



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CASE NO. E327 OF 2021**

**ESTHER KATUSI KITUNDU.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MUSA ABDULLAHI SHEIKH....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated 2<sup>nd</sup> of September 2021, the Plaintiff/Applicant has sought for the following Reliefs;

i. ....(Spent)

ii. The Defendant/Respondent either by himself, agents and/or persons acting under his authority be and are hereby restrained from entering, constructing, making use of or wasting all that parcel of land known as Umoja Innercore, Plot No. A.7-Sector 1 pending the hearing and determination of this Application.

iii. The Defendant/Respondent either by himself, agents and/or persons acting under his authority be and are hereby restrained from entering, constructing, making use of or wasting all that parcel of land known as Umoja Innercore, Plot No. A.7-Sector 1 pending the hearing and determination of this Suit.

iv. The OCS Buruburu Police Station to enforce the orders of the Court.

v. The Honorable Court be pleased to make such further orders in the interest of justice upon examination.

vi. Cost of this Application be in the cause.

2. The Subject Application is based on the grounds contained at the foot thereof and same is further supported by the Affidavit of the Plaintiff/Applicant sworn on the 2<sup>nd</sup> of September 2021 and in respect of which, the Plaintiff/Applicant has exhibited 8 annexures.

3. Following the filing and service of the pleadings and the requisite Application upon the Defendant/Respondent, the Defendant/Respondent has since responded by entering appearance and filing a Replying Affidavit, the latter which was sworn on the 28<sup>th</sup> of September 2021. For clarity, the Defendant/Respondent has opposed the subject Application and in any event, same has averred that what comprises of the suit property, lawfully belongs to and is registered in his name.

4. On the other hand, upon being served with the Defendant/Respondent's Affidavit, the Plaintiff/Applicant herein sought for and obtained Leave of the Court with a view to filing a further Affidavit. In this regard, a Further Affidavit was duly crafted and same was sworn on the 26<sup>th</sup> of October 2021.

**DEPOSITIONS BY THE PARTIES**

**THE PLAINTIFF'S/ APPLICANT'S CASE:**

5. Pursuant to the Supporting Affidavit sworn on the 2<sup>nd</sup> of September 2021, the Deponent thereto has averred that the plot otherwise known as Umoja Innercore No. A.7, Sector 1, was duly and lawfully allocated to one Harry Gibson Kinuka Ndunda, by the City Council of Nairobi, on or about the 25<sup>th</sup> of August 1978.

6. It is further averred that by virtue of such allotment, the allottee was duly issued with a Letter of Allotment and thereafter same became the lawful owner and/ or Proprietor of the suit property.

7. It is further averred that the said allottee entered into a land sale agreement with the Plaintiff/Applicant, whereby the former sold to and in favor of the latter, the entire of the suit property.

8. The Deponent has further averred that following the purchase of the suit property, in terms of the sale agreement, same acquired title to and/or in respect of the suit property.

9. On the other hand, the Deponent has further averred that upon purchasing the suit property, same proceeded to and obtained Development Approvals from Nairobi City Council-Housing Development Department, with a view to commencing construction of premises on the suit property.

10. It is the Plaintiff/Applicant's further averment that other than obtaining the Approval for construction on the suit property, same has also been paying the Rates to date. In any event, the Deponent further avers that the Defendant herein is merely keen on taking over the ownership of the suit property, even though same does not have any valid Title and/or documents at all, to warrant his Defendant's offensive activities.

### **Response by the Defendant/Respondent**

11. The Defendant/Respondent herein filed a Replying Affidavit, sworn on the 28<sup>th</sup> of September 2021 and in respect of which the Defendant/Respondent has averred that what is now the suit property was hitherto known as Plot no. A7, Umoja Innercore, Sector 1, and that same was duly and lawfully leased to one Lucy Njura Ileri by the Nairobi City Council.

12. On the other hand, the Defendant has further averred that by virtue of being the lawful lessee of the subject property, Lucy Njura Ileri entered into and executed a lawful sale agreement, whereby same indeed transferred the suit property to and/or in favor of Silas Mugo Kithenji, who thereafter became the owner of the suit property.

13. It is further averred by the Deponent of the Replying Affidavit that later Silas Mugo Kithenji, who was the registered owner, entered into and/or executed a land sale agreement with the Defendant/Respondent, whereby the Defendant/Respondent ultimately became the registered owner of the property.

14. Owing to the sale and transfer of the suit property, the Defendant/Respondent herein availed to the Honorable Court all the copies of the documents including the duly executed sale agreement between Lucy Njura Ileri and Silas Mugo Kithenji, sale agreement between Silas Mugo Kithenji and the current Defendant herein.

15. In the premises, the Defendant/Respondent herein averred that the suit property lawfully belongs to and is registered in his name. Consequently, the Defendant/Respondent has implored the Court to decline and/or dismiss the Plaintiff's Application.

16. Besides, the Defendant/Respondent has contended that the Plaintiff herein does not have any legitimate Title to the suit property and that the documents which have been exhibited by the Plaintiff/Applicant, are fraudulent and incapable of verification, whatsoever.

17. In short, the Defendant/Respondent has sought that the entire Application be dismissed.

### **SUBMISSIONS BY THE PARTIES**

18. The subject matter came up for hearing of the Application on the 22<sup>nd</sup> of September 2021 and on which day, the Court gave directions concerning the mode of disposal of the said Application.

19. On the other hand, the Honorable Court also directed that the parties do file and exchange written submissions within set timelines.

20. Following the directions of the Court, in this regard, the Plaintiff/Applicant filed his written submissions on the 26<sup>th</sup> of October 2021, whereas the Defendant filed his submissions on the 27<sup>th</sup> of October 2021.

21. Suffice it to say, that the two sets of written submissions, are on record and same have received due attention and consideration.

### **ISSUES FOR DETERMINATION**

22. Having evaluated the Notice of Motion Application dated the 2<sup>nd</sup> of September 2021, the Affidavit in support thereof, the Further Affidavit, as well as the written submissions filed by the Plaintiff/Applicant on one hand, and the Replying Affidavit as well as the Written submissions filed on behalf of the Defendant/ Respondent, I am of the opinion that the following issues are germane for determination;

- i. Whether the Plaintiff/Applicant has laid before the Court any prima facie case with overwhelming chances of success.

ii. Whether the Plaintiff/Applicant has proven the existence of irreparable loss, if the orders sought are not granted.

iii. In whose favor does the Balance of Convenience tilt.

## **ANALYSIS AND DETERMINATION**

### **ISSUE NUMBER ONE:**

#### **Whether the Plaintiff/Applicant has laid before the Court any prima facie case with overwhelming chances of success.**

23. The Plaintiff/Applicant herein filed the subject Application claiming and/or contending that what now comprises of the suit property was hitherto known as Plot no. a.7, Umoja Innercore, Sector 1, and that the said plot was allocated to one Harry Gibson Kinuka Ndunda, who thereby became the owner of the suit land.

24. The Plaintiff/Applicant has further averred that upon being issued with letters of allotment, the said Harry Gibson Kinuka Ndunda, thereafter entered into a land sale Agreement whereby Harry Gibson Kinuka Ndunda, sold to and in favor of the Plaintiff/Applicant the suit property.

26. It is the Plaintiff/Applicant's further contention that upon suit property being sold unto her, same entered upon and took possession of the suit property and that the Plaintiff/Applicant has been in occupation of the suit property from 1993, when she bought the property.

26. Finally, the Plaintiff/Applicant has contended that same has continued to and/or been paying the land rates over and in respect of the suit property, and that the Nairobi City Government, has been issuing receipts whereby Nairobi City County is confirming that the suit property belongs to the Plaintiff/Applicant.

27. Well said. Despite the foregoing contentions by the Plaintiff/Applicant, it is curious to note that the Plaintiff/Applicant has not adduced and/or availed a copy of the letter of allotment, in respect of which the land in question is said to have been allocated to and/or alienated in favor of Harry Gibson Kinuka Ndunda. In this regard, the absence of the letter of allotment is telling.

28. Other than the failure to exhibit and/or attach a copy of the letter of allotment, which is an essential document in allotment of land, the Plaintiff/Applicant herein has also failed to exhibit and/or attach a copy of the Receipts for the payment of the stand premium and the Ground rent, which are statutory requirements, where land has been allocated vide a letter of allotment.

