REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CASE NO. 302 OF 2018

CLEMENT MUTURI KIGANO.....PLAINTIFF/APPLICANT

= VERSUS =

COUNTY GOVERNMENT OF MOMBASA.....1ST DEFENDANT

GRACE WANGUI MAHUTHU.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

R U L I N G

1. Before the Court for determination is the Plaintiff's Notice of Motion application dated 19th December 2018 filed under Order 40 of the Civil Procedure Rules and section 13 (7)(a) of the Environment and Land Court Act. The Plaintiff seeks the following orders:

i. Spent

ii. That pending the hearing and determination of the suit herein the Defendants, and more particularly the 2nd Defendant be restrained from developing, selling, transferring, alienating, charging, mortgaging, pledging or in any other manner howsoever interfering with the land comprised in TITLE NO. MOMBASA/MN/BLOCK 1 /713 (Originally Plot No. 392/VI/MN) situate in Mikindani Site and Service Scheme.

iii. That such further or other order be granted as the Court will deem just and expedient in the circumstances of this case.

iv. That costs of this Application be provided for.

2. The application is supported by the affidavit of the Plaintiff, Clement Muturi Kigano sworn on 13th December 2018. He deposes that the suit property; Plot No. 292/VI/MN situate at Mikindani Site and Service Scheme, presently known as Title No. MOMBASA/MN/BLOCK 1/713 belonged to one Mwakandi Ngao Mwakandi who was allocated the property by the defunct Municipal Council of Mombasa in 1987. Mwakandi then sold the property to him. That pursuant to the sale, Mwakandi donated to the Plaintiff an irrevocable Power of Attorney which was registered at the Mombasa Titles Registry on 29th September 1992 as No. CR PA 7065. That the Power of Attorney was executed on 26th September 1992 on which date Mwakandi wrote and signed a letter to the Director, Housing Development Department of the then Municipal Council of Mombasa informing him that he had assigned all his rights over the property to the Plaintiff. The Plaintiff asserted that the letter which was copied to himself was delivered on the same date.

3. The Plaintiff deponed further that once the suit property was sold to him, he secured it by fencing it with barbed wire and cedar posts. However, sometime in 2015, he visited the property to prepare it for development and was shocked to find temporary structures thereon. That Mwakandi informed him that he did not know the person who had put up the structures. The Plaintiff then instructed Messrs Kanyi J. & Co. Advocates to conduct a search at the County Government of Mombasa which revealed that the 2nd Defendant, Grace Wangui Mahuthu was the registered owner of the suit land. The County officials did not explain how the property had changed ownership to the 2nd Defendant without his involvement or that of Mwakandi who was the original allottee.

4. The aforestated events prompted the Plaintiff to file suit at the High Court at Mombasa being Mombasa High Court Misc. Civil Application No. 16 Of 2015 (Judicial Review) seeking orders to quash the 1st Defendant's decision giving the 2nd Defendant ownership of the suit land. From the 1st and 2nd Defendants' responses to the same, it was admitted that the property was initially allocated to Mwakandi Ngao in 1987. The 1st Defendant claimed to have issued a notice of repossession and subsequent reminders to Mwakandi over alleged

nonpayment of land rates and a loan advanced to him after which the property was repossessed and re-allocated to the 2nd Defendant. The 2nd Defendant on her part claimed that she was unaware that the property had been previously allocated to Mwakandi.

5. The Plaintiff and Mwakandi denied receiving any notice from the 1st Defendant's predecessor and contended that the alleged repossession and re-allocation of the property was unlawful, null and void. The High Court subsequently dismissed the judicial review application on the grounds that the current Court was the appropriate forum to determine the dispute culminating in this suit. The Plaintiff opines that injunctive reliefs is necessary for the property to be preserved failure to which his case will be rendered nugatory and that the Defendants will not suffer any prejudice if the orders are granted.

6. The Application is opposed vide the following:

i. 1st Defendant/Respondent's Grounds of Opposition dated 21st March 2019 and filed on 22nd March 2019.

ii. 1st Defendant/Respondent's Replying Affidavit filed on 10th July 2019

iii. 2nd Defendant/Respondent's Replying Affidavit filed on 21st February 2019

7. The 1st Defendant/Respondent's grounds of opposition are to the effect that there is a similar suit between the parties filed prior to the current case namely Mombasa High Court Miscellaneous Civil Application No. 16 of 2015. That the substantive motion was heard on 6th March 2019 and the Plaintiff should await its outcome before proceeding with this case. Moreover, the Replying Affidavit sworn by Rose Munupe, the Assistant Director Land Administration in the 1st Defendant's employ presents a detailed version to the contrary. She admits that the property was initially allocated to Mwakandi Ngao in 1987. That same year, Mwakandi requested approval to develop the property and a letter was written to him inviting him to a meeting at Mikindani/Chaani for the purpose of identifying his plot and demonstrating his development plan.

