



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**  
**Civil Suit 43 of 2004**

**ROBERT GACHUI MWATHI.....PLAINTIFF**

**VERSUS**

**PETER WAWERU MWANGI.....1<sup>ST</sup> DEFENDANT**

**SAMUEL NJOROGE MIKUI.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MWANGI MACHARIA.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiff has filed an application under the provisions of **Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules** seeking the orders of this court to restrain the defendants, their agents and or servants from occupying, constructing any structures or interfering with parcel number ***Bahati/Bahati Block 1/1780*** in any manner whatsoever pending the hearing and determination of the suit filed herein. The grounds in support of the application, which are stated on the face of the application are that the plaintiff claims the suit land as his having purchased the same from the 3<sup>rd</sup> defendant on the 25<sup>th</sup> of September 1997 for the sum of Kshs 120,000/=. He states that he purchased the suit property from the duly appointed agents of the original owners. He contends that someone else now claims to have purchased the said suit property and has entered therein and commenced construction. In the supporting affidavit, Robert Gachuhi Mwathi depones that he would suffer irreparable harm if the order of injunction sought is not granted.

The application is opposed. Joseph Mwangi Macharia, the 3<sup>rd</sup> defendant has sworn a replying affidavit in opposition to the application. In brief, he depones that he is the registered owner of the suit land having purchased the same from Peter Waweru Mwangi who had the power of attorney to sell the said suit property on behalf of Samuel Njoroje Mikui. He further depones that upon purchasing the said parcel of land, he took possession of the same and has substantially undertaken development on the said suit land including erecting permanent structures. He further deponed that if the said order of injunction is issued he would suffer irreparable loss and damage. He deponed that the application ought to be dismissed with costs.

At hearing of the application, I heard the submission made by Mr Geke, Learned Counsel for the plaintiff and Mr Mbiyu, Learned Counsel for the 3<sup>rd</sup> defendant. Mr Geke reiterated the contents of the application and the supporting affidavit thereto. He submitted that the plaintiff was the registered owner of the suit property having purchased the same from the 1<sup>st</sup> defendant who had the authority of the 2<sup>nd</sup> defendant to sell the said property. It was submitted that the plaintiff was issued with the title deed in respect of the suit land on the 25<sup>th</sup> of September 1997 after the said property had been transferred to him by the former registered owner. It was further submitted that sometime thereafter, the plaintiff was summoned by the District Land Registrar, Nakuru who requested him to surrender the title as investigations were being undertaken to establish how the plaintiff was registered as the owner of the suit land. Learned Counsel submitted that after the plaintiff had surrendered the said title, he was told that the same would be returned to him after the completion of the investigations. The said title was however not returned to him. Instead the plaintiff later learned that the said parcel of land had been transferred to the 3<sup>rd</sup> defendant. The plaintiff was surprised at the turn of events. It was his submission that he was the

registered owner of the suit land. He argued that the title which was issued to the 3<sup>rd</sup> defendant was illegal. He urged the court to grant the order of injunction sought pending the hearing and determination of the suit.

Mr Mbiyu, Learned Counsel for the 3<sup>rd</sup> defendant opposed the application. He reiterated the contents of the replying affidavit. He submitted that the plaintiff had conceded that the 3<sup>rd</sup> defendant has been the registered owner of the suit land since the 5<sup>th</sup> of February 1998 when he was so registered. He argued that the original owner of the suit land transferred the same to the 3<sup>rd</sup> defendant. He submitted that the title which had been issued to the plaintiff was cancelled before the 3<sup>rd</sup> defendant was registered. It was argued that the 3<sup>rd</sup> defendant had acquired the said property in a lawful manner. He further submitted that the 3<sup>rd</sup> defendant had put up structures on the said parcel of land and would suffer irreparable damages which could not be compensated by an award of damages. On the other hand, the plaintiff can adequately be compensated by being awarded damages. It was further argued that the balance of convenience tilted in favour of the 3<sup>rd</sup> defendant who was currently in occupation of the suit land, and which possession he took in 1998. Learned Counsel for the 3<sup>rd</sup> defendant submitted that the application now before court was filed in abuse of the due process of the court as the plaintiff had filed a similar application for injunction in 1998 but abandoned the same after failing to have the same listed for hearing. The 3<sup>rd</sup> defendant urged the court to dismiss the application with costs.