29. Suffice it to say, that the payment of the stand premium and the ground rents, which must be paid within the stipulated timelines, are also essential indicators to confirm acquisition of legal rights over the allocated property.

30. Notwithstanding the foregoing, it is also worthy to note that a person who is allocated land by the Nairobi City Council, pursuant to and in line with the Trust Land Act, now repealed, was also required to communicate acceptance of the allotment and such acceptance was statutorily required to be communicated within 30 days. Yet again, there has been no endeavor to speak to and/or confirm the issue as to whether Harry Gibson Kinuka Ndunda ever confirmed acceptance of the allotment.

31. Be that as it may, the Plaintiff/Applicant herein is content with the production of various receipts including demand for rates, which the Plaintiff/Applicant states that same confirm the fact that the Plaintiff/Applicant is the lawful owner of the suit property.

32. In my humble view, receipts and/or payment of rates to and/or in favor of Nairobi City County, do not confirm or otherwise authenticate ownership of a parcel of land. In this regard, the reliance being placed on the receipts and Approval for development, are not helpful.

33. In view of the foregoing, it is worthy to note that it is the issuance of a compliant letter of allotment, coupled with the payment of the requisite stand premium and ground rent, followed by compliance with the terms thereof, which constitute the legal foundation upon which Title to land can be made.

34. In any event, even assuming that the Plaintiff/Applicant herein had acquired and/or obtained the letter off allotment, which is not the case, same would have been compelled to make the payments within the set timeline and in the event of failure, no legitimate claim and/or Title could arise.

35. In support of the foregoing position, I invoke and rely on 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. The foregoing position touches on and/or concerns a situation and/or scenario where there existed a letter of allotment, but whose term has since expired, and it was found and held that such a document, ceases to anchor any legal and/or valid claim to the land in question.

37. However, in the instant case, the Plaintiff/Applicant has not even come close. For clarity, the Plaintiff/Applicant, has not exhibited even a replica of the letter of allotment, which is said to have been issued to and in favour of the Plaintiff's/ Applicant's predecessor.

38. Consequently, the Plaintiff/Applicant's claim to the suit property is evidently untenable.

39. Other than the foregoing, the Plaintiff/Applicant's case is also anchored on the basis that same purchased and/or acquired the suit property on the basis of a sale agreement. In this regard, one would have expected the Plaintiff/Applicant to exhibit the Sale Agreement, if any, in respect of which the suit property was purchased.

40. However, the Plaintiff/Applicant has again failed to avail a copy of the sale agreement and the failure herein, must be taken to mean that there was no such sale agreement, upon which the Plaintiff/Applicant bought the suit property, if at all.

41. Nevertheless, it must be remembered that by virtue of being a claim for sale of land, the agreement between the Plaintiff/Applicant and Harry Gibson Kinuka Ndunda, if there was any, ought to have been reduced in writing, signed by the parties chargeable therewith and the signatures thereto ought to have been attested, by persons present and who witnessed the execution of the sale agreement.

42. Suffice it to say, that the legal requirement for disposition of an interest in land, are statutorily circumscribed by the provisions of **Section 3(3) of the Law of Contract Act**, which provide as hereunder;

“3. Certain contracts to be in writing (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

43. In view of the foregoing analysis, it is now appropriate to consider whether or not the Plaintiff has established a prima facie case, with overwhelming chances of success.

44. In my humble view, and in absence of inter alia the letter of allotment, evidence of payment of stand premium and also acceptance of allotment, the Plaintiff/Applicant herein, cannot now purport to be the lawful owner of the suit property, with a view to partaking of an order of temporary injunction.

45. In support of the foregoing, I invoke and rely in the decision in the case of **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** where the Court defined a prima facie case as hereunder;

“In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

46. In a nutshell, I am afraid that the Plaintiff/Applicant has not established a Prima facie case with overwhelming chances of success.

## **ISSUE NUMBER TWO:**

### **Whether the Plaintiff/Applicant has proven the existence of irreparable loss, if the orders sought are not granted.**

47. Other than the issue of Prima facie case, an Applicant seeking orders of temporary injunction is also required to prove that same is disposed to suffer irreparable loss, that is, in the event that the orders sought are not granted.

