



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

Civil Suit 1086 of 2002

**PETER KINUTHIA WAITHAKA.....
PLAINTIFF/APPLICANT**

VERSUS

TOM OCHIENG T/a M’OKETCHY AUCTIONEERS.....1ST DEFENDANT/RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT/RESPONDENT

JOHN WANGA JUMA.....3RD DEFENDANT/RESPONDENT

ROSE AKEYO BARAZA.....4TH DEFENDANT/RESPONDENT

RULING

The Plaintiff’s application by Chamber Summons, dated and filed on 13th September, 2004 was brought under Order XXXIX, rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap.21). The prayers in this application were as follows:

- (a) that, the third and fourth defendants be prohibited from building, construction and/or putting up any further structures on the parcel of land known as Nairobi Block 63/530, and/or registering any change in ownership, user, occupation, possession in the said land with any Land Registry, Government Department and all other registering authorities until further orders of the Court;
- (b) that costs of this application be provided for.

The grounds in support of the application are as follows. It is stated that the Plaintiff is the original allottee of L.R. No. Nairobi Block 63/530 and had fully complied with the special conditions set out in the letter of allotment and was awaiting issuance of title. There was no repossession notice or resolution issued by the second Defendant. But on 24th November, 2001 the *first Defendant obtained title documents to the suit land* and subsequently *sold and transferred the same to the third and fourth Defendants*. Between 1992 and 2002 the Plaintiff had been unable to develop the suit land because he was all along still awaiting approval by the second Defendant, of the architectural plans. The third and fourth Defendants disposed of the Plaintiff’s building materials which were lying on the suit land, and they are currently in the process of constructing a house on the same.

The Plaintiff’s supporting affidavit of 6th September, 2004 was filed on 13th September, 2004. He avers that on 21st February, 1992 while working for the second Defendant, *he had been allocated the suit land,*

L.R. Nairobi Block 63/530 (originally plot No. 141), situate at Jamhuri Estate, Phase II. He paid the stand premium and annual rent in the sum of Kshs.10,800 on 17th March, 1992 and also complied with all the conditions stated in the letter of allotment, including writing a formal acceptance. Sometime in 2002 the Plaintiff received a circular letter from the second Defendant requiring allottees to present their building plans for approval. On 18th June, 2002 he submitted his architectural plans to the second Defendant and paid a fee of Kshs.3,360 in respect thereof. The Plaintiff thereafter paid the survey fees and was *requested by the second Defendant to await issuance of the document of title*. The Plaintiff had deposited building materials on the suit plot; but he could not start building as he was awaiting approval of the architectural plans. But when he visited the suit land with his contractor on 19th June, 2002 he was surprised to find a group of men digging trenches on the same. Upon inquiry he was informed that *the first Defendant had obtained title deed for the suit land on 24th September, 2001 and that he had thereafter begun construction*. The Plaintiff thereupon made a complaint and recorded a statement at the Kilimani Police Station. The attempt by the Police to arrest the first Defendant was unsuccessful as he had gone into hiding.

The Plaintiff made investigations to establish whether the second Defendant had formally reallocated the suit land to the first Defendant, but he found no such evidence. He then obtained the Court's injunction orders which he served on those who were working for the first Defendant at the suit plot. However, just before the Plaintiff's application could be heard on the scheduled date, 16th September, 2002 the first Defendant *transferred the suit land to the third and fourth Defendants, and a title deed in their favour was issued on 29th July, 2002*. As soon as the third and fourth Defendants obtained the said title document, they began to construct a house on the suit land.

The Plaintiff pleads that since the wrongful acquisition of the suit land by the first Defendant and his transfer of the same to the third and fourth Defendants, he has suffered emotional stress and hardship, and stands to suffer irreparable loss if the two Defendants are not restrained from proceeding with their building activities.

On 29th September, 2004 the third Defendant swore a replying affidavit which was filed on 30th September, 2004. He avers that *the third and fourth Defendants purchased the suit property on 12th June, 2002, from the first Defendant. The deponent avers that he and the fourth Defendant had carried out an official search to ascertain the ownership of the suit property; and that they thereafter obtained the consent of the second Defendant to register the transfer to themselves of the suit property. In the process, the deponent avers, the third and fourth Defendants had taken "all the necessary steps to ascertain that no other person had [a] claim over the suit property."* Moreover, *the title was found to have no restrictions or caution; and on 29th July, 2002 the third and fourth Defendants were issued with their certificate of lease*.

