

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 392 OF 2002

KARIUKI KIRUBI PLAINTIFF

- VERSUS -

1. MUNICIPAL COUNCIL OF MOMBASA

2. STEPHEN MWANGE MUTUA DEFENDANTS

R U L I N G

The applicant has come to Court by Summons dated 23.10..02 under Order 39 rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks an order of an Injunction to restrain the Defendants jointly and severally from dealing with or transferring the Plot known as 1480 Mikindani. The application was first brought to court by way of certificate of urgency on 29.10.02 when Temporary orders of an Injunction were granted *exparte*.

The Application allegedly purchase the disputed property from one NAHASHON GICHUKI NYAGA who in turn is said to have purchased it from the original allottee Mwanaisha Salim Mohamed He then applied for the transfer of the same to him by the Municipal Council who are the first Defendants herein and on 7.12.95 they informed him the transfer had been approved and consequently he paid an amount of Kshs.1,250/= as requested by the Council being the transfer fees. However, the file went missing up to sometimes in the year 2002. When the file finally re-surfaced the plaintiff discovered in it was a copy of a letter dated 30.7.86 by the Council to him asking him to pay an amount of Kshs.52,333/= by 31.7.96. And although the letter is dated 30.7.86 I agree with the 1st Defendant's Counsel this can only be a typing error going by its contents and the events there before. The plaintiff says he never received the said letter. In any case the Council has offered no explanation as to how the letter was delivered to the plaintiff if at all. Also going by the date of the letter, one wonders why the Council found it necessary to give him only a day's notice to pay an amount of Kshs.52,333/=. The plaintiff alleges it is because there was a plot to defraud him and he has annexed copies of minutes of the Council to show that the property did not fall within the category of those recommended for repossession. He further argues that the person to whom the property is purported to have been re-allocated to is the chairman of the same committee.

The plaintiff however found there were more handles as the 2nd Defendant too claimed ownership having got the same through the chairman of the 1st Defendant's housing Committee. The 2nd Defendant says there was never registered any legal transfers to the plaintiff and therefore he has no title to the property.

The plaintiff bought the property for a sum of Kshs.100,000/= and he says for years he could not access the file at the Council. How then was he expected to pay the sum of Kshs.52,333/= if at all he had received the letter yet the file was missing. The Council has not shown that they had the file and it never went missing as alleged by the plaintiff. At this stage, the Court is not required to go into the merits of the main suit but to grant the orders only if the ingredients as set out in the *Giella -vs- Cassman Brown* case have been fulfilled.

The plaintiff has in my opinion shown he has a case that is worth considering as issues regarding the real ownership and fraud have been raised. He paid an amount of Kshs.100,000/= towards the purchase price, and is normal for one to spend such a sum of money only to fail to regularize the position by either paying the amounts allegedly demanded or attempting to get out of the initial contract and recover his money.

On a balance of Convenience, the plaintiff has been in possession all the time in issue and has fenced it off. As for Damages, the Defendants have not cast any doubt as to the plaintiff's ability to pay any damages if ordered. The value of the plot can be determined without much difficulty.

In the circumstances I do grant the order sought. There shall be an Injunction as against the Defendants jointly and severally pending the finalization of this suit. The plaintiff is however to file a written undertaking as to Damages within 7 days of this Ruling. Costs shall be to plaintiff.

Dated and Delivered at Mombasa this 4th day of April, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE