



**THE REPUBLIC OF KENYA**

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

**ELC CASE NO. 119 OF 2020**

**REUBEN MAGONDU WARIRAH.....PLAINTIFF**

**=VERSUS=**

**THE DEPUTY COUNTY COMMISSIONER**

**KASARANI SUB-COUNTY, NAIROBI COUNTY.....1ST DEFENDANT**

**THE CABINET SECRETARY**

**MINISTRY OF INTERIOR & COORDINATION**

**OF NATIONAL GOVERNMENT.....2ND DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT**

**RULING**

1. The plaintiff initiated this suit through a plaint dated 25/6/2020. He sought the following verbatim reliefs against the defendants:

***a) A declaration that the plaintiff is the rightful and indefeasible owner of the suit property, Land Reference Number 24187 (Title Number I.R 86729), Kasarani Nairobi, having legitimately acquired good title thereto.***

***b) A permanent injunction restraining the defendants, their servants, employees, agents or any other person acting at their behest from in any way unlawfully interfering with the suit property, trespassing, damaging, destroying, entering into or causing any hindrance or interference with the quiet and /or peaceful user and enjoyment of the suit property known as Land Reference Number 24187 Kasarani Nairobi or any portion or part thereof.***

***c) A permanent injunction be and is hereby issued restraining the defendants, their servants, employees, agents or any other person acting at their behest from harassing, threatening, intimidating, and or in any manner whatsoever, interfering with the plaintiff's lawful development of the suit property or erection of a perimeter fencing or wall and any other structures as may be lawfully erected by the plaintiff on the suit property known as Land Reference Number 24187 Kasarani Nairobi.***

***d) An injunction restraining the defendants, their servants, workmen and agents, or anyone under them issuing or uttering any false objections to the plaintiff's title and development of the suit property.***

***e) Damages against the defendants jointly or severally, for loss of the plaintiff's investment opportunity.***

***f) Interest thereon.***

***g) Costs of the suit.***

***h) Any other relief the court deems fit to grant.***

2. Together with the plaint, the plaintiff brought a notice of motion dated 25/6/2020 seeking the following interlocutory injunctive reliefs:

**1. Spent**

**2. Spent**

**3. That a prohibitory injunction restraining the respondent, their servants, employees, agents or any other person acting at their behest from in any way unlawfully interfering with the suit property, trespassing, damaging, destroying, entering into or causing any hindrance or interference with the quiet and/or peaceful user and enjoyment of the suit property known as Land Reference Number 24187 Kasarani Nairobi or any portion or part thereof, pending the hearing and determination of this application and/or suit.**

**4. That a prohibitory injunction be and is hereby issued restraining the respondents, their servants, employees, agents or any other person acting at their behest from harassing, threatening, intimidating, and or in any manner whatsoever interfering with the plaintiff's lawful development of the suit property, erection of a perimeter fencing or wall, and other structures as may be lawfully erected on the suit property known as Land Reference Number 24187 Kasarani Nairobi, pending the hearing and determination of this application and/or suit.**

**5. A prohibitory injunction restraining the respondents, their servants, workmen and agents, or anyone under them from issuing or uttering any false objections to the plaintiff's title and development of the suit property, pending the hearing and determination of this application and/or suit.**

**6. Such other or further orders as the court may deem apt in the circumstances of this suit.**

**7. An order of cost of the suit.**

3. The said notice of motion is the subject of this ruling. It was supported by the applicant's affidavit sworn on 25/6/2020. It was canvassed through written submissions dated 18/6/2021. In summary, the applicant's case was that he was the registered proprietor of **Land Reference Number 24187** measuring 0.1799 of a hectare and comprised in **Grant Number IR 86729**, registered on 21/8/2001, situated in Kasarani, Nairobi (**the suit Property**). He purchased the suit property from one **Ronald Muge Cherogony** at a consideration of Kshs.3,200,000 through a sale agreement dated 15/8/2007. The suit property is one of the twelve plots sub-divided out of **Land Reference Number 13620** pursuant to approval of the relevant part development plan by the Director of Physical Planning on 10/8/1998 under Departmental Reference Number **42/31/98/3A**, registered on 23/11/1998.

4. The plaintiff further contended that soon after purchasing the suit property, he was approached by the Department of Provincial Administration, through a **Mr Evans Mwaura Mutari**, an officer in the Office of the 1st defendant, who offered to assist him and other land owners expel people who had encroached on various plots along the adjacent road. Since then, officers of the 1st defendant had consistently and maliciously abused their offices by persistently intimidating him by: issuing false and malicious objections to his applications for development approvals relating to the suit property; issuing threats of reclaiming the suit property; and attempting to obtain money from him on the unfounded ground that the money was necessary for their continued protection of his interest in the suit property. As a result of his refusal to concede to the intimidation, the 1st defendant abused him by making unfounded claims to the National Environmental Management Authority and to the Nairobi City County Government to the effect that the suit property was public land which he (the Plaintiff) was attempting to grab.

5. The plaintiff added that he had been unable to take actual possession, fence or develop the suit property since purchasing it in 2008 due to the constant interference by the defendants. He further contended that the above acts by the defendants had impeded his peaceful user, enjoyment and development of the suit property, and had caused him pecuniary loss of investment opportunity.

6. The defendants filed a memorandum of appearance dated 7/10/2020 and a statement of defence, similarly dated 7/10/2020. The statement of defence was expressed as drawn by **Freedom Kubai**. The defendants did not, however, file a response to the application. Similarly, they did not file submissions on the application.

7. This case was previously handled by Bor J. At the behest of the plaintiff who filed an application dated 25/11/2020 seeking Judge Bor's recusal, the Learned Judge recused herself on 17/12/2020. The Presiding Judge of the court subsequently allocated the file to me. When the matter was listed before me on 24/2/2021, a Ms Kubai appeared in the virtual court and indicated that the respondents had filed grounds of opposition and intended to also file a replying affidavit. The court granted the respondents 14 days within which to file the replying affidavit and a further 14 days from the date of service of the applicant's written submissions, within which to file their written submissions. The defendants neither filed the replying affidavit nor the written submissions. Further, a perusal of the electronic portal relating to this suit reveals that the only grounds of opposition which the respondents/defendants filed related to the plaintiff's application for recusal of Bor J, dated 25/11/2020. There were no grounds of opposition relating to the plaintiff's application dated 25/6/2020, the subject of this ruling.

8. In the statement of defence dated 7/10/2020, the defendant made general denials of the averments made by the plaintiff in the plaint. They denied the averments made by the plaintiff in paragraphs 13, 14, 15 and 16 of the plaint and stated that, if any actions were carried out by them on the suit property, the same were done in good faith. No attempt was made in the defence to impeach the plaintiff's title.

9. The plaintiff canvassed the application through written submissions dated 18/6/2020, filed through the firm of **M/s Lubullellah & Associates**. Counsel for the applicant submitted that the applicant's registration as proprietor of the suit property was, in the absence of any vitiating evidence, recognized under the law, was absolute, and was indefeasible and conclusive proof of ownership. It was further submitted that the defendants had not sought any relief by way of a counterclaim seeking cancellation of the plaintiff's title or a declaration that the suit property was public land. Counsel contended that in the circumstances, the defence by the defendants was a sham. Counsel relied on the following decisions; (i) **Ardhi Highway Developers v West End Butchery & 6 others (2015)eKLR**; (ii) **Arnacherry Limited v Attorney General 92014 eKLR**; (iii) **Patrick Musumba v National Land Commission & others (2016) eKLR**; (iv) **African Gas Oil Company Ltd v Attorney Genera & 3 others (2016) eKLR**; and **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others (2018) eKLR**.

10. I have considered the application together with the evidential materials and submissions placed before this court. I have also considered the relevant legal framework and jurisprudence. The single question falling for

determination in this application is whether the plaintiff has met the criteria upon which our courts exercise jurisdiction to grant an interlocutory injunctive relief. The said criteria was outlined in the case of **Giella v Cassman Brown (1973) EA 358**. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that he stands to suffer irreparable damage that may not be adequately indemnified through an award of damages. Third, should the court have doubt on both or either of the above two requirements, the application is to be determined based on the balance of convenience. Lastly, at the interlocutory stage, the court does not make conclusive or definitive findings on the substantive issues in the suit. Its focus is on whether the above criteria has been satisfied.

11. The gravamen of the applicant is that the defendants are interfering with his right to peaceful enjoyment of the suit property. He has presented uncontroverted evidence indicating that he is the registered proprietor of the suit property. Although the defendants offered to file a replying affidavit to respond to the application, they did not do so. Consequently, the application is unopposed.

12. Secondly, the defendants filed a defence in which they made general denials of the allegations made in the plaint filed by the plaintiff. The defendants did not put forth any pleadings challenging the plaintiff's title. In the absence of any challenge against the plaintiff's title, the court is obligated to accord the plaintiff interlocutory protection within the framework of **Article 40** of the Constitution, **Sections 24** and **25** of the Land Registration Act, and **Order 40 rule 2** of the Civil Procedure Rules. Put differently, in the absence of any challenge by the defendants against the title held by the plaintiff, the court is satisfied that the plaintiff has made out a prima facie case against the defendants, with a probability of success.

13. The right to property is protected under Article 40 of the Constitution. The rights of a registered proprietor of land are safeguarded under **Sections 24** and **25** of the **Land Registration Act**. No amount of damages can be taken to be an adequate substitute for that right, moreso in a situation such as this one where the respondents have elected not to respond to the plea for interlocutory injunctive relief.

14. Consequently, in the absence of any opposition to the application dated 25/6/2020, the court is satisfied that the plaintiff, as holder of a registered title, has satisfied the criteria upon which our courts exercise jurisdiction to grant an interlocutory injunctive relief. The court accordingly issues the following interlocutory order in favour of the plaintiff:

*(a) A prohibitory injunction is hereby issued restraining the*

*defendants, their servants, agents, and all persons acting under their instructions or at their behest or on their behalf, from unlawfully interfering with the plaintiff's rights over the suit property, Land Reference Number 24184, comprised in Grant Number IR 86729, pending the hearing and **determination of this suit.***

*(b) The above restraining order shall remain in force for twelve (12) months.*

*(c) Costs of the Application shall be in the cause*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF SEPTEMBER 2021**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr. Lubullelah for the Plaintiff

Court Assistant: Lucy Muthoni

**NOTE:**

*The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually from Thika.*

**B M EBOSO**

**JUDGE**