



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 48 OF 2020**

**IN THE MAIN SUIT**

**JOSEPH WAMALWA MURUTU.....PLAINTIFF**

**VERSUS**

**ROBERT MAINA .....DEFENDANT**

**IN THE COUNTER-CLAIM**

**ROBERT MAINA MWANGI (Suing as the administrator of  
the estate of Francis Mwangi Ndungu).....PLAINTIFF**

**VERSUS**

- 1. JOSEPH WAMALWA MURUTU**
- 2. NAIROBI CITY COUNTY**
- 3. DIRECTOR OF SURVEYS**
- 4. CHIEF LAND REGISTRAR**
- 5. THE ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

The dispute before this court relates to a parcel of land formerly known as Dandora Light Industrial Area-Block G Plot No. H.5 which the plaintiff in the main suit who is also the 1<sup>st</sup> Defendant in the counter-claim (hereinafter referred to only as “the plaintiff”) refers to as L.R No. 1134/2403 while the defendant in the main suit and the plaintiff in the counter-claim (hereinafter referred to only as “the defendant”) refers to as L.R No. 27217. I will hereinafter refer to the said parcel of land only as “the suit property”. The plaintiff brought this suit claiming that he is the lawful proprietor of the suit property and that the defendant had trespassed on the property and commenced farming activities thereon. The plaintiff claimed that the suit property was allocated to him by the Nairobi City Commission on 18<sup>th</sup> February, 1992 and he was subsequently issued with a lease in respect thereof on 13<sup>th</sup> March, 2017. The plaintiff sought judgment against the defendant for an injunction restraining the defendant from carrying out farming activities on the suit property.

Together with the plaint, the plaintiff filed a Notice of Motion application dated 4<sup>th</sup> March, 2020 seeking a temporary injunction restraining the defendant from continuing with construction or trespass on the suit property and from in any way interfering with the suit property pending the hearing and determination of the suit. The application was supported by the affidavit of the plaintiff sworn on 4<sup>th</sup> March, 2020 in which the plaintiff reiterated that he was the registered proprietor of the suit property and that the defendant encroached on the property in 2019 and commenced farming activities thereon illegally. The plaintiff averred that he was also running a church on the suit property by the name, Kings Celebration Worship Centre. The plaintiff contended that he would suffer irreparable harm if the defendant was not restrained from continuing with the illegal activities that he was carrying out on the suit property. The plaintiff annexed to his affidavit in support of the application several documents in support of his case.

The defendant entered appearance and thereafter filed two (2) sets of pleadings. The defendant filed a defence in his personal capacity which

is the capacity in which he was sued by the plaintiff. He also filed a separate counter-claim against the plaintiff and other parties in his capacity as the administrator of the estate of one, Francis Mwangi Ndungu, deceased who died on 20<sup>th</sup> March, 2003 (hereinafter referred to only as “the deceased”). In his defence and counter-claim, the defendant averred that he was the administrator of the estate of the deceased. The defendant averred that the deceased purchased the suit property from one, Beatrice Nduta Kiarie on 16<sup>th</sup> August, 1995 and that he was issued with a letter of allotment by the predecessor of the 2<sup>nd</sup> defendant in the counter-claim, Nairobi City Council on 18<sup>th</sup> February, 1997 after Beatrice Nduta Kiarie wrote to the Nairobi City Council surrendering her rights in the property to the deceased. The defendant averred that in 2015 he started processing a title for the suit property and had a Deed Plan prepared and forwarded to the Director of Surveys for approval. The defendant averred that it was at this stage that the suit property was given land reference number 27217. The defendant averred that on 22<sup>nd</sup> November, 2016, he learnt that L.R No. 27217 was unilaterally cancelled by the Director of Surveys without notice to him and the suit property given a new land reference number 11344/2403 on the strength of a new Deed Plan No. 408623 which was used to process a lease in favour of the plaintiff. The defendant averred that the unilateral cancellation of L.R No. 27217, the allotment of the suit property to the plaintiff and the issuance of a lease in respect of the suit property to the plaintiff was fraudulent, illegal, null and void.

