



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. E052 OF 2021**

**YOUNG CHUL CHOI.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. Vide the Notice of Motion dated 11<sup>th</sup> of February 2021, the Plaintiff/Applicant herein seeks the following Reliefs;

- i. ....(Spent)
- ii. *The Honorable Court be pleased to order a temporary injunction restraining the Defendants whether by itself, its agents, servants and any person claiming under it from harassing, intimidating, trespassing or in any way interfering with the peaceful possession of all land known as L.R. NO. 1/1086 (Original number 1/210/2) pending the hearing and determination of this Application.*
- iii. *The Honorable Court be pleased to order a temporary injunction restraining the Defendant whether by itself, its agents, servants and any person claiming under it from harassing, intimidating, trespassing or in any way interfering with the peaceful possession of all land known as L.R. NO. 1/1086 (Original number 1/210/2) pending the hearing and determination of this suit.*
- iv. *The Honorable Court be pleased to issue such further orders or directions that it may deem fit in the interest of justice.*
- v. *Costs of this Application be in the cause.*

2. The Subject Application is premised and/or based on the various grounds enumerated at the foot thereof and same is further supported by the Affidavit of the Plaintiff/Applicant sworn on the 11<sup>th</sup> of February 2021 and to which the Deponent has attached 8 annexures thereto.

3. Upon the filing and service of the Application, the Defendant/Respondent herein duly entered appearance and thereafter filed a Replying Affidavit through one namely, Stanley Gitari, who describes himself as the Senior Legal Officer of the Respondent company and to which Affidavit the Deponent has annexed various documents, including a Consent order which was entered into and endorsed in the Court record on the 14<sup>th</sup> of March 1997.

4. Following the service of the Replying Affidavit, the Plaintiff herein sought for and obtained leave to file and serve a Supplementary Affidavit. In this regard, a Supplementary Affidavit was duly sworn and filed on the 4<sup>th</sup> of August 2021, and to which Affidavit the Plaintiff/Applicant exhibited one document namely, the lease Document entered into with an Organization known as **Party People Entertainment Ltd.**

