



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 39 OF 2020**

**TERESIAH WAMBUI NJUGUNA.....PLAINTIFF/ APPLICANT**

**VERSUS**

**EMMA WANGARI WANGUI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPH KINYANJUI MUTHONI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOYCE MUTHONI WAITHAKA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**REGISTRAR OF TITLES,**

**THIKA DISTRICT LAND REGISTRY.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**KENYA COMMERCIAL BANK.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated **15<sup>th</sup> June 2020**, by the Plaintiff/ Applicant seeking for orders that;

***1. That a permanent injunction do issue restraining the Defendants/ Respondents whether by themselves, or whosoever from trespassing, alienating occupying, charging, transferring or otherwise dealing with Ruiru/Kiu Block 2/ 5874 and Ruiru/ Kiu Block 2/5875 both measuring approximately 0.0410 Ha located at Ruiru Township Kiambu County pending the hearing and determination of this suit***

***2. That the following entries entered in the green card as hereunder be cancelled by the 4<sup>th</sup> Defendant***

***-Entry No. 3 done on 8<sup>th</sup> July 2014, to the 2<sup>nd</sup> Defendant be cancelled***

***- Entry No. 5 done on 6<sup>th</sup> May 2015, to the 3<sup>rd</sup> Defendant be cancelled***

***-Entry Numbers 6 and 7 entered on 6<sup>th</sup> May 2014, and 19<sup>th</sup> November 2016, be cancelled and the 1<sup>st</sup> Defendant be compelled to substitute the Plaintiff's title with her own security at the Kenya Commercial Bank Limited.***

***3. That the Plaintiff be allowed to sell the 1<sup>st</sup> Defendant's house located at Kenyatta Road which was built out of the proceeds of the sale of Ruiru/Kiu Block 2/5874 and Ruiru/Kiu Block 2/5875.***

***4. That the costs be provided for by the Defendants/ Respondents***

The Application is premised on the grounds that after the subdivision of Plot Number **3919**, by the Plaintiff, **plots No. Ruiru/Kiu Block 2/5874 and Ruiru Kiu Block 2/5875**, were created and entry number 1 was done on the green card on **2<sup>nd</sup> April 2008**, in the name of the Plaintiff/ Applicant. That upon compliance with requisite steps of conveyancing, two titles were issued to the Plaintiff/ Applicant being **L.R 2/5874 and 2/5875**, as per entry No. 1 on the green card and the somewhere among the ten issued to the Plaintiff after subdivision. That the said subdivision is indicated in the mutation form dated **6<sup>th</sup> March 2008**, while at the back of the said form, a sketch on

Development Plan is drawn, showing how the Plaintiff carried out the subdivision.

That in **November 2013**, the 1<sup>st</sup> Defendant visited the Plaintiff's shop, who mentioned that she was rushing to the Thika Lands Registry to conduct searches of her two plots to confirm status, as she had already sold them to **Lucy Thua** and needed to transfer the same to her. That the 1<sup>st</sup> Defendant indicated to the Plaintiff that she was also headed there and as she worked at the Lands office, she could assist her with the searches. That the Plaintiff/Applicant gave the 1<sup>st</sup> Defendant/Respondent copies of her titles, but that the 1<sup>st</sup> Defendant informed her that because of fraud, a search could only be done at the Thika Lands Registry if one produced an original title, to which the Plaintiff/Applicant handed over the originals to be assisted as the 1<sup>st</sup> Defendant/Respondent was an official at the Thika Land Registry. Further that the 1<sup>st</sup> Defendant/Respondent took both titles but did not return as promised and when the Plaintiff/Applicant inquired on the fourth day the 1<sup>st</sup> Defendant/Respondent went to the Plaintiff's/Applicant's shop and handed over fake titles with a remark that the 1<sup>st</sup> Defendant/Respondent discovered that both titles had exchanged hands and therefore no searches were carried out.