8. Subsequently, in 1988 Mwakandi applied for a development loan from the Municipal Council of Mombasa which application was accepted. The Council sent him a letter informing him of his monthly loan repayment installments, the rate he was to pay and the date on which he was to commence payment. However, as at 15th July 1988, Mwakandi had not paid up his rates and loan installments. Consequently, the 1st Defendant issued a notice reminding him to settle the same failure to which it would be deemed as an indication that he was no longer interested in the property hence it would be repossessed and allocated to another party. Mwakandi was urged to visit the municipal offices to address the issue. He however failed to do so despite issuance of four more notices on 26th February 1990, 31st December 1991, 10th April 1993 and 31st January 1995.

9. The suit property was then repossessed and allocated to the 2nd Defendant, Grace Mahuthu on 18th October 1995 and a letter of allotment issued on that same date. That the 2nd Defendant applied for electricity after completing her development on 23rd December 1998 and was issued with a title deed on 17th March 2009. The 1st Defendant faulted the Applicant for failing demonstrate ownership of the property by attaching a sale agreement, allotment letter and receipts for the transaction between himself and the original allottee. Moreover, Mwakandi Ngao did not dispute the postal address used to deliver the aforementioned notices to him. Neither Mwakandi Ngao nor the Plaintiff paid any rates or outstanding liabilities on the suit property. The 1st Defendant also denies giving consent for the property to be transferred from Mwakandi Ngao to the Plaintiff which is a statutory prerequisite.

10. The 2nd Defendant's case vide her affidavit sworn on 14th February 2019 is that in 1995 her attention was drawn to an advertisement at the defunct Municipal Council Mikindani Office addressed to the general public inviting applications for allocation of plots. She made inquiries on the available plots to a field officer at the Council, one Mr. Zero who showed her the suit property. On Mr. Zero's advice the 2nd Defendant went to Town Hall Mombasa, filled forms and paid application fees with respect to her application for allotment of the suit plot. Consequently, her application was accepted, she was officially shown plot No. 392 Mikindani and took possession thereof from 1995 to date.

11. The 2nd Defendant deposes further that at the time she was officially shown the property it was a bushy area with no sign of previous occupation. That there was no fence or post as alleged by the Applicant. Moreover, the 2nd Defendant has been paying rates to the Municipal Council of Mombasa as well as its successor, the County Government of Mombasa demonstrated by the bundle of receipts annexed.

12. That on 22nd May 2003 she received a letter from the Council informing her that documents authorizing preparation of the title to the property from the Commissioner of Lands were ready. That she was required to pay development charges, administration costs of Kshs.10,000 for survey, registration and stamp duty and ground rent from 1981. She met the said requirements and was issued with a title deed.

13. Currently, the 2nd Defendant avers that she uses the suit property for her water supply business in the name of Kamugunda Water Supply. She owns water tankers parked on the property and underground tanks where fresh water supplied by the Ministry of Water, Mazeras is stored for use by her clients in the event of water shortages. The plot is therefore fully utilized and developed. The 2nd Defendant asserts that she has no intention of selling or charging the property as it is her source of livelihood.

14. That from the time the first suit being Judicial Review No. 16 of 2015 was filed, the Plaintiff has never demonstrated that the property is in danger of alienation. She also faulted the Plaintiff for forum shopping, filing a claim that has been overtaken by events and seeking final orders at an interim stage. In any event on balancing of the party's rights; the 2nd Defendant states that she has a title to the property yet the Plaintiff has failed to attach any proof of ownership such as the original allottee's allotment letter.

15. Parties canvassed the application by way of written submissions. The Plaintiff/Applicant's submissions were filed on 7th June 2019. It is submitted that the repossession and re-allocation of the suit property is a nullity as the remedy of a rating authority over unpaid rates is not repossession but proceedings in a subordinate court of the first class to secure payment of the overdue rates pursuant to section 17 of the Rating Act Cap 267 Laws of Kenya. The 1st Defendant ought to have abided by the same. Counsel quoted the case of ***Henry Kuria Ndethi Vs Molo Town Council & Another (2015) eKLR*** to buttress his claim.

