



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 9 OF 2020

PETER MWANGI GACHERU.....PLAINTIFF/APPLICANT

VERSUS

CHANIA TRAVELLERS CO-OPERATIVE

AND CREDIT SOCIETY LTD 1ST DEFENDANT/RESPONDENT

DANIEL TIMOTHY MURIUKI 2ND DEFENDANT/RESPONDENT

SPIKED GARAGE LIMITED.....3RD DEFENDANT/RESPONDENT

RULING

Vide a Notice of Motion Application dated **31st January 2020**, bought under **Sections 1A, 1B, 3A 63(a)** of the **Civil Procedure Act, Order 40 rule 1(a) and b** and **Order 51 rule 1** of the **Civil Procedure Rules, Sections 3 and 13** of the **Environment & Land Act, Sections 68, 69** of the **Land Registration Act**, the Plaintiff/Applicant sought for the following orders.

1. That the 1st Defendant/Respondent either by itself, agents, servants, directors, employees, assignees, or persons acting under its direction, control, supervision and/ or authority be barred by an order of temporary injunction from collecting rent, entering into any further tenancy or lease agreements or in any way whatsoever exercising any mandate, authority, control or supervision or dealing whatsoever as a landlord or the suit property pending hearing and determination of this suit.

2. That an order of Mandatory Injunction do issue compelling the 2nd and 3rd Defendants/Respondents or any other tenants or prospective tenants to forthwith enter into tenancy/lease agreements pay rent as and when it falls due to or with the Plaintiff/Applicant pending further orders of this Court. In default the Plaintiff be at liberty to exercise such rights conferred upon him as a landlord.

3. Costs of this application.

The Application is supported by the affidavit of **Peter Mwangi Gacheru** dated **31st January 2020**, together with annexures marked **PMG 1 – PMG XVIV**, as well as a Supplementary Affidavit dated **13th April 2021**.

He averred that he is the beneficial owner of the property known as **Thika Municipality Block 8/184**, having been issued with an allotment letter dated **24th November 1994**. He further averred that he learned of irregularities and the suit property being transferred to third parties and commenced proceedings before the **National Land Commission**.

It was his contention that the findings of the **National Land Commission** were in his favor and the **Chief Land Registrar** was directed under **section 14(5)** of the **National Land Commission Act**, to revoke the title deed held by the 1st Defendant/Respondent vide **Kenya Gazettee Vol.CXIX- No 97 of July 17th 2017**. That the 1st Defendant/ Respondent was aggrieved by the determination of the Commission and commenced Judicial Review Proceedings before this Court being **JR ELC Case No.9 of 2017**, and the Court dismissed the 1st Defendant's/Respondent's case with Costs.

It was his further contention that the 1st Defendant/Respondent cannot continue to receive rent from the 2nd Defendant/Respondent or any other 3rd party since it holds no title or proprietary stake over the suit property.

The Application is opposed through the 1st Defendants/Respondent's Replying Affidavit dated **7th April 2021**, sworn by **John Kiarri Gicharu**, who averred that the Plaintiff/Applicant does not deserve injunctive reliefs for reasons that **Summons to Enter Appearance** were

not extracted and served and that the Plaintiff/Applicant did not meet the terms in his letter of allotment so as to entitle him to any legal rights.

He further averred that the 1st Defendant/Respondent is the beneficial owner who holds a Certificate of title issued on the **6th September 2012**. That they are innocent purchasers for value having purchased the land from **Patrick Karanja Ngugi**, who had acquired the suit property from **Cecilia Wamaitha Mwangi**, and that there is a Charge against the property in favor of Cooperative Bank of Kenya.

It was his contention that the 1st Defendant/Respondent already filed an Appeal at the Court of Appeal and a Notice of Appeal has also been filed in this Court.

The 1st Defendant/Respondent also filed Grounds of Opposition dated **12th March 2021**. The 2nd Defendant/Respondent's filed a Replying Affidavit dated **7th July 2021**, by **Daniel Muriuki**, who averred that he has all along been paying lease premiums to the 1st Defendant/Respondent amounting to **Kshs.100,000/=** monthly by virtue of a lease or rental agreement. He further averred that until the dispute between the Plaintiff/Applicant is determined with finality, the 2nd and 3rd Defendants/Respondents should be ordered to deposit the rent payable as per the tenancy lease terms with the 1st Defendant/Respondent to this Honorable Court.

