



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS)**  
**CIV CASE 86 OF 00**  
**PETERKEEN M. KIMWELI**  
**& 5 OTHERS.....PLAINTIFF**  
**VERSUS**  
**MUSDAF ABDI MOHAMED & OTHERS.....DEFENDANT**

**RULING**

In the plaint filed on 19th January 2000, it is shown that the five named plaintiffs brought the suit “ for and on behalf of the residents of Greenfields Estate Phases 2&6. Indeed, paragraph 1 of the said plaint describes them as representatives’ of the said residents.

At the centre of these proceedings are four parcels of land known as Nairobi/Block 82/6360, 82/6361, 82/6362 and 82/6363. These parcels of land are subdivisions of the original parcel of land known as L.R. Nairobi/block 82/2384.

The first defendants are the registered proprietors of the parcels of land set out herein above. Before the first defendants became the current registered proprietors, the second defendant was the original leaseholder of the entire parcel of land and retained a leasehold over the suit properties as open space.

The 2nd defendant is then said to have transferred the suit property to another party who then transferred the same to the first defendants. In the course of events, the suit property was changed from an open space to nursery school and subsequently to residential. The plaintiffs say this was done without their knowledge. The change of user was effected by the 3rd defendant and communicated to the 4th defendant in June, 1997.

It is the plaintiff’s case that the conditions for change of user have been breached. That notwithstanding, the first defendants are constructing residential houses on the said parcels of land. The said area being the only open space in the entire Greenfields Estate, the plaintiffs say theY stand to suffer irreparably if residential houses are constructed thereon.

The prayers sought by the plaintiffs are, inter alia, a declaration that the change of user approved by the 3rd defendant’s planning Committee and the 4th defendant in the absence of notice and/or consultations with the plaintiffs was void and a nullity ab initio; a declaration that the title originally held by the 2nd defendant was in trust for the residents and hence the transfer of the title was void ab initio to the extent that the residents were not consulted; an injunction to restrain the 1st defendants jointly and severally from further constructing or erecting residential houses upon the said suit land anD that the original user of the said title to wait, open space be reverted and maintained.

Alongside the said plaint there was filed an application by way of Chamber Summons for injunction orders against the 3(three) 1st defendants to restrain them from further constructing residential houses on the suit properties. The application is supported by affidavits of two named plaintiffs Peter Keen M.

Kimweli and Dr. Joshua Okumbe.

Replying affidavits were sworn by Musdaf Abdi Mohamed on behalf of the first defendants together with grounds of opposition filed by their counsel. The 3rd defendant also filed grounds of opposition.

Learned counsel appearing herein have made their submissions which I have on record. This being an interlocutory application where the only evidence available is by way of affidavit, the court bears in mind that the said evidence has not been subjected to cross-examination.

The plaintiffs were required to show a prima facie case with a probability of success that damage would not be adequate compensation for any harm that may be suffered and finally, if the court is in doubt, it shall decide the matter on a balance of convenience. See Giella -v- Casman Brown Company Limited (1973) 358.

The suit before the court is a representative suit. The plaintiffs have said as much in their pleadings. That being the case, the plaintiffs were bound by law to comply with Order 1 rules 8 and 22 of the Civil Procedure Rules. They did not do so and it would appear they do not have the locus standi to litigate on behalf of any other persons apart from themselves. That alone would have disentitled the plaintiffs to any orders sought upon an application founded on incompetent pleading.

Be that as it may, I have decided to address the merits of the application in recognition of the applicants' spirited wish to be heard.

The applicants have recognised the proprietorships of the first defendants in respect of the suit property. They also know that the first defendants bought the same from another party, not the second defendant who was the original leaseholder. They have said as much in their pleadings. The plaintiffs have not alleged any fraud on the part of the first defendants. They have not alleged any breach of conditions of change of user on the part of the first defendants. They have not alleged any collusion between the first defendants and either of the first two owners of the suit properties.

In the absence of any such allegations against the first defendants and either of the first two owners of the suit properties.

In the absence of any such allegations against the first defendants, against whom the injunction orders are sought, they remain lawful purchasers for value without notice. Their proprietary rights are protected by Section 28 of the Registered Land Act Cap. 300 Laws of Kenya. I have also perused the development plans annexed to the application. The suit property was never designated as open space in the original plot. The plans did not go through all approval stages. What appears thereon was provisional.

With respect, the plaintiffs have not placed sufficient material before the court to show a prima facie case with a probability of success. They have equally not shown what injury they have or are likely to suffer and if so that the same cannot be compensated by an award of damages. The damage if any can only be said to be remote and that is not a basis for granting the orders sought. I also note that the plaintiffs have not made any undertaking in damages.

I have no doubt in my findings hereinabove and therefore do not deem it necessary to address the principle of balance of convenience. The bottomline is that the plaintiff's application is clearly misconceived. I therefore dismiss the same with costs.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of March, 2000.

A. MBOGHOLI MSAGHA

JUDGE