the absence of fraud or mistake, the registration of a person as the proprietor of land or a lease shall, under Section 27 of the Act, accord such a person absolute ownership of the land or the leasehold interest described thereon together with all rights and privileges belonging or appurtenant thereto but, in the case of a leasehold, subject to all implied agreements, liabilities and incidents of the lease.

The Applicant's contention is that owing to the 3<sup>rd</sup> Defendant's registration as owner of the suit premises the Plaintiff/Respondent's Plaintiff discloses no cause of action and should therefore be struck out. Although this court has the discretion to strike out pleadings under Order VI Rule 13 the cardinal principle in doing so is that such discretion is to be exercised sparingly and in very clear and obvious cases. It has been held time and time again that a court of law must always aim at preserving a suit.

A cause of action is defined in Osborn's Concise Law Dictionary as

"the fact or combination of facts which give rise to a right of action."

Elsewhere it has been said to mean

"an act on the part of the Defendant which gives the Plaintiff his cause of complaint". (See *DRUMMOND-JACKSON VERSUS BMA* (1970) 1 WLR 688)

To have a cause of action does not necessarily mean that the party suing is bound to succeed in the action or that the party must have a right to that which he or she claims. This is clearly demonstrated in the Court of Appeal decision of **Kiungani Farmers Company Ltd versus Mbugua (Civ Appeal No. 46 of 1982)** reported in [1984] KLR at page 476 where the Court found that a convicted trespasser's cause of action in an action for wrongful eviction was not ousted by the conviction and that he had a cause of action arising out of trespass to his person and property even though he had no right to the land in question.

The Plaintiff herein clearly sets out the facts and circumstances in which and for which the Plaintiff feels compelled to challenge the 3<sup>rd</sup> Defendant's Title to the suit property. As previously stated in this Ruling the law does allow the registration such as of the 3<sup>rd</sup> Defendant's to be impeached on the ground of fraud as is sought by the Plaintiff.

Indeed were it to be found that the 1<sup>st</sup> Defendant's Title was acquired by fraud in which case he had no proper title to pass to the 2<sup>nd</sup> Defendant, it follows therefore that his title, being void ab initio, would affect all subsequent registrations including that of the 3<sup>rd</sup> Defendant as there would have been no title to pass in the first place. To prove such fraud, evidence is required which can only be adduced at a full hearing. Guided by the Court of Appeal decision cited above and the law as already referred to I am of the considered view that the Plaintiff's Complaint does disclose a cause of action and ought not be struck out. I disallow the application and dismiss the same with an order that costs shall be in the cause.

Consequently the Plaintiff's Chamber Summons of 13<sup>th</sup> October 2005 may proceed to hearing inter parties on a date to be taken at the Registry on priority basis. Parties shall maintain status quo pending the hearing and determination of that application.

Dated and delivered at Nairobi this 23<sup>rd</sup> day of June 2006

M. G. MUGO

JUDGE

Delivered in the presence of

Muthusi for Applicant

Matara for Defendant