The Court directed that the instant Application be canvassed by way of written submissions. The Plaintiff/Applicant filed his written submissions dated **23rd February 2021**, through the **Law Firm of Wokabi Mathenge & Co. Advocates**, while the 1st Defendant/Respondent's written submissions dated **7th April 2021**, were filed through the **Law Firm of J. Harrison Kinyanjui Advocates**. The 2nd and 3rd Defendants/Respondents did not file their respective submissions.

The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and notes that the main issue for determination is **whether the Plaintiff/Applicant's Application is merited**.

The Plaintiff/Applicant having sought for Injunctive Orders, is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria”.

The Court herein will be guided by the principles set out in the case of **Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358**, which are:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might 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. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

Firstly, the Plaintiff/Applicant needed to establish that he has a *prima-facie* case with probability of success. It is very clear that *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“A case in 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”.

It is the duty of the Plaintiff/Applicant herein to establish that he has a *prima-facie* case. In the instant case, the Plaintiff/Applicant maintains that he is the lawful allottee by virtue of a finding by the **National Land Commission**. That the said Commission was exercising its mandate under **section 14** of the **National Land Commission Act No. 5 of 2012**, to review all grants and dispositions and it made a finding of the legality and propriety of the subsequent grants or allocation processes.

According to the Plaintiff/Applicant, the findings of the **National Land Commission** were in his favor and the **Chief Land Registrar** was directed under **section 14(5)** of the **National Land Commission Act** to revoke the title deed held by the 1st Defendant/Respondent vide **Kenya Gazette Vol.CXIX- No 97 of July 17th 2017**. In essence, the Plaintiff/Applicant maintains that the said **Certificate of title** held by the 1st Defendant/Respondent stands revoked by operation of law and hence by that decision, the 1st Defendant/Respondent cannot claim any proprietary rights.

On the other hand, the 1st Defendant/Respondent maintains that it has a valid title and should enjoy legal protection, hence the Plaintiff/Applicant's title if any, has not yet crystallized.

The Defendants/Respondents have all averred that there was Judicial Review proceedings filed but it is evident the said Judicial Review was determined and dismissed and there is no decision from the Court of Appeal revoking the said decision. Further there is no evidence that the Plaintiff/Applicant has been barred from enforcing what the **National Land Commission** had recommended.

It is the Court's considered view that without an Appeal or Court Orders setting aside the determination in **JR ELC Case No. 9 of 2017**, the said judgement is still enforceable and has the force of law. In light of the above, and the prevailing conditions, the Plaintiff/Applicant has

established that he has a prima facie case with probability of success.

Touching on the second limb of irreparable damages, the Plaintiff/Applicant as a bonafide allottee and whose rights were confirmed through a Constitutional process in **July 2017**, has stayed for long without enjoying his proprietary rights. It is this Court's considered view that the Plaintiff/Applicant may suffer irreparable damages which might not be awarded by way of compensation. See the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, where the Court

held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.

On the third limb, the Court finds that the balance of convenience tilts in favor of the Plaintiff/Applicant who has a finding from National Land Commission in his favour directing that the 1st Defendant/Respondent title should be revoked.

The Plaintiff/Applicant has also sought for a mandatory injunction. In the case of **Kenya Breweries Ltd & Ano....Vs....Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109**, the Court held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See **Volume 24 Halsbury Laws of England 4th Edition Paragraph 948**.

It is evident that Mandatory Orders of Injunction are granted in very special and exceptional circumstances at the Interlocutory stage. The Court finds that the said exceptional circumstances are applicable in this Case since a constitutional body found that the 1st Defendant/Respondent title should be revoked and the Plaintiff/Applicant was found to be the rightful owner of the suit property.

In any event the 2nd and 3rd Defendants/Respondents are not opposed to depositing the rental income in an interest earning account or in Court before the dispute herein is resolved.

Having carefully considered all the available evidence, the Court finds and holds that the **Notice of Motion Application** dated **31st January 2020**, is merited and the same is allowed entirely in terms of **prayers No. 3 and 4**. Costs will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF JULY 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Mathenge for the Plaintiff/Applicant

Mr. Harrison Kinyanjui for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent

No appearance for the 3rd Defendant/Respondent

L. GACHERU

JUDGE

29/7/2021