**DEPOSITIONS BY THE PARTIES**

**The Plaintiff/Applicant’s Case**

5. The Plaintiff/Applicant herein has filed two sets of Affidavit namely, one sworn on 11<sup>th</sup> of February 2021, as well as the Further Affidavit, latter which was sworn on the 4<sup>th</sup> of August 2021.
6. Pursuant to and in respect of the two Affidavits, the Plaintiff has averred that on or about the 30<sup>th</sup> of June 2000, same entered into and/or executed a sale agreement with one, Paul Mbatia Githaiga (*hereinafter referred to as the Vendor*) and whereby the Plaintiff/Applicant bought or acquired ownership over and in respect of the suit property.
7. It is the Plaintiff/Applicant's further averment that prior to the suit property being transferred to and registered in the name of Paul Mbatia Githaiga, the said property belonged to and was registered in the name of the Defendant/Respondent herein.
8. Besides, the Plaintiff further avers that the Defendant herein, who was hitherto the registered owner of the suit property, proceeded to and executed an Indenture over and in respect of the suit property, where the Defendant agreed to sell and transfer the suit property to one Paul Mbatia Githaiga.
9. After the execution of the Indenture, the Defendant herein transferred and had the property registered in favor of Paul Mbatia Githaiga, and Majorie Wanjuki Mbatia, respectively.
10. According to the Plaintiff/Applicant, the execution of the Indenture and the subsequent transfer of the suit property, the Defendant herein was paid the agreed purchase price amounting to Kshs. 6,000,000 only, which amount the Defendant duly received and acknowledged vide various letters including the letter dated 4<sup>th</sup> May 2000, which was written on the Defendant's own letterhead.
11. It is the Plaintiff/Applicant's further averment that immediately the Defendant herein executed an indenture with one Paul Mbatia Githaiga, the said property was sold to the Plaintiff/Applicant, who indeed proceeded to and was the one who paid the entire purchase price.
12. Following the completion of the payment, the Plaintiff/Applicant herein assumed possession and thereby became the lawful and legitimate proprietor of the suit property.
13. Be that as it may, the Plaintiff has further deposed that on or about the 15<sup>th</sup> of March 2020, the Defendant herein commenced a process which was designated to forcefully intimidate and/or harass the Plaintiff/Applicant with a view to interfering with the Applicant's quiet possession.
14. It is the Applicant's further averment that as a result of the actions by and on behalf of the Defendant/Respondent, same proceeded to and caused to be filed civil proceedings vide **Milimani CMCC No. E20 of 2021**, to avert any further activities.
15. Nevertheless, the said civil proceedings were later withdrawn, on account of lack and/or want of jurisdiction, in terms of the Ruling which was rendered on the 16<sup>th</sup> of October 2020.
16. In the premises, the Plaintiff/Applicant has further averred that the actions by the Defendant, who very well appreciates that Plaintiff/Applicant is the owner of the suit property, is now threatening to overrun the Applicant's title and thereby defeat the Title and the consequential rights attendant to the ownership of the suit property.
17. Other than the foregoing Affidavit, the Plaintiff/Applicant also swore a further Affidavit and in respect of which the Plaintiff/Applicant has reiterated that the suit property was lawfully sold by the Defendant/Respondent to one of her employees namely, Paul Mbatia Githaiga, who ultimately sold and transferred the suit property to the Plaintiff.
18. It is the view of the Plaintiff/Applicant that the property was never unlawfully or illegally acquired and that the Defendant/Respondent herein cannot purport that the Plaintiff/Applicant is a trespasser on the land belonging to the Defendant.
19. Finally, the Plaintiff/Applicant has also averred that it does not lie in the mouth of the Defendant/Respondent to contend that the Plaintiff's title is unconstitutional yet there is no Petition and/or civil proceedings that have ever been undertaken to invalidate the Title.
20. In the premises, the Plaintiff/Applicant avers that the contents of the Supporting Affidavit and Further Affidavit, raise pertinent issues and thus the Plaintiff/Applicant has a prima facie case with overwhelming chances of success.

#### **The Defendant/Respondent's Case**

21. The Defendant responded to the subject Application by filing a Replying Affidavit sworn on the 18<sup>th</sup> of May 2021 and to which the Defendant/Respondent has attached various documents.
22. According to the Defendant, the suit property namely L.R. NO. 1/1086 (Original No. 1/210/2) was initially land belonging to the Defendant/Respondent. For clarity, the Deponent of the Replying affidavit has stated that the land herein was hitherto part of the original LR. NO. 1/210/2.
23. Besides, the Defendant has also averred that the suit land was never sold to anyone, including Paul Mbatia Githaiga, and in this regard the said Paul Mbatia Githaiga, could thus not be able to confer any lawful Title to the suit property to the Plaintiff/Applicant.
24. On the other hand, the Defendant/Respondent herein has stated that what is claimed as the suit property belongs to the Defendant and that

an attempt to grab same by one Paul Mbatia Githaiga, culminated into the endorsement of a Consent order vide **Nairobi HCC 2760 of 1996**, which touched on L,R, NO. 1/210, Nairobi.

25. Finally, the Defendant/Respondent herein has also averred that the Defendant/Respondent issued a Notice where it demanded that all illegal trespassers occupying the Defendant's parcels of land were required to peacefully vacate and in default, same were to be forcefully evicted.

26. It is also the Defendant/Respondent's averment that in any event, they are not the ones troubling and/or interfering with the Applicant's Title. For clarity, it has been said that the persons who are actually in possession of the suit property, are officers from the Directorate of Criminal Investigations and the Ethics and Anti-Corruption, the latter who is said to be investigating the Title with a view to cancellation thereof.

27. In view of the foregoing position, the Defendant/Respondent therefore contends that the Plaintiff/Applicant herein does not have any lawful, legitimate or valid Title to the suit property .Consequently, the Plaintiff/ Applicant is thus not entitled to the Orders of Temporary Injunction either as sought or at all.