In his counter-claim, the defendant has sought a declaration that the deceased is the legal and legitimate owner of the suit property, an order declaring the letter of allotment, lease and certificate of lease issued to the plaintiff in respect of the suit property null and void, an order directing the 2<sup>nd</sup> defendant in the counter-claim to issue a certificate of lease in respect of the suit property to the defendant in his capacity as the administrator of the estate of the deceased, a mandatory injunction compelling the plaintiff to vacate the suit property and handover vacant possession to the defendant, a permanent injunction restraining the plaintiff from selling, transferring, trespassing, entering or interfering in any way whatsoever with the defendant’s possession of the suit property and general and exemplary damages for fraud.

The defendant also filed a replying affidavit on 19<sup>th</sup> June, 2020 in response to the plaintiff’s injunction application in which he reiterated the contents of his defence and counter-claim that I have highlighted above. The defendant averred that the plaintiff was at all material times the defendant’s tenant on the suit property and that he and his church had undertaken on several occasions to vacate the suit property if he was paid compensation for protecting the property from land grabbers. The defendant averred that there was no way the plaintiff who was born in 1978 and was barely 14 years in 1992 could have been allocated the suit property by the Nairobi City Commission. The defendant annexed several documents to his affidavit in support of his case.

Together with his counter-claim, the defendant in his capacity as the administrator of the estate of the deceased filed an application by way of Notice of Motion dated 10<sup>th</sup> August, 2020 seeking; a temporary injunction restraining the plaintiff from selling, charging, leasing, transferring or interfering in any manner whatsoever with the suit property, a temporary injunction restraining the 4<sup>th</sup> defendant in the counter-claim from effecting any registration relating to the suit property and a mandatory injunction compelling the plaintiff to handover vacant possession of the suit property to the defendant. The application was supported by the affidavit of the defendant dated 10<sup>th</sup> August, 2020 in which he reiterated the contents of his defence and counter-claim.

On 31<sup>st</sup> August, 2020, the plaintiff filed a Notice of Preliminary Objection and a replying affidavit both dated 25<sup>th</sup> August, 2020 in response to the defendant’s application. The plaintiff also filed a further affidavit on 10<sup>th</sup> March, 2021 in further support of his injunction application. In this further affidavit, the plaintiff claimed that he applied for the suit property in 2017 when he was of age but the letter of allotment was backdated to 1992 by the Nairobi City County for accounting purposes.

What is now before me for the purposes of this ruling is the plaintiff’s Notice of Motion application dated 4<sup>th</sup> March, 2020, the defendant’s Notice of Motion application dated 10<sup>th</sup> August, 2020 and the plaintiff’s Notice of Preliminary Objection dated 25<sup>th</sup> August, 2020. The same were argued together by way of written submissions. The plaintiff filed his submissions on 10<sup>th</sup> March, 2021 while the defendant filed submissions and further submissions 18<sup>th</sup> February, 2021 and 30<sup>th</sup> March, 2021 respectively.

I have considered the two applications before me together with the supporting affidavits and the affidavits filed in opposition thereto. I have also considered the Notice of Preliminary Objection filed by the plaintiff. Finally, I have considered the written submissions by the advocates for the parties and the authorities cited in support hereof. The plaintiff has sought a temporary prohibitory injunction while the defendant has sought both prohibitory and mandatory injunction.

