



**THE REPUBLIC OF KENYA**

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

**ELC NO. E141 OF 2021**

**JOSEPH KAMAU MUHORO.....PLAINTIFF**

**-VERSUS-**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff herein filed and/or commenced the subject suit vide Plaintiff dated 22<sup>nd</sup> April 2021, in respect of which the Plaintiff sought various Reliefs as against the Defendants herein. For clarity it is worthy to note that the Defendants herein include the Hon. Attorney General, who has been sued in his representative capacity as the principal legal advisor to the Government of the Republic of Kenya, pursuant to the provisions of the **Government Proceedings Act, Chapter 40 Laws of Kenya, as well as the provisions of Article 156 of the Constitution, 2010.**

2. On the other hand, the 2<sup>nd</sup> Defendant herein is the Ministry of Interior and Coordination of the National Government and in this regard, same is a Department of the National Government.

3. Be that as it may, at the same time of filing the Plaintiff, the Plaintiff also lodged and/or mounted a Notice of Motion Application dated the 22<sup>nd</sup> of April 2021 and in respect of which the Plaintiff/Applicant has sought numerous Reliefs, namely;

i. ....(spent)

ii. ....(spent)

iii. *Pending the hearing and determination of the Application Interpartes, the Defendants/Respondents whether by themselves, their servants, employees and/or agents be and are hereby restrained from entering into L.R. NO. 209/22184, constructing or continuing with the construction of any structure thereon or purporting to sell, alienate, transfer, mortgage or otherwise dispose of L.R. NO. 209/22184.*

iv. *Pending the hearing and determination of this Application, the Defendants/Respondents whether by themselves, their servants, employees and/or agents be and are hereby restrained from entering into L.R. NO. 209/22184, constructing or continuing with the construction of any structure thereon or purporting to sell, alienate, transfer, mortgage or otherwise dispose of L.R. NO. 209/22184 or any portion thereof.*

v. *Pending the hearing and determination of this suit, the Defendants/Respondents whether by themselves, their servants, employees and/or agents be and are hereby restrained from entering into L.R. NO. 209/22184, constructing or continuing with the construction of any structure thereon or purporting to sell, alienate, transfer, mortgage or otherwise dispose of L.R. NO. 209/22184 or any portion thereof.*

vi. *Upon hearing the Application, a Permanent Injunction do issue prohibiting the Defendants/Respondents from entering or illegally trespassing and building or interfering with peaceful enjoyment by the Plaintiff of L.R. NO. 209/22184.*

vii. *Cost of this Application be borne by the Defendants/Respondents.*

viii. *The Honorable Court be pleased to grant and/or issue such further orders that it may deem fit, expedient and/or just.*

4. The subject Application is premised on the grounds contained at the foot thereof, as well as the Supporting Affidavit, sworn by the Plaintiff/Applicant on the 22<sup>nd</sup> of April 2021, to which the Plaintiff/Applicant has attached various exhibits aimed and/or intended at vindicating the Plaintiff/Applicant's claims and essentially to confirm ownership of the suit property.

5. Upon the filing and service of the Plaint as well as the Notice of Motion Application, the Defendants/Respondents herein, proceeded to and indeed entered appearance and thereafter filed a Replying Affidavit, through one Geoffrey Cheruiyot sworn, on the 8<sup>th</sup> of September 2021. Besides, the Defendants/Respondents also filed Grounds of Opposition dated the 10<sup>th</sup> of August 2021.

#### **DEPOSITIONS BY THE PARTIES**

##### **The Plaintiff/Applicant's Case**

6. The Plaintiff/Applicant herein has averred that same was issued with a Letter of Allotment on the 2<sup>nd</sup> of July 1998, pertaining to and/or concerning a Commercial plot situate and/or located at Pangani Area, off Desai Road, within the City of Nairobi.

7. It is the Plaintiff/Applicant's further deposition that upon being allocated the said commercial plot, same proceeded to and paid the requisite stand premium. In this regard, the Plaintiff/Applicant has annexed copies of the demand for rates issued by the City Council of Nairobi.