Once the third and fourth Defendants had obtained title to the suit land, they *submitted their building plan to the City Planning Department of the second Defendant who gave the necessary approvals*.

Thereafter the third and fourth Defendants, *who had in the company of the first Defendant inspected the suit property and confirmed that no other person was in occupation*, commenced their constructions beginning with the servant's quarter. *They later proceeded with the construction of the main house and there was no opposition at all to their building project*. The deponent averred that the third and fourth Defendants are **bona fide** purchasers for value; and that they stand to suffer irreparable loss if the Court were to restrain them from proceeding with their construction, as they have already purchased building materials and have hired construction workers. He averred that he and the fourth Defendant are the registered proprietors of the suit property and they are entitled to uninterrupted enjoyment of the same. He denied the particulars of fraud as alleged in the Plaintiff.

Learned counsel for the Plaintiff, **Mrs. Kinuthia**, stated that in the Plaintiff's amended Plaintiff he would be seeking a declaratory order that the first Defendant's letter of allocation and the titles issued to him on 24th September, 2001 as well as those later issued to the third and fourth Defendants on 29th July, 2002 in respect of L.R. No. Nairobi Block 63/530, were obtained fraudulently.

Mrs. Kinuthia contended that the transfer from the first to the third and fourth Defendants had been hurriedly done, *with fraudulent intent, being with full knowledge that the suit land was not unalienated and could not be passed on to anyone else*. She contended that the Plaintiff's distress at the wrong done to him could not be adequately compensated in monetary terms, and that the Plaintiff should be held to have **prima facie** proved his case against the third and fourth Defendants. Counsel submitted that the balance of convenience lay in favour of the Plaintiff.

Mr. Nyaga for the third and fourth Defendants submitted that the Plaintiff is not entitled to grant of his prayers for injunctive relief, because he had not brought his prayer within the governing principles which are recognised to be authoritatively laid down in **Giella v. Cassman Brown** (1973). There must be a **prima facie** case with a high probability of success; failure to grant the prayer must be destined to cause irreparable harm that cannot be compensated by payment of damages; the balance of convenience must be shown to favour the Applicant.

Mr. Nyaga submitted that the Plaintiff did not satisfy the requirements in the applicable principles, particularly because the third and fourth Defendants were **bona fide** purchasers for value, without notice of want of title in the vendor. Counsel submitted that the *Applicant had not shown that the third and fourth Defendants were parties to any fraud* being alleged; and he considered it questionable that *while alleging fraud, the Plaintiff had chosen not to enjoin the Registrar of Lands as a Defendant*. He observed, I think quite correctly, that the *Registrar was an eminently relevant party* against whom the Court could have seen fit to make appropriate orders - and yet he was not made a party.

Counsel remarked the common cause which is apparent, that the third and fourth Defendants are in effective occupation of the suit premises and they are engaged in active construction thereon. As they have a title to the suit property, counsel submitted, their position cannot be challenged by the Plaintiff. *He cited Section 28 of the Registered Land Act (Cap. 300), which made the title to the suit premises held by third and fourth Defendants, absolutely indefeasible. He remarked, quite meritoriously, with respect, that the letter of allotment which was the only document held by the Plaintiff, was no more than a contract between the Plaintiff and the second Defendant.* Counsel stated, again quite correctly, with respect, that *title was a superior interest as compared to a mere allotment letter*. Moreover, the allotment letter had *plot No. 141* as its reference number, whereas the suit property bore a proper registration number, *L.R. Nairobi Block 63/530* and this was held by the third and fourth Defendants. Counsel raised *the possibility that plot No. 141 and L.R. Nairobi Block 63/530, could very well refer to different land parcels*.

Mr. Nyaga submitted that the suit premises was a parcel of land which *could readily be valued*; and therefore any *loss incurred in relation to this land could be considered quantifiable in money terms, and hence the Plaintiff had an avenue towards solution in seeking damages from the right party or parties*. Counsel suggested that the Plaintiff could very well claim damages from the first and the second Defendants. The effect of this argument is that the Plaintiff has not brought his case for injunctive relief within the governing rules set out in **Giella v. Cassman Brown** (1973).