The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

**“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”**

For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in

applications for interlocutory mandatory injunction were set out in Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court stated that:

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.”**

In Shepherd Homes Ltd. v Shandahu [1971] 1 Ch.304, Meggary J. stated as follows:

**“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.**

In Ougo and Another v Otieno [1997] KLR 364, it was held that:

**“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”**

The following is my view on the two applications and Notice of Preliminary Objection before me. I will start with the plaintiff’s application for injunction. In Munyu Maina v Hiram Gathiha Maina, Civil Appeal No. 239 of 2009, the Court of Appeal stated that:

**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”**

The root of the plaintiff’s title to the suit property can be traced to a letter of allotment dated 18<sup>th</sup> February, 1992 purportedly issued by the Nairobi City Commission. When the defendant pointed out in his replying affidavit that as at 1992 the plaintiff who was born in 1978 was 14 years old and as such a minor who could not have been allocated land by the Nairobi City Commission, the plaintiff claimed in his further affidavit that he applied for the suit property in 2017 and that he was issued with a letter of allotment in 2017 but the same was backdated to 1992 for accounting purposes.

I am in agreement with the defendant that this explanation by the plaintiff does not add up. According to the said letter of allotment, the suit property was allocated to the plaintiff by the Nairobi City Commission. In 2017 when the plaintiff claims to have applied to be allocated the suit property, the Nairobi City Commission was not in existence. The said commission could not therefore allocate the suit property to the plaintiff. The application could only have been made to the Nairobi City County Government. What the plaintiff is telling the court is that he applied to the Nairobi City County to be allocated the suit property in 2017, the application was approved and the Nairobi City County issued him with a letter of allotment in the name of Nairobi City Commission backdated to 1992. There is no evidence before the court showing that Nairobi City County was involved in the allocation of the suit property to the plaintiff and the backdating of the letter of allotment.

Backdating of a letter allotment purportedly issued in 2017 to 1992 is in itself an act of fraud. The purported letter of allotment dated 18<sup>th</sup> February, 1992 in favour of the plaintiff is therefore prima facie fraudulent. Since the said letter is the root of the plaintiff’s title to the suit property, the title that was issued to the plaintiff subsequent to the said letter of allotment is similarly tainted with fraud and as such cannot be a valid title. It follows therefore that the plaintiff has not established that he is the lawful owner of the suit property. Without establishing his title to the suit property, the plaintiff cannot maintain an action for trespass. A prima facie case against the defendant has therefore not been established by the plaintiff. In the absence of a prima facie case, it is not necessary for me to consider whether the plaintiff will suffer irreparable harm that cannot be compensated by an award of damages if the orders sought are not granted.

With regard to the Notice of Preliminary Objection by the plaintiff, this is my view: The plaintiff took objection to the defendant’s counter-claim on which the defendant’s application was anchored. The plaintiff contended that the counter-claim was brought by a stranger to the suit and similarly the defendant’s injunction application. The plaintiff has contended that the counter-claim could not be brought without leave of the court. I find merit in the plaintiff’s objection. In his submission, the defendant clearly missed the point raised by the plaintiff in his objection.

The plaintiff sued the defendant in his personal capacity. The suit was not brought against the defendant in his capacity as the administrator of the estate of the deceased. The defendant entered appearance in his personal capacity and filed a defence in that capacity. The defendant thereafter purported to file a counter-claim against the plaintiff in his capacity as the administrator of the estate of the deceased in which capacity he also brought an application for injunction. I am in agreement with the contention of the plaintiff that the defendant as an administrator of the estate of the deceased is a stranger to this suit and as such had no capacity to file a counter-claim. The defendant in his capacity as an administrator of the estate of the deceased being a stranger to the suit also lacked capacity to file an application for injunction in the suit. I am of the view that if the defendant wanted to join the suit in his capacity as the administrator of the estate of the deceased he should have sought leave of the court to be added to the suit as 2<sup>nd</sup> defendant and once leave was granted, he would have been at liberty to bring a counter-claim and add other parties to his counter-claim. On the strength of this counter-claim, he could also bring an application for injunction. There is no rule requiring leave to be obtained before a defendant who is filing a counter-claim adds parties to his counter-claim

which is being filed within time for filing defence and counter-claim or where leave has been granted for the filing of the same. For the foregoing reasons, I will uphold the plaintiff's preliminary objection to the defendant's counter-claim and application for injunction.