Further that the Plaintiff took the fake titles oblivious of any illegal changes that had been done by the 1<sup>st</sup> Defendant/Respondent. That the Plaintiff/Applicant having sold the two parcels in **2013**, the purchaser took sometime to formalize the purchase, but in **2019**, the purchaser resurfaced and on conducting a search to enable her lodge the transfer papers at the Thika Lands Registry, the Plaintiff/Applicant discovered that the titles which were handed over to her by the 1<sup>st</sup> Defendant/Respondent were fake and that the 1<sup>st</sup> Defendant/Respondent used the Plaintiff's original and genuine titles to defraud the Plaintiff. That upon investigations being carried out by the Police from Ruiru Police Station, it was discovered that the 1<sup>st</sup> Defendant/Respondent duped her husband, the 2<sup>nd</sup> Defendant and transferred the Plaintiff's plots to the 2<sup>nd</sup> Defendant/Respondent, which the 2<sup>nd</sup> Defendant/Respondent sold without knowing how the said two titles were registered under her name. Further that at the Ruiru Police Station, the 2<sup>nd</sup> Defendant informed the Police that the 1<sup>st</sup> Defendant/Respondent had informed him that the 1<sup>st</sup> Defendant's brothers were ganging up with a view to grab her two plots, which her father had bequeathed to her and therefore needed to be assisted by transferring the two plots to the 2<sup>nd</sup> Defendant's/Respondent's name who later sold them to the 3<sup>rd</sup> Defendant and the same have since been charged to the 5<sup>th</sup> Defendant.

That the Plaintiff/Applicant did not enter into any Contract with the 2<sup>nd</sup> Defendant/Respondent nor executed any Sale Agreement with the 2<sup>nd</sup> Defendant/Respondent nor transfer as no consideration was paid by the 2<sup>nd</sup> Defendant to the Plaintiff and the Plaintiff did not know the 2<sup>nd</sup> Defendant. That the 1<sup>st</sup> Defendant/Respondent is solely responsible for forgeries, manufacturing of documents, effecting the same and finally selling the Plaintiff's two plots, whose proceeds was utilized to build her residential house along Kenyatta Road, at Ruiru.

That the Plaintiff/Applicant for a long period of time has known the 1<sup>st</sup> Defendant/Respondent as an official at the Thika lands office and upon that trust, handed over her two titles to the 1<sup>st</sup> Defendant with only the hope of being assisted with official searches. That out of the 10 plots, which were as a result of the subdivision, the Plaintiff sold 8 plots without any issue save for the two which she handed over the original titles to the 1<sup>st</sup> Defendant/Respondent.

In her Supporting Affidavit **Teresiah Wambui Njuguna** averred that in **2008** she carried out subdivision of her property to wit **L.R Ruiru Kiu Block 2/3919**, in which **10 plots** were created and she surrendered the mother titles. That she sold the **8 plots** of land and the two plots she sold to **Lucy Thua**, as per the sale agreement dated **15<sup>th</sup> May 2006**, to which the full purchase price was duly paid and since the purchaser was transferred, she took too long to pick the original titles. She denied ever selling the two plots to the 2<sup>nd</sup> Defendant or ever seeing him before until he was summoned to the Police Station.

The Application is opposed and the 5<sup>th</sup> Defendant/Respondent filed grounds of opposition dated **6<sup>th</sup> July 2020**, to the Notice of Motion Application on the grounds that;

***1. The Motion as taken out is misconceived, incompetent and fatally defective as it seeks final orders in the interlocutory stage. It is trite that no final orders can be issued at the interlocutory stage.***

***2. The Motion and the entire suit fails to disclose any cause of action against the 5<sup>th</sup> Defendant/Respondent it follows therefore that the Application and the entire suit as framed as against the 5<sup>th</sup> Defendant/Respondent is incurable defective and ought to be struck out in limine.***

The 2<sup>nd</sup> Defendant/Respondent **Joseph kinyanjui Muthoni** swore a Replying Affidavit on **27<sup>th</sup> July 2020**, and averred that he did not participate in or issue consent to **Emma Wangari Wangui** to change land title documents mentioned in the Plaintiff's/Applicant's Application. That the 1<sup>st</sup> Defendant/Respondent undertook the land transfer alleging fears that her relatives would possess the land in question against her will, which at the time he believed to be true. Further, that together with the 1<sup>st</sup> Defendant/Respondent, they undertook a sale agreement with **Joyce Muthoni Waithaka**, but they did not conclude the transfer. That he did not undertake any other transaction to facilitate the transfer of land to **Teresiah Wambui Njuguna** and **Joyce Muthoni Waithaka**.

The 5<sup>th</sup> Defendant/Respondent through **Bonnie Okumu**, its Director of Legal Service swore a Replying Affidavit on **22<sup>nd</sup> July 2020**, and averred that the entire Application is defective as the Court has no jurisdiction to award the final orders sought at the Interlocutory stage. The Plaintiff/Applicant has not met the threshold set by law to grant the orders and the suit against the 5<sup>th</sup> Defendant is incompetent. That it raises eyebrows how the Plaintiff/Applicant indicates that the subdivision was conducted in **2008**, and the sale for the last two parcels of land was conducted in **2006** and that a perusal of the agreement reveals that the full purchase price had been paid by then. He averred that the 5<sup>th</sup> Defendant's/Respondent's position is that it conducted due diligence in line with the applicable laws to proceed and charge the suit properties. That as per the bank's records, one **Joyce Muthoni Waithaka**, is the registered owner of the suit properties and the said **Joyce Muthoni** applied for a bank loan and the bank engaged the Law Firm of **Njoroge Kugwa Advocates**, who conducted due diligence and the bank advanced the loan as secured by the titles. That the bank only registered interest is **Kshs. 2,000,000/=** on each parcel and the

titles are only but a security . That according to the bond to attend Court, the Plaintiff/ Applicant has been aware of all the charge of procuring execution from **2018**, and never took any action until **15<sup>th</sup> June 2020**. That the Plaintiff/ Applicant has indicated that she has been labelled as an accomplice in Criminal Case **No. 3825 of 2018**, and granting the orders sought would mean that the Court is granting an advantageous position to a suspected accomplice in appending criminal case. That it is immature to preempt the results of the criminal investigations and the Plaintiff/Applicant has not made out a proper case for the award of the orders being sought and the Plaintiff shall not suffer any prejudice if the Application is disallowed, but the **5<sup>th</sup> Defendant/ Respondent** stands to suffer immeasurable damages.

The **2<sup>nd</sup> Defendant/ Respondent Joseph Kinyanjui Muthoni** swore a Further Affidavit on **2<sup>nd</sup> September 2020** and averred that in **2014**, the **1<sup>st</sup> Defendant/ Respondent** informed him that her father had given her two plots and her uncles were teaming up ready to defraud her and he should assist her in securing the same and informed him that she needed to transfer the same into his name. He averred that he never attended any **Land Board** with a view to be issued with a consent to transfer, but after three weeks, she showed him two titles bearing his name, but he wondered how she managed to transfer the plots without him signing any documents. Further, that after a few months the **1<sup>st</sup> Defendant/ Respondent** informed him that she had gotten a purchaser and sale agreement was prepared which he signed selling the two plots to the **3<sup>rd</sup> Defendant** at an agreed price of **Kshs.3,470,000/=**. That the **3<sup>rd</sup> Defendant/ Respondent** paid the same to his bank account at Family Bank, a total of **Kshs.3,400,000/=**. That on **3<sup>rd</sup> February 2015**, he transferred **Kshs.1,330,000/=** to the **1<sup>st</sup> Defendants/ Respondent's** account and on **19<sup>th</sup> February 2015**, he transferred **Kshs.1,200,000/=** to the **1<sup>st</sup> Defendants** account . Further that on **29<sup>th</sup> December 2015**, he withdrew **Kshs.970,000/=** after he was arrested by Juja Police under the **1<sup>st</sup> Defendant's** instructions and as the Police officer were watching he handed over the cash to the **1<sup>st</sup> Defendant** and they went back to Juja Police Station for clearance, which the **1<sup>st</sup> Defendant/ Respondent** indicated.

That after several years, the Police called him and asked him whether he had bought two plots from the Plaintiff and he indicated he had not to which they showed him a copy of the agreement between him and the **3<sup>rd</sup> Defendant** and he informed them that the plots had been given to him by the **1<sup>st</sup> Defendant/ Respondent**. That apart from the sale agreement, he never signed nor obtained the transfer. Consent to transfer, copy of his ID, PIN, Passport. That he only signed the agreement, but no subsequent documents and was not aware how the **3<sup>rd</sup> Defendant** got them.

The **1<sup>st</sup> Defendant Emma Wangari Wangui** swore a Replying Affidavit on **1<sup>st</sup> July 2020**, and averred that the person who effected the transfer on by the Plaintiff is **Lucy Thua**, being a different person and Identity from her. That she is unaware of the Plaintiff's dealings and engagements and that the Plaintiff/ Applicant has not demonstrated anything to show that she said that she was a lands officer. That the Plaintiff's/ Applicant's statement is skewed and full of false allegations and that she has never been an employee at Thika Lands Office. She denied undertaking any role on behalf of the Plaintiff and she further averred that a criminal case at the Chief Magistrates Court exonerated her . That the allegations are meant to taint her repute and that the **2<sup>nd</sup> Defendant** and the Plaintiff are well known to each other and are driving the suit to settle relationship scores. That her signature appear on documents which she never gave nor signed any spousal consent and she had reported the said acts to the Police. That the Plaintiff and the **2<sup>nd</sup> Defendant/ Respondent** are well known and lived in the Plaintiff's/ Applicant's residence over the period up to **17<sup>th</sup> June 2018**. She opposed the selling of her house as she did not feature in any role as alleged by the Plaintiff/ Applicant and that the Thika Chief Magistrates Court did find her innocent.

The Plaintiff **Teresiah Wambui Njuguna** swore a Supplementary Affidavit on **9<sup>th</sup> September 2020**, and averred that the Application and entire suit against the **5<sup>th</sup> Defendant / Respondent** is proper as **5<sup>th</sup> Defendant** failed to conduct proper and thorough due diligence. That all parcels of lands were sold when the Mutation form was duly executed and titles were issued and the issue before the Court is how the two plots were transferred from the Plaintiff to the **2<sup>nd</sup> Defendant/ Respondent** and finally **3<sup>rd</sup> Defendant/ Respondent** and eventually a facility granted to the **3<sup>rd</sup> Defendant** by the **5<sup>th</sup> Defendant**. That if the **5<sup>th</sup> Defendant/Respondent** conducted due diligence, it would have noticed serious errors on the documents purported/ effected transfer from the Plaintiff/Applicant to the **2<sup>nd</sup> Defendant/ Respondent** and finally **3<sup>rd</sup> Defendant**. That the **3<sup>rd</sup> Defendant** has not shown how she bought the two plots from her. That she has been advised by her Advocates, which she advise she believes to be true that the short span of transfer as it appears on the green card from the **2<sup>nd</sup> to 3<sup>rd</sup> Defendant/ Respondent** would have triggered a credible lending institution to request for more documents from the parties for verification. That she has never been labeled as an accomplice, rather a prosecution witness and that the criminal case has been withdrawn under **Section 87(a)**. That she was only interrogated by the Police when the purchaser **Lucy Thua**, reported the matter at **Ruiru Police Station** and that is when she had learnt of the exchange. That where there are serious issues like illegal transfer, forged signatures on documents, the Court has discretion to preserve the said plots, till the main suit is heard and determined. That the two plots are charged by the **5<sup>th</sup> Respondent** through forged documents which the **5<sup>th</sup> Defendant** relied on to grant facility to the **3<sup>rd</sup> Defendant/Respondent**.

The **3<sup>rd</sup> Defendant/Respondent Joyce Muthoni Waitbaka** filed a Replying Affidavit sworn on **5<sup>th</sup> October 2020** and averred that the **2<sup>nd</sup> Defendant/ Respondent** indicated to her that he is the legal owner of the suit properties as evidenced by the copies of the titles. That on **16<sup>th</sup> February 2018**, she purchased the parcels of land from the **2<sup>nd</sup> Defendant** vide a Sale agreement that was duly executed by the **2<sup>nd</sup> Defendant** at an agreed price of **Kshs. 3, 600,000/=** of which the sum of **Kshs. 2, 600,000/=** was paid by funds transfer from bank at the time of signing the agreement and the **2<sup>nd</sup> Defendant** acknowledged receipt of the same. Further that she is aware that the balance of the purchase price being **Kshs. 1,000,000/=** was paid to the vendor on the completion date and it was when the **2<sup>nd</sup> Defendant/ Respondent** obtained the Land Control Boards Consent to transfer and handed over to her the completion documents. That on **18<sup>th</sup> March 2018**, she paid to the **2<sup>nd</sup> Defendant** **Kshs. 1,000,000/=** being final payment . That she has never met the **1<sup>st</sup> Defendant/Respondent** and she is a stranger to all the averments raised by the **2<sup>nd</sup> Defendant/ Respondent**. She sought that the suit against her be dismissed.

The **1<sup>st</sup> Defendant Emmah Wangari Wangui** swore a Supplementary Affidavit on **5<sup>th</sup> October 2020**, and averred that the **2<sup>nd</sup> Defendant** is giving falsified information with no basis calculated at evading liability for his actions. That the **2<sup>nd</sup> Defendant/Respondent** intention to take over the land in absence of any due diligence was a scheme to defraud the Plaintiff. That she was not involved in any arrest of the **2<sup>nd</sup> Defendant/ Respondent**. Further that the **2<sup>nd</sup> Defendant/ Respondent** never complained of his documents being used, a clear demonstration that he was the master mind of the plot .

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the instant Application, affidavits and the relevant provisions of the law and finds that the issue for determination is ***whether the Plaintiff/ Applicant is entitled to the orders sought.***

In her Notice of Motion Application, the Plaintiff/ Applicant has sought for various orders amongst them; A permanent Injunction, cancellation of entries in the **green card** in favour of the 5<sup>th</sup> Defendant/ Respondent and an order to sell the 1<sup>st</sup> Defendant's/ Respondents house located at Kenyatta Road, which was built out of the proceeds of the sale of the suit property.

The instant Application is an interlocutory Application and that the Plaintiff has also filed a Complaint in which final orders would be granted. The Plaintiff/ Applicant's claim over the suit property is the alleged fraud and she is seeking to have the 3<sup>rd</sup> Defendant's/ Respondent's ownership cancelled and also holds the 1<sup>st</sup> Defendant/ Respondent liable for falsifying the titles that she gave to her. At an interlocutory stage, the Court is not required to make a determination over contentious issues.

From the Affidavits of the parties, it is not in doubt that the allegations by the Plaintiff/ Applicant as against the 1<sup>st</sup> Defendant/ Respondent has been disputed. Further, there are counter allegations by the parties that have further been disputed and the same being serious allegations of fraud, the Court finds and holds that it cannot make a determination based on affidavit evidence as the same ought to be subjected to cross examination during the main hearing and then the Court can make a determination.

The Court has carefully read and considered the orders sought by the Plaintiff/ Applicant and it has satisfied itself that the same are mandatory orders. A mandatory injunction can be granted on an interlocutory applications as well as at the hearing, but should not normally be granted in the absence of special circumstances. But if a case is clear and which the Court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory stage. See the case of ***Shariff Abdi Hassan ...Vs... Nadhif Jama Adan [2006] eKLR***, where the Court held that:

***“The Courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”***

It is evident that mandatory orders of injunction are granted in very special and exceptional circumstances at the interlocutory stage. These are orders that are sought in the Complaint and if granted at this stage, it would mean that some of the prayers in the Complaint have been exhausted at the interlocutory stage, without the benefit of hearing evidence of all the parties. The Court must therefore be satisfied that the Plaintiff/Applicant has established existence of exceptional circumstances in order to grant the said orders. See the case of ***Kenya Breweries Ltd & Anor...Vs...Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109***, where 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 4<sup>th</sup> Edition Paragraph 948.***

Having carefully considered the issues in this instant case, it is not in doubt that the same is not a straight forward matter. The Plaintiff/ Applicant alleges that she gave her title documents to the 1<sup>st</sup> Defendant/ Respondent who fraudulently transferred the same to the 2<sup>nd</sup> Defendant/Respondent. The same is denied by the 1<sup>st</sup> Defendant/ Respondent, who claims to have no knowledge of the same. Further the allegations by the 2<sup>nd</sup> Defendant/ Respondent that he was introduced to the 3<sup>rd</sup> Defendant/ Respondents by the 1<sup>st</sup> Defendant have also been denied by the 1<sup>st</sup> Respondent and 3<sup>rd</sup> Defendant/Respondent. The 5<sup>th</sup> Defendant/Respondent also has an interest over the suit properties.

Therefore, this Court finds that there is no evidence of existence of any special or exceptional circumstances to warrant this Court issue the mandatory orders of injunction at this interlocutory stage and further order for cancellation of the green card entries. Further, there is no evidence that was brought out to show that the Defendants are trying to steal a march against the Plaintiff/Applicant herein.

For the above reasons, the Court finds the Plaintiffs/Applicants' ***Notice of Motion*** application dated **15<sup>th</sup> June 2020** is not merited. The same is dismissed entirely with costs being in the cause.

It is so ordered

***Dated, signed and Delivered at Thika this 24<sup>th</sup> day of September, 2021***

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**