Mr. Nyaga doubted the **bona fides** of the Plaintiff's claim, *as he had failed to register a caution against the suit property even when he learned that the title thereto was held by other parties*.

Counsel submitted that the balance of convenience rested in favour of the second and third Defendants who had incurred major expenses in the purchase and development of the suit property; and who were in actual occupation of the suit property. By contrast the Plaintiff had incurred hardly any costs in relation to the suit premises. Counsel urged that it was only fair to allow the third and fourth Defendants to continue with and complete their constructions, as they stood to suffer major losses if construction work stopped at this stage.

Mr. Nyaga also pleaded **laches** on the part of the Plaintiff who *has waited since suit was originally filed on 27th June, 2002 before moving the Court on 13th September, 2004 to grant injunctive relief*. Counsel also observed that the Plaintiff had sought orders of injunction without giving an undertaking as to damages, if the main suit should, in the event, turn against him.

Mr. Nyaga relied on the High Court decision in *Joseph Kagunya v. Boniface K. Muli, City Council of Nairobi and Commissioner of Lands*, Civil Case No. 268 of 2003 – a case similar in most respects to the present one. *Mr. Justice Visram* there held as follows:

“Part III of the Registered Land Act (Cap. 300) confers upon a registered proprietor of land an absolute title that cannot be defeated except as provided in the Act. The rights of parties to land registered under that Act must, therefore, be determined from the Register kept according to Part II of the Act.

“The plaintiff claims title to the suit land pursuant to a letter of allotment and other matters not contained in the register of the suit land. There were allegations of fraud against the first defendant but none of them were borne [at] all by any credible evidence. Even the plaintiff’s own application is somewhat inconsistent. He seeks to restrain the first and second defendants from interfering with his ‘possession and/or ownership’ of the suit land yet all the material presented before the Court indicates that he has neither possession nor ownership of the suit land. It is the first defendant who has both ownership and possession of the suit land.”

In that very similar case to the present one, the learned judge held:

“Considering what I have stated above, I do not think that the plaintiff has set out a prima facie case with reasonable prospects of success to entitle him to the order sought. On this conclusion alone, I do not see the need to consider other principles, as nothing useful will be achieved...”

Counsel also relied on another High Court case, *Agnes Wahito Kinyua & Another v. Ramuka Agencies Ltd and Two Others*, Civil Case No. 1425 of 2002, in which *Mr. Justice Rimita* stated as follows:

“The competing interests show that the first defendant was allocated the plot before Kinyua, the deceased. But what is important is that the defendant is now relying on a lease and certificate of lease. The first defendant is protected under Section 28 of the Registered Land Act, Cap. 300...”

“I have considered all the relevant material placed before me. There is nothing... to show that the defendants or any of them acted fraudulently... There is nothing to show that the first defendant obtained the title fraudulently. It will be difficult for the applicants to challenge the first defendant’s title in view of the evidence on record and in view of the provisions of Section 28 of the Registered Land Act...”

“Consequently, I find that the plaintiffs have failed to make a case for an interlocutory injunction especially as they shied away from offering any security for damages in the event of losing the case.”

Following the same principles is the High Court case, *Austin Oduor Origi v. Karimi M. Muna & Two Others*, Civil Case No. 1355 of 2003 which was also relied on by counsel. In that case, which was quite similar to the instant one, *Mr. Justice Nyamu* remarked:

“Any good land registered system must provide certainty of title and the ingredient of indefeasibility, except in the case of fraud or mistake. Public interest must again occupy [a] central place in our system of land registration. In fact, the only recognised unregistered interests are **overriding interests** as described in s.30 of the Act...[unregistered] trust and the applicant’s case are not based on any one of these interests. It is clear to me that the applicant has not established a prima facie case with a probability of success. He has not given an undertaking as to damages even in the face of a completed building.”

In her reply, Mrs. Kinuthia for the Plaintiff/Applicant doubted whether it was true that the third and fourth Defendants were **bona fide** purchasers for value. Counsel insisted that the two Defendants did have notice of the Plaintiff’s claim and that they contributed by their act to fraudulent transfer. She sought to rely on Section 143(2) of the Registered Land Act (Cap. 300) which provides that land title can be rectified by order of the Court, if it can be shown that a party did contribute to fraud.

