



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 41 OF 2020**

**ETHICS AND ANTI-CORRUPTION COMMISSION .....PLAINTIFF**

**VERSUS**

**CHARLES GEKONDE OTARA..... 1<sup>ST</sup> DEFENDANT**

**DR. CHRISTA OTARA.....2<sup>ND</sup> DEFENDANT**

**SANDRA CATHLEEN OTARA ..... 3<sup>RD</sup> DEFENDANT**

**GRACE KERUBO MOSE..... 4<sup>TH</sup> DEFENDANT**

**VICTOR MOKAYA NYAMBATI ..... 5<sup>TH</sup> DEFENDANT**

**HEZEKIAH MACHORA OIRA MOGARE ..... 6<sup>TH</sup> DEFENDANT**

**KISII DISTRICT LAND REGISTRAR ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. By a Notice of Motion d dated 27<sup>th</sup> November 2020 the Plaintiff filed an application seeking the following orders:

a) Spent.

b) Pending the inter partes hearing and determination of this application, the 3<sup>rd</sup> and 5<sup>th</sup> Defendants /Respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from alienating, selling, charging, leasing, developing, sub-dividing, wasting, transferring, disposing or in any other way dealing with the parcel of land known as Land Reference Number Kisii Municipality/Block 11/112 and 169.

c) Pending the hearing and determination of this suit the 3<sup>rd</sup> and 5<sup>th</sup> Defendants/Respondents by themselves, their agents, servants and/or employees or any other person whatsoever be restrained from alienating, selling, charging, leasing, developing, sub-dividing, wasting, transferring, disposing or in any other way dealing with the parcel of land known as Land Reference Number Kisii Municipality/Block 11/112 and 169.

d) The costs of this application be provided for.

2. The application is based on the grounds stated on the face of the application and the supporting affidavit of Margaret Matheka, an investigator with the Ethics and Anti- Corruption Commission (EACC) sworn on the 27<sup>th</sup> November 2020.

3. In the said affidavit Ms. Matheka depones that on 22<sup>nd</sup> April 1977 and in total disregard of the pre-existing use Gusii County Council irregularly caused a Green Card to be opened at Kisii Land Registry in eh name of Gusii County Council for parcel number KISII MUNICIPALITY/BLOCK/11/112 measuring 0.4543 Hectares under Registry Index Map Sheet Number 16/10. Subsequently on the same date a white card for parcel number KISII MUNICIPALITY/BLOCK/11/112 and a lease was registered in the name of the 1<sup>st</sup> Defendant purportedly granted by the Gusii County Council for a term of 99 years from 1.10.1975 and a certificate of lease issued.

4. She further depones that on the 8<sup>th</sup> July 1992, the 1<sup>st</sup> Defendant transferred the suit property to Dr.Christa Otara, the 2<sup>nd</sup> Defendant and a Certificate of lease was issued on the same day. Subsequently on 22nd December 1997, the suit property was transferred to Sandra Cathleen Otara, the 3<sup>rd</sup> defendant and a Certificate of Lease was issued in her name as recorded in the green card.

5. She depones that on 3<sup>rd</sup> May 2011 and in blatant disregard of the pre-existing public use and without considering the existence of KISII MUNICIPALITY/BLOCK/11/112 on the ground and in the Registry Index Map, Gusii County Council irregularly caused a green card to be opened at the Kisii Land Registry for parcel number KISII MUNICIPALITY/BLOCK/11/169 measuring 0.216 Hectares. The said parcel forms part of KISII MUNICIPALITY/BLOCK/11/112. On the same day a white card was opened and a lease registered in the name of the 4<sup>th</sup> defendant for a term of 99 years from 1<sup>st</sup> September 1998 and a Certificate of Lease was issued. On 19<sup>th</sup> August 2011, the 4<sup>th</sup> Defendant transferred parcel number KISII MUNICIPALITY/BLOCK/11/169 to the 5<sup>th</sup> Defendant and Certificate of Lease was issued on the same day.

6. It is her further deposition that the investigations by the Applicant established that on the ground, parcel number KISII MUNICIPALITY/BLOCK/11/112 and KISII MUNICIPALITY/BLOCK/11/169 are one and the same property with the latter overlapping the former, though the title numbers exist concurrently. ,

7. According to the deponent, the investigations revealed that suit property has always been part of the larger KISII MUNICIPALITY/BLOCK/11 known as Milimani Government quarters that was alienated for the construction of Government houses for civil servants within the region of South Nyanza and which said houses were built and as such neither the 6<sup>th</sup> Defendant, the Gusii County Council nor any other person had a right to allocate or lease the suit property or any part thereof for private use. It is the applicant's contention that the purported alienation and issuance of a Certificate of Lease to the 1<sup>st</sup> and 4<sup>th</sup> Defendants was therefore null and void *ab initio*.