I have read the pleading filed by the parties to this application in support of their respective positions. I have also carefully considered the rival arguments made by the parties to this suit. The issue for determination by this court is whether the plaintiff has established a case as to entitle him to be granted the order of interlocutory injunction sought. The principles governing the grant of interlocutory injunctions by courts of law are well settled. As was stated by the Court of Appeal in **Giella –versus- Cassman Brown & Co Ltd [1973]E.A. 358** for the orders of interlocutory injunction to be granted, the applicant must establish that he has a prima facie case with a probability of success. He must also show that he would suffer irreparable injury which would not be compensated by an award of damages and finally if the court is in doubt, it would decide the application on a balance of convenience.

In this application certain facts are not in dispute. Both the plaintiff and the 3<sup>rd</sup> defendant claim that they purchased the suit property from the 1<sup>st</sup> defendant who was the holder of a power of attorney donated to him by the 2<sup>nd</sup> defendant. Both the plaintiff and the 3<sup>rd</sup> defendant paid valuable consideration for the purchase of the suit property. Transfers were signed in favour of both the plaintiff and the 3<sup>rd</sup> defendant. It is not disputed that the plaintiff was first registered as the owner of the suit land but his registration was mysteriously cancelled by the Land Registrar. After the registration of the plaintiff was cancelled the 3<sup>rd</sup> defendant was registered as the owner of the suit land (*i.e. Bahati/Bahati Block 1/1780*). The 3<sup>rd</sup> defendant was so registered on the 5<sup>th</sup> of February 1998.

Since then the plaintiff has made efforts, which have proved to be futile so far, to have the ownership of the said parcel of land revert to him. He filed a suit in the subordinate court immediately upon learning that the 3<sup>rd</sup> defendant had been registered as the owner of the suit land. He also filed an application to restrain the 3<sup>rd</sup> defendant by means of a temporary injunction from taking possession of the suit land. However for some reason, he did not prosecute the application, even though for all intents and purposes the subordinate court then had jurisdiction to hear and determine the matter. Seven years down, the plaintiff now seeks to restrain the 3<sup>rd</sup> defendant from continuing with the construction of a building which he has commenced on the suit land. The plaintiff claims that he will suffer irreparable harm which cannot be compensated by an award of damages. On his part, the 3<sup>rd</sup> defendant argues that he would suffer irreparable damage as the person now in occupation of the suit property. He has deponed that he has constructed a building on the suit land which he is about to complete and is due to occupy soon.

Having carefully considered the facts of this case it is clear that the registration of the plaintiff as the owner of the suit land was cancelled by the Land Registrar in circumstances that appear to be illegal.

However since becoming aware of the registration of the 3<sup>rd</sup> defendant as the owner of the suit land, the plaintiff slept on his rights. He has been indolent. He let the 3<sup>rd</sup> defendant take occupation of the suit land and commence construction of a building on it. From the affidavits filed, it is evident that the 3<sup>rd</sup> defendant took occupation of the suit property soon after the same was registered in his name. I agree with the 3<sup>rd</sup> defendant that he would suffer irreparable damages which may not be compensated by an award of damages, if this court were to issue an order restraining him from completing the construction of the building at the suit property. Although, *prima facie*, the registration of the 3<sup>rd</sup> defendant as the owner of the suit property raises legal questions, if the plaintiff was to succeed in his case, an order that would most probably be made is that he be refunded the purchase consideration and any other damages that may be assessed. As the person in occupation, the balance of convenience tilts in favour of the 3<sup>rd</sup> defendant.

For the reasons stated, I decline to grant the order of interim injunction sought. Although the plaintiff has established that at one time he may have had a legal right over the suit property, he has not satisfied the court that he would suffer irreparable damages were the 3<sup>rd</sup> defendant to continue occupying the suit land which he has been in possession since 1998. As stated earlier, the plaintiff sat on his rights to the extent that the 3<sup>rd</sup> defendant took the opportunity to entrench himself as the owner of the suit property by taking possession of it and constructing a building thereon. In this regard, the circumstances of this case precludes this court from upsetting the situation as it exists on the ground.

The application therefore lacks merit. It is dismissed with costs to the 3<sup>rd</sup> defendant.

**DATED at NAKURU this 28<sup>th</sup> day of October 2005.**

**L. KIMARU**

JUDGE