8. On the other hand, even though the Plaintiff/Applicant has exhibited and/or annexed the copies of the demand for rates, the face of the said Documents are substantially ineligible.

9. Be that as it may, the Plaintiff/Applicant has also exhibited a copy of the demand notice dated the 16<sup>th</sup> of April 2021, which was sent to the 1<sup>st</sup> Defendant/Respondent herein, and in respect of which the Plaintiff/Applicant avers that upon allocation of the plot in question, same duly paid the stand premium and annual rent on the 23<sup>rd</sup> of December 2009.

10. It is the Plaintiff/Applicant's further averment that the allocated plot was thereafter surveyed, culminating into the preparation of a Deed Plan as well as a Beacon Certificate, the latter which was issued on the 14<sup>th</sup> of December 2020.

11. Besides the Plaintiff has also averred that upon the survey and issuance of the Deed Plan, same executed and/or entered into an agreement for Lease with the City Council of Nairobi, now defunct, who alienated the suit property to and/or in favor of the Plaintiff/Applicant.

12. In view of the foregoing depositions, the Plaintiff/Applicant has thus contended that same is the lawful and legitimate owner of the suit property.

13. Nevertheless, the Plaintiff/Applicant has proceeded to aver that despite being the owner of the suit property, the Defendants/Respondents herein, by themselves and/or agents trespassed onto the suit property in February 2021 and same have therefore interfered with the Plaintiff/Applicant's right to and/or over the suit property.

14. Owing to the foregoing, the Plaintiff/Applicant has therefore sought for the various Reliefs, details whereof have been supplied herein before.

##### **Respondent's Case**

15. Upon being served with the Notice of Motion Application, the Respondents herein responded by filing a Replying Affidavit, sworn by one Geoffrey Cheruiyot, on the 8<sup>th</sup> of September 2021, and in respect of which same contended that the suit plot, which is claimed by the Plaintiff/Applicant namely, L.R. NO. 209/8240, predicated on Deed Plan No. 94221, is actually Public Land, which has not been alienated to anyone.

16. On the other hand, the Defendants/Respondents have equally averred that the City Council of Nairobi, which was the predecessor of the City County of Nairobi, had indeed built a public toilet on the suit property and the public toilet remains thereon to date.

17. Further, the Defendants/Respondents have also averred that the Nairobi Metropolitan Services, are the ones who entered upon and have been in possession of what is alluded to be the suit property and same were renovating the toilets standing thereon, so as to support the development and usage by various persons, who would be served by the Bus Terminus, being developed along Park Road and Desai Road respectively.

18. It is also the position by the Defendants/Respondents that what the Plaintiff/Applicant is claiming was not and could not be available for allocation or alienation, in so far as same was already a reserved portion of land, meant for public use and this explains why a public toilet was built thereon.

19. Finally, the Defendants/Respondents have also contended that what is claimed as the suit property, being Public land, same could not be allocated or alienated by the City Council of Nairobi, without the sanction, consent and/or authority of the Commissioner of Lands and particularly in the absence of the directions of the President of the Republic of Kenya, in accordance with the provisions of **the Government**

**Land Act, Chapter 280, Laws of Kenya, now repealed.**

20. In the premises, the Defendants/Respondents implored the Court to decline the Application by and/or at the instance of the Plaintiff/Applicant

**SUBMISSIONS BY THE PARTIES**

21. On the 26<sup>th</sup> of July 2021, the Notice of Motion Application dated the 22<sup>nd</sup> of April 2021, came up for hearing, whereupon the Honorable Court directed that same be canvassed and/or be disposed of by way of written submissions.

22. Pursuant to and in line with the directions of the Court, the Plaintiff/Applicant herein filed his written submissions on the 20<sup>th</sup> of August 2021 and in respect of which the Plaintiff/Applicant has reiterated the facts that same is the lawful and legitimate owner of the suit property.