8. It is deponed that at the date of alienation, there existed Government houses number KISII/HOU HG 4 and HG 18 designated as State Guest Wing which were under the management of the Department of Housing and it is from the compound of the said houses that the subject property was hived off. It is the Plaintiff's/Applicant's contention that the alienation and transfer of the suit property to the 1<sup>st</sup> and 4<sup>th</sup> Defendants was fraudulent, illegal null and void for all intents and purposes.

9. It is against the foregoing background that the Plaintiff/Applicant seeks to restrain the 3<sup>rd</sup> and 5<sup>th</sup> Respondents from transferring, disposing of or otherwise dealing with the suit property pending the hearing and determination of the suit herein as she fears that if this happens the suit shall be rendered nugatory.

10. In response to the application, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents file a Replying Affidavit sworn by Dr. Charles Gekonde Otara on the 5<sup>th</sup> day of March 2021 in which he explains how the 1<sup>st</sup> to 3<sup>rd</sup> defendants acquired the suit property. He depones that way back in the 70s, he applied to the Commissioner of Lands for two plots; one for the construction of a hospital and the other one residential dwelling house. His application was accepted and he was issued with two letters of allotment which he duly paid for. He depones that he later applied to interchange the plot and the said application was approved. He was then issued with a lease by the County Council of Gusii. It is his averment that he subsequently developed the plots by constructing a modern hospital on one plot and a residential house on the other. He avers that he later transferred the suit property to the 2<sup>nd</sup> defendant who is his wife and she in turn transferred it to the 3<sup>rd</sup> Defendant who is their daughter. It is his contention that the suit property constitutes their only residential home.

11. The court directed that the application be canvassed by way of written submissions and the Applicant filed their submissions dated 12<sup>th</sup> April 2021 while the Respondents filed their submissions dated 7<sup>th</sup> June 2021 in which they have articulated their respective positions.

12. Learned counsel for the Applicant summarized the contents of the Applicant's affidavit and dismissed the Respondent's explanation of how they acquired the suit property terming it as a process that does not exist in law. It is his contention that at the time, there were two distinct regimes that governed the acquisition of government land; the Government Lands Act Cap 280 and the Local Government Act Cap 265 of the Laws of Kenya.

13. He submitted that the Plaintiff has through its investigations established that the suit property is public property under the management of the Ministry of Transport, Infrastructure, Housing and Urban Development. Further that their investigations revealed that the suit property was not available for sub-division, transfer or allocation to private persons as it was reserved for Residential Government housing and the said houses had been built from the 1960s.

14. Counsel relied on the celebrated case of **Giella V Cassman Brown 1973. E.A 358** and proceeded to demonstrate that the Applicant had met each of the conditions set out therein. He cited the various authorities) including the case of **Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, **Celestine Ann King & 4 Others v Said Hassan Mwatsumiro & 5 Others (2020) eKLR**, **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR**, **Ahmed v Mannasseh & Another and Kenya Anti - Corruption Commission v Stanley Mombo Amuti (2011) eKLR** to illustrate that the Applicant ought to be granted an order of temporary injunction.

15. On the other hand, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents also summarized the averments in the Plaintiff's Supporting Affidavit and those in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Replying Affidavit and submitted that the Applicant had failed to meet the conditions for injunction set out in the Giella case. He faulted the Plaintiff for failing to enjoin the National Land Commission which was the successor of the Commissioner of Lands yet the allocation was done by the Commissioner of Lands. He also faulted the Plaintiff for failing to enjoin the County Government of Kisii as the leases were issued by its predecessor, the Gusii County Council. It was his contention that the allegations of overlap of the suit property as well as fraud were not supported by any documents. Furthermore, he claimed that the Applicant was guilty of laches as the suit was filed in court 46 years after the title was issued. He ended by submitting that the suit property was the only residential home of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the balance of convenience was therefore in their favour.

## ISSUES FOR DETERMINATION

16. Having considered the pleadings, Notice of Motion, affidavits and rival submissions, the singular issue for determination is whether the plaintiff/ Applicant has met the threshold for the grant of injunctive orders.