The disposal of the plaintiff's application and Notice of Preliminary Objection takes me to the defendant's application. My finding on the plaintiff's preliminary objection disposes of the defendant's application. However, in case I was to consider the application on merit, the following would have been my view on the same. I am satisfied from the material on record that the defendant in his capacity as the administrator of the estate of the deceased has established a beneficial interest in the suit property. The evidence placed before the court shows that the suit property was allocated to the deceased in 1997 after he acquired the same from Beatrice Nduta Kiarie. The evidence also shows that the plaintiff started the process of acquiring a title for the suit property and that the process was hijacked at the office of the Director of Surveys where a survey that had been done for the suit property was cancelled and a new survey done that gave rise to the Deed Plan that was used to process the plaintiff's title. When the plaintiff allegedly applied for the suit property in 2017, the property was owned by the deceased whose letter of allotment had not been cancelled. In Rukaya Ali Mohamed v David Gikonyo Nambacha & another, Kisumu HCCC No. 9 of 2004, the court stated as follows:

**“... once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.” (emphasis added)**

The plaintiff has admitted that his letter of allotment of the suit property was issued in 2017 and backdated to 1992. As I have observed earlier, the act of backdating a letter of allotment amounts to fraud and a fraudulent title is not a valid title. The defendant's contention that the plaintiff's letter of allotment was fraudulently back dated to 1992 to give the impression that it was the first in time compared to the deceased's letter of allotment is not farfetched. Due to the foregoing, I am satisfied that the defendant has established a prima facie case against the plaintiff.

I am also satisfied that the defendant stands to suffer irreparable harm if the injunction sought is not granted. There is evidence that the plaintiff has obtained some form of title to the suit property. That means that the plaintiff is at liberty to lease, charge or sell the property unless restrained by the court. A case has therefore been made out for a temporary prohibitory injunction. I am however not persuaded that there is a case for a mandatory injunction. It is not clear to me at this stage as to what arrangement the defendant or the deceased had with the plaintiff in relation to the suit property. The defendant has placed before the court a number of agreements that the defendant entered into with the plaintiff in relation to the suit property in which the defendant was ready to pay the plaintiff some compensation. There is no doubt that the plaintiff has been in possession of the suit property for several years. I am of the view that the defendant has not presented exceptional circumstances that would justify evicting the plaintiff from the suit property before the hearing of the main suit and the counter-claim. For the foregoing reasons, I would have allowed the defendant's Notice of Motion dated 10<sup>th</sup> August, 2020 in terms of prayers 3 and 4 thereof. However, in view of my earlier finding that the application is not properly before the court, I will not grant the prayers. I will however in the interest of justice make an order for the preservation of the suit property pending the hearing and determination of the suit.

In conclusion, I make the following orders;

1. The plaintiff's Notice of Motion application dated 4<sup>th</sup> March, 2020 is dismissed.
2. The plaintiff's Notice of Preliminary Objection dated 25<sup>th</sup> August, 2020 is upheld and consequently, the defendant's counter-claim dated 29<sup>th</sup> July, 2020 and Notice of Motion application dated 10<sup>th</sup> August, 2020 are struck out.
3. Pending the hearing and final determination of this suit or further orders by this court, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as L.R No. 11344/2403(formerly known as Plot No. H.5 Light Industrial Area-Dandora Light Industrial Area Block G). For the avoidance of doubt, the plaintiff is restrained from selling, transferring, leasing, charging or in any other manner whatsoever alienating the suit property pending further orders by the court.
4. Each party shall bear its own costs of the applications and the preliminary objection.

**Dated and Delivered at Nairobi this 25<sup>th</sup> day of October 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Khaduli for the Plaintiff

Mr. Njuru for the Defendant

Ms. C. Nyokabi - Court Assistant