23. On the other hand, the Defendants/Respondents herein filed their written submissions on the 9<sup>th</sup> of September 2021 and whereby same have ventilated the position that what is claimed as the suit property, being Public Land, which was already alienated, could not thus have been allocated to the Plaintiff/Applicant.

24. On the other hand, the Defendants/Respondents have also contended that given the nature of the public use for which the plot was reserved, including the construction of a public toilet thereon, it would be unconscionable to allow the private rights of the Plaintiff/Applicant to trample upon the public rights and interests.

25. On their part, the Defendants therefore sought for Orders that the Application be dismissed.

**ISSUES FOR DETERMINATION**

26. Having taken into account and considered the contents of the Notice of Motion Application dated the 22<sup>nd</sup> of April 2021, the Supporting Affidavit thereto and the written submissions by the Plaintiff/Applicant on one hand, and the Documents filed by the Defendants/Respondents, including the written submissions thereto, the following issues do stand out for determination;

- i. Whether the Plaintiff/Applicant has established and/or proven a prima facie case with overwhelming chances of success.*
- ii. Whether the Plaintiff is disposed to suffer irreparable loss.*
- iii. Whether the Balance of Convenience tilts in favor of the Plaintiff or otherwise.*

**ANALYSIS AND DETERMINATION**

**ISSUE NUMBER ONE**

***Whether the Plaintiff/Applicant has established and/or proven a prima facie case with overwhelming chances of success.***

27. The Plaintiff/Applicant herein claims that the suit property was allocated to and/or in his favor vide and/or on the basis of the Letter of Allotment issued on the 2<sup>nd</sup> of July 1998 and signed by an unnamed secretary/town clerk, Nairobi City Council.

28. The Plaintiff further contends that upon being issued with the Letter of Allotment, that he appropriated same and thereafter proceeded to and made payments in respect of the letter of Allotment to the City Council of Nairobi. In this regard, the Plaintiff/Applicant has exhibited various copies of receipts, ostensibly to confirm payments of the statutory levies.

29. Though the Plaintiff claims to have paid the statutory levies and the incidental payments, the Plaintiff/Applicant has however, not explicitly stated in his Affidavit, as to when the stand premium and the ground rent, were paid. Suffice it to say, that such payments ought and should have been made within 30 days of the issuance of the Letter of Allotment.

30. On the other hand, the Plaintiff/Applicant herein has however remained quiet and/or silent on the issue as to whether same formally accepted the Letter of Allotment. For the avoidance of doubt, it is imperative to recall that one of the conditions spelt out by the Letter of Allotment is communication of a written acceptance within 30 days of the issuance of the Letter of Allotment.

31. Notwithstanding the fact that the Plaintiff did not indicate, when the statutory levies namely, stand premium and ground rent were paid, the Plaintiff/Applicant has however exhibited a copy of the Demand notice dated the 16<sup>th</sup> of April 2021, which was addressed to the 1<sup>st</sup> Defendant/Respondent herein and in respect of which same has stated and / or disclosed that the payment of the stand premium, amounting to Kshs. 7,200 and annual rent of Kshs. 1,400, respectively, were paid on the 23<sup>rd</sup> of December 2009 and thereafter, an agreement for Lease was executed between the Plaintiff/Applicant and the City Council of Nairobi.

32. From the contents of the demand notice, it is evident and/or apparent that the payment of the stand premium and annual rent, were only made on the 23<sup>rd</sup> of December 2009. For clarity, it suffices to say that the said payments were being made more than 11 years from the date when the Letter of Allotment was issued.

33. In my humble view, by the time the Plaintiff/Applicant herein, was purporting to pay the stand premium and the annual rent, which were mandatory conditions to the letter of Allotment, the allotment in question was already extinguished and was thus incapable of attracting any payment and/or being activated whatsoever.

34. Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.

35. In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of **Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others [2007] eKLR**;

*“ In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive”.*

36. On the other hand, the Defendants/Respondents herein, clearly stated that what was being claimed by the Plaintiff/Applicant to be the suit property, was Public Land, which was already reserved for public purpose and/or use. In this regard, the Defendants went ahead and indicated that a public toilet had long been built and/or erected thereon.