48. In the premises, it was therefore incumbent upon the Plaintiff/Applicant herein to plead and/or advert to incidence of irreparable loss, by clearly deponing to any such loss in the Affidavit.

49. However, it is worthy to note that the Plaintiff/Applicant has yet again failed to show and/or exhibit what kind of loss that same shall suffer.

50. Perhaps to underscore the centrality of the doctrine of irreparable loss, it is important to take cognizance of the decision in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014]Eklr**, where the Court defined the meaning and import of irreparable loss 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 face, 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.”

51. From the foregoing decision, it is imperative to note that evidence of irreparable loss is essential and paramount and that where no such evidence is supplied, availed and/or proved, the equitable remedy of temporary injunction does not issue.

52. As pertains to the subject matter, the Plaintiff/Applicant has not pleaded, deponed to and/or expounded on any incidence and/or evidence of irreparable loss.

53. Nevertheless, even if the Plaintiff/Applicant had endeavored to avail any such evidence, which is not the case, I am afraid that in the absence of any valid ownership documents such plea, could have been an act in futility.

54. Similarly, I am constrained to and do come to the conclusion that the Plaintiff/Applicant has again not proved, established and/or satisfied the threshold for irreparable loss.

### **ISSUE NUMBER THREE:**

#### **In whose favor does the Balance of Convenience tilt.**

55. As pertains to the incidence of Balance of Convenience, three [3] things do arise as hereunder;

i. First and foremost, the Plaintiff herein has not produced and/or availed any evidence of the letter of allotment and having not produced same, she therefore does not have any legitimate claim to the suit property.

ii. The Plaintiff has conceded that it is the Defendant/Respondent who has been and still is in occupation of the suit property. For clarity, the Plaintiff/Applicant has confirmed that the Defendant/Respondent has indeed commenced construction on the suit property, and this thus confirms that the Defendant/Respondent is the one who has been in occupation and possession of the suit property.

iii. Where one is the registered owner of the suit property, such a person accrues and/or attracts certain rights and/or privileges that arise from and/or are attendant to the ownership of such land.

56. Owing to the fact that the Defendant/Respondent appears to be the legitimate owner of the suit property, same therefore cannot be restrained, prohibited and/or limited in the manner in which same uses and/or seeks to use the suit property.

57. On the other hand, the registered owner of a property can also not be barred and/or restricted from the use of own land, and in the event of any such order being issued, it would be tantamount to negating and/or cancelling the Title belonging to the Defendant/Respondent before the plenary hearing, which is legally untenable.

58. As concerns the legal position that the registered owner of land cannot be restrained by an order of temporary injunction, unless there exists exceptional and peculiar circumstance to warrant such orders, it is worthy to take note of the decision in the case of **George Orango Orago v George Liewa Jagalo & 3 others [2010] eKLR** where it was held as hereunder;

**“The appellant was in possession. Prima facie, he is the owner of the land and until his title to it is set aside, there would be no proper basis for dispossessing him of the land. The denial of injunction has the effect of dispossessing the appellant of his land. The purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.”**

59. Arising from the foregoing, it is my finding and holding that the Balance of Convenience also tilts in favor of the person who currently holds title to the suit property and who is in possession thereof.

60. In the premises, the Balance of Convenience tilts in favour of the Defendant/Respondent.

### **FINAL DISPOSITION**

61. The Plaintiff/Applicant herein has not laid before the Court any credible evidence and/or basis to warrant a positive finding in her favor. For clarity, the Plaintiff/Applicant did not place before the Court any Letter of Allotment issued over the Suit Property or otherwise, a copy of the Sale Agreement, if any, relating to the Purchase thereof.

62. Having failed to tender and/ or adduce the foregoing Documents, the Plaintiff/Applicant is not entitled to the Reliefs sought.

63. In a nutshell, the order that commends itself to me is that the Plaintiff/Applicant’s Application, is Devoid of Merits and same is hereby Dismissed with Costs to the Defendant/ Respondent.

64. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

**June Nafula**      **Court Assistant**

.....For the Plaintiff/ Applicant.

.....For the Defendant/ Respondent.