From the most reliable part of the submissions, from the depositions and from the authorities cited, I think certain clear conclusions can be drawn which must direct the final determination of the instant application. These are as follows:

- (a) The second Defendant had made an allotment of what is most probably the suit land (as plot number 141) to the Plaintiff.**
- (b) There would have been something in the nature of a contractual obligation placed on the second Defendant to facilitate acquisition of the legal title for the allotted parcel of land, by the Plaintiff.**
- (c) It appears that the second Defendant *wrongly* (or even fraudulently) took leave of its obligation and facilitated the acquisition of title to the said plot by the *first Defendant*, rather than the Plaintiff.**
- (d) The said acquisition of title by the first Defendant was *given full effect by the Land Office, and thus the Chief Land Registrar ought to have been held accountable in the suit brought by the Plaintiff.***
- (e) There are *allegations* only, but no cogent proof, that when the third and fourth Defendants purchased the suit land from the first Defendant and had the title thereto transferred to them, they acted other than as innocent purchasers for value without notice of any fraud (such as might have been committed and in respect of which possible privies would have been the first Defendant, the second Defendant and employees of the Land Office).**
- (f) Therefore, on the evidence before me, the third and fourth Defendants did not acquire their title fraudulently or unlawfully.**
- (g) Since fraud is a *serious charge which must be strictly proved*, the allegations of fraud such as made by the Plaintiff in this interlocutory application, just will not lie at this stage and *must pass on to the stage of full trial, for proper proof.***
- (h) It follows that the allegations of fraud at this stage must defeat the prayer being made for interim orders of injunction.**
- (i) The evidence on record shows that the third and fourth Defendants once they purchased the suit land and secured the registration in their names of the title, proceeded with substantial construction plans and are in effective occupation of the suit premises.**
- (j) It is also clear from the evidence that the Plaintiff, who has only a letter of allotment, *has never at any time been in occupation of the suit premises.***
- (k) It is clear from the authorities that the title of the third and fourth Defendants *has the protection of Section 28 of the Registered Land Act (Cap. 300) which gives indefeasibility except where there is fraud or mistake, and subject to such overriding interests as there may be.***
- (l) As already indicated, *no fraud or mistake is apparent at this state* which may be held to vitiate the title to the suit premises now held by the third and fourth Defendants.**
- (m) And no evidence at all has emerged that there were any overriding interests such as could qualify the title now held by the third and fourth Defendants.**

In the circumstance as analysed and described above, the correct decision in law, as I do believe and hold, would be that *the third and fourth Defendants are the true owners of L.R. No. Nairobi Block 63/530, and it is the constitutional obligation of this Court to give protection to that state of property-holding. This obligation also emerges clearly from the provisions of the Registered Land Act (Cap.300) and in particular from Section 28 thereof.*

It is already clear at this point that the Plaintiff's claim cannot possibly have a clear probability of success at the projected trial.

If the Plaintiff is not granted the injunction he seeks, is it the case that he will be irreparably damnified and could not obtain adequate compensation in damages? I doubt it. First of all the Plaintiff had no investment of any significance at the suit premises. Secondly, his loss is so readily quantified, that he could quite quickly prove for damages, against those parties who must have brought him to grief.

Given, as I have already noted, that the third and fourth Defendants are in effective occupation of the suit premises and are there conducting major construction developments, it follows that *the balance of convenience clearly lies in their favour*; and it is the duty of this Court to ensure that they are not interrupted in their legitimate project of home development.

Finally, from my entire analysis of the factual and legal scenario, I have to conclude *that it entails the least injustice to uphold the position of the third and fourth Defendants, rather than that of the Plaintiff*.

I will, therefore, make the following orders:

1. The Applicant's prayer that the third and fourth Defendants be prohibited from building, constructing and/or putting up any further structures on the parcel of land known as Nairobi Block 63/530, and/or registering any change in ownership, user, occupation or possession on the said land with any Land Registry, Government Department or any other registering authorities until further orders of the Court, is refused.
2. The Plaintiff/Applicant shall bear the costs of this application in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of January, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mrs. Kinuthia, instructed by M/s. A.W. Kinuthia & Co. Advocates

For the 3rd and 4th Defendants: Mr. Nyaga, instructed by M/s. Njeru Nyaga & Co. Advocates

1st and 2nd Defendants absent and unrepresented.