### **SUBMISSIONS BY THE PARTIES**

28. On the 13<sup>th</sup> of May 2021, the subject Application came up for directions, whereupon the Honorable Court directed and/or otherwise ordered that the Application be canvassed by way of written submissions.

29. Besides, the parties were ordered to file and exchange the requisite written submissions and in this regard, the Parties duly complied and filed their respective Written Submissions and same are now on record.

### **ISSUES FOR DETERMINATION**

30. I must state that I have been able to look at the two sets of the submissions that were filed and having internalized the said submissions, **the following issues do arise for determination:**

- i. *Whether the Plaintiff/Applicant has established a Prima facie case with overwhelming chances of success*
- ii. *Whether the Plaintiff shall suffer 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 established a Prima facie case with overwhelming chances of success**

31. It is evident and/or apparent that the suit property previously belonged to and was registered in the name of the Defendant company and same was originally known as L.R. NO. 1/210/2, before same was subdivided by the Defendant/Respondent.

32. It is further evident that the Defendant herein, who was hitherto the registered proprietor, effected a transfer of the suit property to and in favor of one Paul Mbatia Githaiga, who was previously an employee of the Defendant/Respondent company.

33. Indeed, the entire purchase price was paid to and acknowledged by the Defendant vide various correspondence which have been attached to the Supporting Affidavit and which Documents have not been denied and/ or controverted by the Defendant/ Respondent in her Replying Affidavit or otherwise.

34. Suffice it to say, that upon the sale and transfer to and/or in favor of Paul Mbatia Githaiga, parties entered into a lawful sale agreement over an in respect of the suit property, culminating into the transfer and registration thereof in favor of the Plaintiff.

35. Owing to the foregoing, the Plaintiff/Applicant acquired and therefore became the lawful owner and/or registered proprietor of the suit property and in this regard, the Plaintiff is thus entitled to exclusive and absolute rights over the suit property.

36. It is my observation and finding that the Defendant/Respondent, having lawfully and willingly sold and transferred their interest in respect of the suit property, to one Paul Mbatia Githaiga, who is the one who sold the Suit Property to the Plaintiff, the Plaintiff/Applicant has an indefeasible Title and same should be allowed to benefit from and/or partake of the rights, interests and the appurtenant thereto. **(See Section 24 and 25 of the Land Registration Act).**

37. By virtue of being the registered owner of the suit property, the Plaintiff/Applicant has therefore raised and/or established a prima facie case with overwhelming chances of success. **(See Section 24 and 25 of the Land Registration Act).**

38. In support of the foregoing position, I rely on and re-echo the findings of the Court in the decision in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others**[2003] eKLR where the Court observed as hereunder;

**“So, what is a prima facie case? 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.”**

39. On the other hand, the Defendant/Respondent herein has contended that the suit property was unlawfully and/or illegally acquired, firstly by one Paul Mbatia Githaiga, who was previously an employee of the Defendant/Respondent and after the said illegal acquisition, the said employee transferred the suit property to the Plaintiff/Applicant.

40. On this account, the Defendant avers that to the extent that the suit property was unlawfully and illegally acquired, the Plaintiff/Applicant does not have any lawful right to the suit property which can be protected by a Court of Law.

41. Notwithstanding the allegations by the Defendant/Respondent herein, it is worthy to note that the Defendant has neither commenced and/or filed any civil proceedings to impugn and/ or invalidate the Plaintiff/Applicant’s Title or at all.

42. In my humble view, the issue as to whether the Plaintiff/Applicant’s title was illegally acquired and is thus unconstitutional, is not a decision that the Defendant/Respondent can unilaterally make and thereafter take the law into own hands and purport to enter upon, interfere with and/or otherwise attempt eviction of the registered proprietor.

43. Suffice it to say, that if the Defendant/Respondent is seeking to challenge the transfer and registration of the suit property in the name of the Plaintiff, then it behooves the Defendant/Respondent to file and/or commence a suitable civil and/or constitutional Petition and upon such lodgment, the Honorable Court will exercise its jurisdiction to determine such a claim and where appropriate render itself on the claim of the Illegal acquisition or otherwise.