37. Consequently, having already been reserved for public use and a public toilet having been constructed thereon, the said piece of land was therefore incapable of alienation, even if, the plaintiff/Applicant herein had timeously paid the statutory levies, which I have held was not the case.

38. Besides, the Defendants/Respondents also contended that by virtue of being Public Land, the Nairobi Metropolitan Services, are the ones who entered upon the said property and indeed commenced renovation of the toilet located thereon, to enable same to be used by persons who will be served by the Public Bus park, to be established along Park Road and Desai Road.

39. Finally, in this regard, the Defendants/Respondents also contended that the title Number, namely L.R. NO. 209/8240, which the Plaintiff was claiming is actually Public Land, which is premised on Deed Plan Number 94221. For clarity, the Defendants even exhibited a copy of the approved Survey Plan to that effect.

40. I must say, that despite the contents of the Replying Affidavit, which was filed by and/or on behalf of the Defendants/Respondents, the Plaintiff/Applicant herein, did not find it fit to file a further/supplementary Affidavit, to respond and/or react to the averments therein.

41. In my humble view, the averments contained in the Replying Affidavit by and/or on behalf of the Defendants/Respondents herein, reiterate and/or vindicate that what is claimed to be the suit property was already alienated and reserved for public use. In this regard, the land was already alienated and thus unavailable for any subsequent alienation to the Plaintiff or any such other person.

42. In support of the foregoing position, I adopt and refer to the Decision in the case of **Gitwany Investments Ltd vs Taj Mall Ltd & 2 others [2006] eKLR**, the Court stated as hereunder;

**“ The alienation to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents is the grant [that] takes priority; at the time another grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5<sup>th</sup> respondent to allot and alienate to the original allottees.”**

43. If further emphasis is necessary on this point, it is appropriate to refer to the Decision in the case of **Kipsirgoi Investments Ltd vs Kenya Anticorruption Commission [2013] eKLR** where the Court of Appeal held that once land is reserved for a particular purpose the land is rendered alienated and thus becomes unavailable for subsequent alienation, whatsoever.

44. Other than the fact that the subject land was already reserved for public purpose and could thus not be allocated to and/or in favor of the Plaintiff/Applicant herein, it is also common ground that the Plaintiff/Applicant herein has not exhibited any title to and/or grant over the suit property, which can confer upon the Plaintiff/Applicant any legitimate title and/or legitimate claim. For clarity, what the Plaintiff has exhibited, is an Agreement to Lease, which did not culminate into issuance of a grant or a Certificate of Title.

45. In further support of the foregoing position, it is imperative to take note of the decision in the case of **Kenya Anti- corruption Commission versus Online and 4 Others, 2019 eKLR** where the court observed as hereunder;

*“Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio.”*

46. Perhaps, the Agreement to Lease which the Plaintiff has exhibited could not be registered and/or culminate into a Certificate of Title, because the Reference Number, which the Plaintiff is purporting to hold was already in existence in favor of the Government, on the basis of reservation of what is claimed as the suit property to be a Public Land.

47. Owing to the foregoing, I am afraid that the Plaintiff/Applicant herein, does not appear to hold any lawful and/or legitimate title over and in respect of the suit property, which can attract the protection and/or intervention of this Honorable Court.

48. Based on the foregoing observations, I am of the humble view that the Plaintiff/Applicant herein has fallen short of proving and/or establishing the existence of a prima facie case with overwhelming chances of success.

49. For the avoidance of doubt, what constitutes and/or amounts to a prima facie case, was described and/or defined by the Court of Appeal in the case of **Mrao Limited versus First America Bank Limited [2003] Eklr**, where it was defined as hereunder;

*“I would say that in civil cases it is 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.”*

## **ISSUE NUMBER 2**

### **Whether the Plaintiff is disposed to suffer irreparable loss**

50. In the course of evaluating whether the Plaintiff/Applicant herein has raised and/or proven a prima facie case, with overwhelming chances of success, I found and held that the Letter of Allotment, which founds the Plaintiff/Applicant's claim, was rendered invalid, immediately the Plaintiff failed to comply with the terms thereof.

