



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 58 OF 2013**

**LYDIA MUTHONI GACHARIA.....APPLICANT**

**VERSUS**

**DOROTHY WANJIRU NDUNGU.....1<sup>ST</sup> DEFENDANT**

**PAUL THUMBI KABAI.....2<sup>ND</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....INTERESTED PARTY**

**RULING**

Coming up before me for determination is the Notice of Motion dated 23<sup>rd</sup> January 2014 and filed on 27<sup>th</sup> January 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction to be issued restraining the Defendants whether acting by themselves or through the agents, servants and/or employees from evicting the Plaintiff or in any manner dealing with the parcel of land known as Ngong/Ngong/34366 (hereinafter referred to as the "suit property") pending the hearing and determination of the suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Lydia Muthoni Gacharia, sworn on 23<sup>rd</sup> of January 2014, in which she averred that sometime in the year 2006, she was introduced to one William Kepaiwua Melonyie (hereinafter referred to as the "vendor") who had the intent of selling the suit property. She averred that after carrying out the necessary due diligence on the suit property, she entered into a sale agreement dated 1<sup>st</sup> February 2006 with the vendor for the purchase of the suit property. She told the court that the agreed purchase price was Kenya shillings 380,000/-. It was her further averment that subsequent to entering into the sale agreement, the vendor applied to the Oloolaiser Land Control Board for consent to transfer the suit property to her. She averred that she paid Kshs. 80,000/- to the vendor during the execution of the sale agreement and thereafter paid the remainder of Kshs. 300,000/- upon completion. She then stated that on 14<sup>th</sup> February 2006, the transfer between the vendor and her was executed and on 15<sup>th</sup> February 2006, she was registered as the legal owner of the suit property with a title deed being issued to her. She annexed copies of the sale agreement, the transfer, the consent and her title deed. She told the court that sometime in December 2011, it was brought to her attention that there were some strangers encroaching, trespassing and erecting a fence on the suit property without her permission. Worried about the suspicious activity, she commenced her own investigations starting with conducting an official search on the suit property. She then said that the official search led her to discover, to her shock, that the suit property had been transferred from her to one Dorothy Wanjiru Ndungu, the 1<sup>st</sup> Defendant, who subsequently transferred to the suit property to the 2<sup>nd</sup> Defendant, Paul Thumbi Kabai. She stated that on 27<sup>th</sup> December 2011, she took the precautionary measure of registering a caution over the suit property to protect her interests as a true and rightful proprietor. She added that she made a formal complaint about the trespass and illegal transfer of the suit property at the Ongata Rongai Police Station. She said that it was during this period that she managed to personally meet the 2<sup>nd</sup> Defendant who exhibited to her a copy of his title deed over the suit property. She then said that she also discovered that she had misplaced her original title deed to the suit property and she immediately rushed to the Hardy Police Station on 12<sup>th</sup> of January 2012 and recorded the loss. She reported that she met the 1<sup>st</sup> Defendant at Ongata Rongai Police Station on 13<sup>th</sup> January 2012 who had been arrested at the instance of the 2<sup>nd</sup> Defendant on account of the fraudulent sale of the suit property. She also stated that her advocates conducted searches at the District lands registry where the suit property is located and established that on 17<sup>th</sup> and 18<sup>th</sup> January 2007 there is no record in the presentation book of any transfer between her and the 1<sup>st</sup> Defendant. She said that the fraudulent actions of the Defendants, in particular the 1<sup>st</sup> Defendant, of unlawfully and illegally transferring the suit property to herself and thereafter to the 2<sup>nd</sup> Defendant have deprived her of her hard earned property. She then said that as a result of the fraud, she cannot be compensated by any form of damages, save that the Defendants be prevented from alienating, transferring and/or any other way dealing with the suit property until the issues relating to ownership thereof be determined by this Honourable Court. On those grounds she sought for the court to allow this Application.