44. In support of the foregoing position, I beg to echo the decision in the case of **Isaac Gathungu Wanjohi vs The Registrar of Titles [2012] eKLR** where the Honorable Court observed as hereunder;

**“I also hold that the finding of “unlawful acquisition” referred to in Article 40(6) of the Constitution must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession. Thus, as was held in the case of Kuria Green Limited v Registrar of Titles and Another (Supra), it must follow that the purported revocation to title LR No. 209/2052 by way of Gazette Notice No. 9230 is illegal, null and void and of no effect.**

45. At any rate, though the Defendant is happy to propagate the allegation that the Title of the suit property was illegally acquired by Paul Mbatia Githaiga, before he transferred same to the Plaintiff/Applicant, the Defendant has however not explained why same was paid the sum of Kshs. 6,00,000Only, and which sum was duly acknowledged and confirmed by the Respondent as being representative of the total consideration for the suit property.

46. Similarly, the Defendant herein has not addressed and/or responded to a copy of the indenture which was duly executed and signed by the Defendant/Respondent’s authorized officers, culminating into the transfer of the property in favor of Paul Mbatia Githaiga and another. Surely the Defendant/Respondent cannot bury her head under the sand and imagine that the hard facts and the reality contained in the duly executed indenture, would evaporate into thin air.

47. For me, the duly executed indenture constitutes and/or comprises of a binding agreement executed in compliance with and/or adherence to the provisions of **Section 3(3) of the Law of Contracts Act, Chapter 23 Laws of Kenya**. Consequently, unless the indenture is invalidated, the allegations of illegality alluded to remains red herring.

48. Other than the foregoing arguments, the Defendant has also raised a disingenuous argument premised on a copy of a Consent order which was issued vide Nairobi HCC No. 2760 of 1996, whereby the Defendant/Respondent is purporting that the issues pertaining to the transfer and ownership of the suit property were addressed and/or deliberated upon.

49. The allegations and/or averments by the Defendant/Respondnet touching on the said order, which has been annexed as **annexture SG4** to the Replying Affidavit is replete with dishonesty to the extent that firstly, the said Court order related to L.R. NO. 1/210, Nairobi, which is not the same as the suit property or at all.

50. Secondly, the said order did not touch on and/or concern ownership of the suit property and/or the circumstances under which the suit property was transferred to and/or registered in favor of Paul Mbatia Githaiga and another or at all.

51. Thirdly, the Consent order which I have alluded hereto before and which is irrelevant to the issues in dispute herein, was entered into on the 14<sup>th</sup> of March 1997, long before the Defendant herein executed the indenture dated the 30<sup>th</sup> of June 2000, which is responsible for the alienation, transfer and registration of the suit property to Paul Mbatia and another, before it was sold to the Plaintiff/Applicant.

52. In my view, the Defendant/Respondent herein have no lawful basis to take the law into their own hands and to imagine that the suit property can be invaded and thereby repossessed by the Defendant/Respondent.

53. Finally, on this issue, the Defendant/Respondent has also adverted to the fact that it is the Directorate of Criminal Investigations and EACC, who have taken the suit property for purposes of facilitating investigation, and that same are not agents of the Defendant/Respondent.

54. The foregoing allegation is without merit. For clarity, the Defendant has adverted to the issue that it is herself that put in place the steps to

evict and/or remove the Plaintiff/Applicant. (See Paragraphs 8,9 and 16 of the Replying Affidavit which underline the fact that the offensive actions were carried out by the Defendant/Respondent.)

55. In any event, the Directorate of Criminal Investigation are not authorized under law to carry out any investigations pertaining to and/or concerning the illegal and/or unlawful acquisition of land. Consequently, whereas the DCI can carry out any other investigations, their investigation cannot amount to taking possession and interfering with the Plaintiff's ownership rights.