51. On the other hand, I have also found and held that despite the allegations by the Plaintiff/Applicant to be the legitimate owner of the suit property, same was never issued with a Grant and/or a Certificate of Title, over and in respect of the suit property.

52. The question then that arises is whether in the absence of title to the suit property, the Plaintiff/Applicant can claim that he shall be disposed to suffer irreparable loss. Clearly, no irreparable loss can accrue and/or be suffered by one who does not hold any legitimate Title to and/or in respect of the property in question.

53. In any event, I must say that Irreparable loss, must similarly be proven and must not be the subject of speculation. In this case, I am afraid none has been pleaded, established and/or proven. In support of the foregoing position, I take guidance from the decision in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014]Eklr**, where the Court observed as hereunder;

*“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”*

## **ISSUE NUMBER 3**

### **Whether the Balance of Convenience tilts in favor of the Plaintiff or otherwise.**

54. The Defendants/Respondents herein, clearly stated and established that what is claimed to be the suit property is Public land, on which a public toilet was constructed and stands to date. This Deposition on behalf of the Defendants/Respondents, was neither challenged, impeached nor controverted.

55. On the other hand, the Defendants have also stated that officers of Nairobi Metropolitan Services, entered onto what is alleged to be the suit property and commenced renovation activities, in respect of the public toilet, which is standing thereon. Similarly, the issue of the renovation of the public toilet, has also not been disputed by the Plaintiff/Applicant.

56. Notwithstanding the foregoing, the Plaintiff/Applicant himself has supplied and/or availed various photographs taken from the suit property and which photographs confirm that the construction activities on what is claimed to be the suit property, was nearly complete as at June 2021.

57. For clarity, the photographs have been attached to the Plaintiff/Applicant's further list of Documents dated 18<sup>th</sup> May 2021, 19<sup>th</sup> July 2021 and 31<sup>st</sup> August 2021, all of which connote that it is the Defendants/Respondents, who are in possession and Occupation of what is claimed to be the suit property.

58. Owing to the fact that it is the Defendants/Respondents, who are in possession of the suit property, the balance of convenience tilts to and/or in favor the said Defendants/ Respondents. For clarity, the Plaintiff /Applicant cannot seek to assume or take possession vide the Orders sought.

59. In any event, having conceded and/or confirmed that the Defendants/Respondents are in possession and have carried out extensive activities, which have reached the Roofing stage, the grant of the Orders sought by the Plaintiff/Applicant, shall be tantamount to issuing Eviction orders.

60. In my humble view, to the extent that the Plaintiff/Applicant is not in possession of the subject property, same cannot benefit from orders of temporary injunction, whose purpose and/or intendment, is to prohibit offensive activities from being carried out over and in respect of the

suit property.

61. In my humble view, the Orders of temporary injunction, including the one for Permanent injunction, which was also sought for in the subject Application, [the latter which cannot issue on an interlocutory application], are less efficacious, if at all, in addressing the Plaintiff's complaint.

62. Be that as I may, it is also my humble opinion that the Balance of convenience does not favor and / or tilt towards the Plaintiff/Applicant, at all,

**FINAL DISPOSITION**

63. Having Reviewed the submissions, and having addressed the issues enumerated herein before, I come to the inescapable conclusion that the Plaintiff's Application under reference, has not met and/or satisfied the preconditions underlying the grant of Orders of temporary injunction.

64. Consequently, and in view of the foregoing, the Plaintiff's/ Applicant' Application, dated the 22<sup>ND</sup> April 2021, is Devoid of merits. In the premises, same be and is hereby Dismissed.

65. As pertains to costs, I hereby direct that same shall abide the Cause..

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

**In the Presence of;**

**June Nafula          Court Assistant**