



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 330 OF 2018**

**FREDRICK NZOIKA MUSILU**

**(being the appointed Attorney for**

**Annah Mbithe Kiragu.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**KENNEDY OCHIENG KIMATA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**NATIONAL LANDS COMMISSION.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the notice of motion dated 20<sup>th</sup> July 2018 brought under order 40 rules 1a, 2, 3 and 4 of the Civil Procedure Rules 2010, Section 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21), Section 68 of Land Registration Act No. 3 of 2012, Laws of Kenya and other enabling provisions of the law.

2. It seeks orders:-

**(a) Spent.**

**(b) That pending the hearing and determination of this application and suit interparties this honourable court be pleased to grant a temporary injunction restraining the defendants/respondents by themselves, their charging, transferring, selling, alienating, disposing off, constructing and/or in any other way interfering with the parcel of land being Title No. Nairobi/Block 118/773.**

**(c) That an inhabitation be registered against all that parcel of land being title No. Nairobi/Block 118/773 pending hearing and determination of the main suit.**

**(d) That the OCS, Ruai Police Station do oversee the enforcement of court orders issued.**

**(e) That the costs of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs 1 to 13.

4. The application is supported by the affidavit of Fredrick Nzioka Musilu, Attorney of Annah Mbithe Kiragu, the plaintiff/applicant herein sworn on the 20<sup>th</sup> July 2018.

5. The application is opposed. There is a replying affidavit sworn by Kennedy Ochieng Kimita, the 1<sup>st</sup> defendant/respondent sworn on the 20<sup>th</sup> December 2019. There are also grounds of opposition filed on behalf of the 2<sup>nd</sup> defendant/respondent dated 13<sup>th</sup> December 2018. The 3<sup>rd</sup> defendant/respondent neither entered appearance nor filed any defence. They also did not file any response to this application.

6. On the 16<sup>th</sup> May 2019 the court directed that the application be canvassed by way of written submissions

## The plaintiff's/applicant's submissions

7. The plaintiff was granted a letter of allotment for the Nairobi/Block 118/773 for a term of 99 years with effect from 1<sup>st</sup> January 1994. Since then the plaintiff has been paying the requisite land rents and rates as when the same fell due. She was waiting to be issued with a certificate of lease. It came to the plaintiff's attention that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants unlawfully and illegally issued the 1<sup>st</sup> defendant with a certificate of lease. It was the intention of the Government of Kenya that the suit property be allocated to the applicant/plaintiff and no other person. The letter of allotment is still valid.

8. The plaintiff/applicant has satisfied the condition for grant of temporary injunction as set out on the case of **Giella vs Cassman Brown Co. Ltd [1973] EA 358**. The plaintiff/applicant has established a prima facie case. She has put forward the cases of **Nguruman Ltd vs Jan Bonde Nielsen [2014] eKLR**, **Mrao Ltd vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125**.

9. The plaintiff/applicant will suffer irreparable loss which cannot be compensated by an award of damages. She has put forward the case of **Joseph Mbugua Gichanga vs Cooperative Bank of Kenya Ltd HCCC No. 74 of 2000** where it was held that damages are not always a suitable remedy when the plaintiff has established a clear legal right or breach. The balance of convenience tilts in the favour of the plaintiff/applicant. She has put forward the case of **Films Rover International Ltd vs Cannon Film Sales Ltd [1986] ALL ER 772**.

10. The plaintiff/applicant seeks an order of inhibition under order 40 rule 1, 2, 3 and 4 of the Civil Procedure Rules and Section 68 of the Land Registration Act. The application is not frivolous, vexatious, scandalous and an abuse of the court process. She has put forward the cases of **Dupoto Group Limited vs Kenya Airports Authority & Another [2013] eKLR**; **Trust Bank Limited vs Amin Company Limited & Another [2000] KLR 164**. The plaintiff/applicant prays that the letter of allotment held by the plaintiff be found to be valid as it has not been revoked. Further that she has established a prima facie case with a probability of success and urges that the application be allowed.

## The 1<sup>st</sup> Defendant's/Respondent's Submissions

11. The 1<sup>st</sup> defendant/respondent has produced a transfer of lease document and has paid all the land rates and rents for the suit property since 2015, when he acquired the suit property. The 1<sup>st</sup> defendant/respondent title is lawful. No evidence has been adduced to show that it was fraudulently acquired. He has put forward the case of **Gitwanys Investments Ltd vs Tajmal Limited & 3 others [2006] eKLR**.

12. The assertion that the 1<sup>st</sup> defendant/respondent acquired the certificate of title fraudulently is not supported by any evidence. Fraud is a serious accusation which procedurally has not to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. He has put forward the case of **Arthi Highway Developers Ltd vs West End Butchery Ltd & Others**. The plaintiff/applicant is not the owner of the suit property hence she has not met the conditions for grant of temporary injunctions. He has put forward the case of **Jane Kemunto Mayaka vs Municipal Council of Nakuru & Others, HCCC 124 of 2005**. The 1<sup>st</sup> defendant/respondent has been in occupation of the suit property since 2016. He has also put forward the case of **Nakuru Industries Ltd vs S. S Mehta & Sons [2016] eKLR**. He prays that the application be dismissed with costs.

13. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, and the annexures, the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:-

(i) *Whether or not the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.*

(ii) *Who should bear costs?*

14. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. **In the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

15. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was)** held that:-

*“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”*

I find that the plaintiff/applicant has failed to demonstrate that she is the registered owner of the suit property. I am not satisfied that she deserves this kind of protection. She has failed to establish a prima facie case with a probability of success at the trial.

16. **Section 26 (1)** of the Land Registration Act, 2012 provides that :-

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

There is no doubt that the 1<sup>st</sup> defendant/respondent is the registered owner of the suit property. As to whether he acquired the title lawfully will come out during the hearing where evidence will be adduced. No evidence has put forth by the plaintiff/applicant to show that the 1<sup>st</sup> defendant/respondent acquired the title unlawfully.

**17.** I find that the plaintiff/applicant has failed to demonstrate what loss she will suffer if the orders are not granted. I find that the balance of convenience tilts in favour of the 1<sup>st</sup> defendant who is the registered owner of the suit property.

**18.** In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 14<sup>TH</sup> day of MAY 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

No appearance for the Defendant

Kajuju -Court Assistant