56. As pertains to the Ethics and Anti-Corruption Commission, it is sufficient to note that if same were responsible for any actions geared towards interfering with the ownership rights, same would have sought for and obtained a suitable order, which is not the case.

57. In a nutshell, the Defendant/Respondent cannot be allowed to approbate and reprobate simultaneously whereas on one hand, same says it has evicted the Plaintiff/Applicant and recovered its own land, yet on the other hand, same makes another parallel albeit contrary statement as to who are in occupation and/or possession.

58. In view of the foregoing, it is my finding and holding that the Plaintiff/Applicant has proven a Prima facie case with overwhelming chances of success.

### **Issue Number Two**

#### **Whether the Plaintiff shall suffer irreparable loss if the orders sought are not granted.**

59. As pertains to what amounts to Irreparable loss, I can do no better than refer to the Decision in the case of **Nguruman Ltd vs Jan Bonde Nielsen & Another [2013] 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.”**

60. As for me, the Plaintiff/Applicant is currently the registered owner of the suit property, and premised on such registration, the Plaintiff/Applicant is entitled to enjoy the rights arising therefrom and in particular quiet possession.

61. Where the rights of the registered owner, in this case those of the Plaintiff/Applicant are violated or otherwise threatened with imminent violation, the Plaintiff/Applicant was lawfully entitled to approach the Honorable Court for interim protection and conservation of the property.

62. Otherwise, if no intervention is taken by the Honorable Court, the Court would be failing in her duty to protect the right and/or liberties of the citizens of the Republic of Kenya and in particular the Plaintiff/Applicant and therefore letting the space free for insurgents. Such a scenario would culminate into an irreparable loss and/or prejudice to the Title holder.

63. In support of the foregoing holding, I beg to adopt and restate what was held in decision in the case of **George Orago vs Liewa Jagalo & Others [2011] eKLR**, where it was observed as hereunder;

**“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. The respondents appear to be concerned that Rose Akech Achieng, a married woman, is benefiting from the estate of her deceased father against the Luo Custom.”**

64. Based on the foregoing decision, I arrive at a conclusion that the nature and kind of loss that the Plaintiff/Applicant shall suffer if the orders sought are not granted, including deprivation of the suit property, shall amount to and or constitute irreparable loss.

### **Issue Number Three**

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

65. As concerns the Balance of Convenience, it is established and/or common ground that after the sale and transfer of the suit property to and/or in favor of the Plaintiff/Applicant, it is the said Plaintiff/Applicant who has been in occupation and possession thereof.

66. On the other hand, the Plaintiff/Applicant has also placed evidence before the Court that the suit property has been demised to a third party namely, Party People Entertainment Ltd, to whom, the Plaintiff no doubt gave a warranty of quiet possession and enjoyment.

67. In the premises and having been in occupation of the suit property, it is thus convenient, lawful and mete that the said status quo, concerning occupation, possession and use by the Plaintiff/Applicant and/or authorized agents, be protected and/or otherwise be preserved.

68. Short of the preservation of the Plaintiff's occupation, it shall be tantamount to negating and/or cancelling the Plaintiff/Applicant's Title prematurely and without compliance with the due process of the law which failure shall be inimical to public interest, rules of natural justice and the Constitutional Provisions.

69. In short, the Balance of Convenience also tilts to and/or in favor of the Plaintiff/Applicant.

**FINAL DISPOSITION**

70. Having addressed and/or deliberated upon all the issues enumerated for determination, the Orders that commends themselves to me are as hereunder;

***i. The Notice of Motion Application dated 11<sup>th</sup> of February be and is hereby allowed, in terms of Prayer 3 thereof. For clarity, an order of temporary injunction be and is hereby issued restraining the Defendant whether by itself, its agents, servants and any person claiming under it from harassing, intimidating, trespassing or in any way interfering with the peaceful possession of all land known as L.R. NO. 1/1086 (Original number 1/210/2) pending the hearing and determination of this Application.***

***ii. Costs of the Application shall abide the cause.***

71. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH 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