The Application is contested. The 1<sup>st</sup> Defendant, Dorothy Wanjiru Ndungu, filed her Replying Affidavit sworn on 17<sup>th</sup> March 2014 and filed on 18<sup>th</sup> March 2014 in which she stated that she was the registered proprietor of the suit property prior to the sale of the same to the 2<sup>nd</sup> Defendant. She discounted the Plaintiff's allegation that the suit property was registered to her through fraud, stating that the truth is that she

was a bona fide purchaser for value without notice. She denied that she was ever an employee or an agent at the land registry and could not have registered the suit property to herself. She then stated that the Plaintiff is a stranger to her and they had not met prior to her tenure as the registered owner of the suit property. She made the claim that the 2<sup>nd</sup> Defendant is the duly registered proprietor of the suit property and has a valid title deed.

The Application is further contested by the 2<sup>nd</sup> Defendant, Paul Thumbi Kabai, who filed his Replying Affidavit sworn and filed on 24<sup>th</sup> February 2014 in which he averred that he is the current registered owner of the suit property, having bought the same for value after conducting a thorough due diligence, following the due process of transfer and paying all the requisite government fees and levies as per law required. He added that he got interested to buy the suit property which was on sale and personally did all the due diligence required by meeting all the previous registered owners who were reflected in the land records including the Plaintiff. It was his averment that he met the Plaintiff in the month of November 2011 long before the transfer of the suit property had been effected into his name, when he was carrying out his due diligence and she gave him a clean bill to proceed with the transaction. He averred that the Plaintiff is not being sincere in her claim that she had never met the 1<sup>st</sup> Defendant prior to the 1<sup>st</sup> Defendant purchasing the suit property. He further told the court that it was only after the transfer into his name was fully effected and he had vacant possession of the suit property that the Plaintiff lodged a complaint with the police. He averred that the Plaintiff was just making desperate attempts to try to exonerate herself from complicity in her attempt together with the 1<sup>st</sup> Defendant to deprive him of the suit property which he lawfully purchased using his hard earned money. On those grounds he sought for this Application to be dismissed with costs.

The Plaintiff responded to the Defendants' Replying Affidavits by way of her Supplementary Affidavit sworn on 2<sup>nd</sup> April 2014 and filed on 3<sup>rd</sup> April 2014 in which she stated that she is the registered owner of the suit property and has never put it up for sale as alleged by the 2<sup>nd</sup> Defendant. She further told the court that the 1<sup>st</sup> Defendant could not have been a bona fide purchaser for value without notice since she was the registered owner of the suit property from 15<sup>th</sup> February 2006, having purchased it directly from the previous owner William Kepaiwua Melonyie. She added that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have never obtained vacant possession of the suit property. She denied the 2<sup>nd</sup> Defendant's allegations of having met her prior to the sale transaction that saw him registered as the owner of the suit property by indicating that she first met the 2<sup>nd</sup> Defendant after the suit property had been registered in his name in mid-December 2011. She denied that the 2<sup>nd</sup> Defendant carried out due diligence before purchasing the suit property and the 2<sup>nd</sup> Defendant's claims of having met previous owners before the purchase. She reiterated that she actually first met the 2<sup>nd</sup> Defendant in mid-December 2011 after the suit property had been illegally transferred to him. She denied having given the 2<sup>nd</sup> Defendant a clean bill to proceed with the purchase of the suit property. She denied being in collusion with the 1<sup>st</sup> Defendant in denying the 2<sup>nd</sup> Defendant to suit property, stating that she did not know the 1<sup>st</sup> Defendant and had never met her, a fact that was confirmed by the 1<sup>st</sup> Defendant in her Replying Affidavit. She further stated that she informed the 2<sup>nd</sup> Defendant that his title deed to the suit property was improperly obtained since she had never sold the suit property to the 1<sup>st</sup> Defendant. She then added that after meeting the 2<sup>nd</sup> Defendant, she immediately registered a caution over the suit property on 27<sup>th</sup> of December 2011 to protect her interests. She also said that on 12<sup>th</sup> of January 2012, she swiftly made a formal complaint to Hardy Police Station to report the loss of her original title deed to the suit property. She also said that on the same day she further made another formal complaint to the Ongata Rongai Police Station over the illegal transfer of the suit property to the 2<sup>nd</sup> Defendant. She denied being indolent in protecting her interest in the suit property stating that she acted expeditiously, with clean hands and followed the appropriate legal channels to protect her interests in the suit property. On those grounds she sought for the court to allow this Application.