## ANALYSIS AND DETERMINATION

17. In order for the court to exercise its discretion in granting injunctive relief, the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

*“First, the applicant must show that he has 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 would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”*

18. I will now proceed to analyze the application from the foregoing criteria;

### **Whether Applicant has demonstrated that it has a prima facie case with a probability of success**

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

*“A prima facie case is... one 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”*

19. Counsel for the Plaintiff has submitted that the Plaintiff has demonstrated that it has a prima facie case with a probability of success as it has shown that it has a clear unmistakable right to be protected which is threatened by the Defendant. It is his submission that the Defendants' invasion of the suit property before the question of ownership is determined is detrimental, the Plaintiff and the public at large. It is counsel's submission that even without delving into the merits of the case, the Plaintiff has demonstrated that its rights have been or are threatened with violation. Counsel has relied on the case of **Celestine Ann King & 4 Others v Said Hassan Mwatsumiro & 5 Others (2020) eKLR** where the Court of Appeal relying on the case of **American Cyanamid Co (No.1) v Ethicon Ltd (1975 UKHL and Central Bank of Kenya & Another v Uhuru Highway Development Ltd & 4 Others (2000) eKLR** held that in a dispute concerning two competing proprietary interests in a parcel of land, it is no part of the court's function to try and resolve the conflicts of evidence on an affidavit as to facts on which the claims of either party may ultimately depend nor decide difficult questions of law which call for detailed argument and mature consideration.

20. In the instant case the Plaintiff has raised questions regarding the manner in which the Defendants acquired the suit property which, according to the Plaintiff, is public land which was reserved for the construction of Government houses. On the other hand the Defendants have vehemently denied the accusations leveled against them. There is no doubt that the Plaintiff will be required to prove its claim during the main suit. It is not the role of the court to determine whether or not the Defendants' title was lawfully issued at this stage. However, the documents annexed to the Plaintiff's application prima facie show that there are serious questions to be tried by the court. It is therefore my finding that the Plaintiff has demonstrated that it has a prima facie case with a probability of success.

### **Whether the Applicant shall suffer irreparable loss if the injunction is not granted.**

21. Even though an Applicant who seeks an injunction would ordinarily be required to demonstrate that he is likely to suffer irreparable damage which cannot be compensated by an award of damages, it is trite law that where there is a breach of the law an Applicant cannot be compelled to accept damages as compensation. In the case of **Said Ahmed v Mannaseh Benga & Another (2019) eKLR** the court held as follows:

*“Where it is clear that the Defendant's acts complained of is or may well be unlawful, the issue of whether damages can be an adequate remedy for the Plaintiff does not fall for consideration . A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it”. Support for this position is to be found in the Court of Appeal decision in the case of **Aikman v Muchoki (1984) KLR353**.*

22. This position was also restated in the case of **Siro Mosioma v Housing Finance Company of Kenya & 3 Others (2008) e KLR** where Warsame J (as he then was) stated that

*“damages is and cannot be substituted for the loss which is occasioned by a clear breach of the law; the financial strength of a party is not always a factor to refuse an injunction.”*

### **Balance of Convenience**

23. In the instant case, the Defendants have argued that they were issued with the titles to the suit property 46 years ago and that the Plaintiff is guilty of laches. It is not lost to me that the Plaintiff has raised the question of fraud and therefore the timeliness of its claim is dependent on when the fraud was discovered. However, the Defendants have also raised valid concerns regarding the non-joinder of the National Land Commission and the County Government of Kisii as the successors in title of the Commissioner of Land and Gusii County Council respectively. In the circumstances, I have to decide this application on a balance of convenience.

24. The purpose of a temporary injunction is to preserve the property in dispute pending the disposal of the suit. It is not in dispute that the 1<sup>st</sup> Respondent has been in occupation of the suit property for the last 46 years. On the material placed before the court, there is nothing to suggest that the Defendants intend to dispose of the suit property as they have stated that they have a home thereo. I also note the Plaintiff has carefully crafted his application in such as way that it has not prayed for an order to stop the Defendants from entering or occupying the suit property. What the Applicant seeks is an order to stop the Defendants from alienating, transferring or charging the suit property pending the hearing and determination of the suit herein. In the circumstances, and in applying the balance of convenience test, the order that commends itself to me is that the status quo prevailing as at the date of this ruling shall maintained pending the hearing and determination of the suit herein. This means that the Defendants shall remain in occupation of the suit property but they shall not alienate, sell, charge, lease, develop, sub-divide, waste, transfer or dispose of the parcel of land known as Land Reference Number Kisii Municipality/Block 11/112 and 169.

The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY, 2021.**

**J.M ONYANGO**

**JUDGE**