The issue arising for determination is whether or not to grant the prayer of a temporary injunction to the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must mention to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

***“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”***

With that background laid down, the Plaintiff/Applicant has asserted that she is the registered proprietor of the suit property having purchased the same from the previous owner William Kepaiwua Melonyie. She intricately described the whole process that she and the vendor followed in order for her to purchase the suit property. She annexed copies of her sale agreement with the vendor, application for land control board consent, the actual consent, the duly executed transfer form and finally a copy of her title deed. She informed the court that she had misplaced her original title deed to the suit property, a matter she reported to the police, but asserted strenuously that she has never sold the suit property to anybody, let alone the 1<sup>st</sup> Defendant. She averred that she and the Defendants were complete strangers and only met after

the 1<sup>st</sup> Defendant fraudulently transferred the suit property to the 2<sup>nd</sup> Defendant, a matter that she reported to the police and the reason for her filing this suit. The 1<sup>st</sup> Defendant on her part averred that she is a bona fide purchaser of the suit property for value without notice and that the 2<sup>nd</sup> Defendant is the duly registered proprietor of the suit property, having purchased the same from her. The 1<sup>st</sup> Defendant in her Replying Affidavit stated that the Plaintiff was heretofore a complete stranger to her and they had never met before. The 1<sup>st</sup> Defendant did not shed any light as to how she came to be the registered owner of the suit property. She did not disclose to the court from whom she purchased the suit property from. She did not produce any sale agreement, transfer form, land control board consent in evidence. She left the court in complete darkness on this issue. The 2<sup>nd</sup> Defendant claimed to have purchased the suit property from the 1<sup>st</sup> Defendant after personally conducting all the necessary due diligence, including meeting all the previous owners of the suit property. This assertion was denied by the Plaintiff who informed the court that she had never met the Defendants. I am inclined to believe the Plaintiff that she is indeed the duly registered proprietor of the suit property going by the evidence that she produced to support her claim. The Defendants on the other hand appear to make false allegations of being bona fide purchasers of the suit property. The 1<sup>st</sup> Defendant has left the court in darkness over how she got the suit property transferred to her by a complete stranger the Plaintiff. The 2<sup>nd</sup> Defendant's claim of having met the Plaintiff prior to the purchase seems to be untrue owing to the fact that he never met the Plaintiff until he had purchased the suit property. My overall finding at this interlocutory stage is that the Plaintiff has demonstrated that she has a genuine and arguable case and therefore a prima facie case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

***“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”***

Further, land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of possession over the suit property until this suit is heard and determined.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

***“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”***

In this particular suit, the suit property is in the possession of the Plaintiff. It was reported that the 2<sup>nd</sup> Defendant was trespassing the same which prompted the filing of this suit. I find that the balance of convenience lies in favour of the Plaintiff.

Having satisfied all the 3 conditions for the grant of a temporary injunction, this Application is allowed with costs to the Plaintiff.

It is so ordered.

**SIGNED AND DATED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 24<sup>TH</sup> DAY OF APRIL 2018.**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED AT NAIROBI BY JUSTICE SAMSON O. OKONG'O THIS 3<sup>RD</sup> DAY OF MAY 2018.**

**SAMSON O. OKONG'O**

**PRESIDING JUDGE**