16. The 1st Respondent's submissions were filed on 10th July 2019. It is submitted that the Plaintiff bases his entitlement to the property on being the ***"beneficial owner of the suit property having purchased the same from the original allottee thereof, Mwakandi Ngao Mwakandi***." Of note is the fact that the Plaintiff has not disclosed the date on which the property was sold to him nor is there a sale agreement attached demonstrating the same. Counsel cited section 3(1) of the Law of Contract Act to the effect that no suit shall be brought upon a contract for disposition of an interest in land unless it is in writing; signed by the parties and the said signatures attested. Further, that a power of Attorney does not confer ownership.

17. The 1st Respondent contends that even if there was a sale, it was void for the reason that consent of the Municipal Council as the head lessor was not obtained prior to the transaction. Moreover, what was the status of the original allottee's proprietorship in the event that he failed to meet the conditions set out in the letter of allotment issued in 1987? That the purported transaction if based on the issuance of the Power of Attorney in 1992 took place way after the original allottee failed to meet the conditions in the allotment letter hence he did not have a good title to pass on to the Plaintiff. Counsel cited the case of ***Wreck Motor Enterprises Vs the Commissioner of Lands & Others (1997) eKLR*** to that effect.

18. That where there are competing interests between a party in possession of a registered title and that with a letter of allotment over the same property, the party with a registered title has a superior title as per the holding in ***Njuwangu Holdings Ltd Vs Langata KPA Nairobi & 5 Others (2014) eKLR***. Once the 2nd Defendant was issued with a Title Deed, she became the absolute and indefeasible owner of the suit property within the meaning of ***Section 23 of The Registration of Titles Act Cap 281 Laws of Kenya (repealed).*** On the issue of the validity of repossession of the property the 1st Defendant avers that the same was procedurally sound. Records by the Housing Development Department demonstrate that neither the Plaintiff nor the original allottee paid any of the requisite charges leading to the Council's decision to repossess the plot.

19. The 1st Defendant contends that the Plaintiff has failed to meet the conditions stipulated in the celebrated case of ***Giella Vs Cassman Brown (1973) EA 358.*** He has failed to meet the threshold of prima facie case with a probability of success at trial. It is submitted that a letter of allotment is not a title to property in accordance with the holding in ***Stephen Mburu & 4 Others Vs Comat Merchants Ltd & Another (2012) eKLR***. Further the Applicant does not have any proof of payment of land rent and rates. That the claim is overtaken by events and does not adequately address the issue of ownership. It only addresses occupation, use and possession which also have not been proved.

20. The second limb being irreparable harm to which damages will not suffice has also not been met. The plot is undeveloped and unoccupied by the Applicant which raises the question what irreparable harm is he in danger of? In the event that he is successful the Applicant can be compensated by way of damages hence the Application ought to be dismissed.

21. The 2nd Defendant/Respondent's submissions were filed on 15th July 2019. After briefly rehashing her case, she cited section 26 of the Land Registration Act of 2012 to the effect that her title to the property is prima facie evidence that she is the absolute and indefeasible owner thereof. The 2nd Defendant asserts that issues of ownership can however only be determined at the main hearing of the case and not at an interim stage. She submits that she intends to challenge the genuineness and authenticity of the documents upon which the Applicant bases his claim namely the Power of Attorney and the letter purportedly delivered to the offices of the 1st Defendant.

22. The 2nd Defendant further submits that the application has been brought under Order 40 of the Civil Procedure Rules which in sub-rule (1) stipulates that a **temporary injunction may be granted to restrain a party from wasting damaging or alienating a property in dispute.** However, the Applicant has failed to demonstrate that the 2nd Defendant intends to do so. Besides the requirements set out in Order 40, the 2nd Respondent argues that the Applicant's case falls short of the essential of prima facie case with a probability of success. The case is based entirely on the Rating Act to render the repossession by the 1st Respondent a nullity yet the Applicant does not fit the definition of a Rateable Owner as provided by section 7 of the Valuation for Rating Act cap 266 Laws of Kenya. The section defines a rateable owner as ***'the lessee from a local authority of the rateable property holding under a registered lease of not less than ten years.'*** By this definition, the 2nd Defendant opines that since the original allottee was in possession for only 8 years, the Rating Act does not apply to him as opposed to the 2nd Defendant who has held a registered lease for more than 10 years. Further, the balance of convenience tilts in favour of the 2nd Defendant who has been in occupation, actual ownership and control of the plot since 1995.

23. I have considered the parties' pleadings, oral submissions and the applicable law. The essentials for the granting of an injunction were set out in the celebrated case of ***Giella Vs Cassman Brown (supra) thus***;

> *"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."*

24. The Plaintiff/Applicant seeks injunctive orders restraining the Defendants/Respondents particularly the 2nd Defendant from developing, selling, transferring, alienating, charging, mortgaging pledging or in any other manner howsoever interfering with the suit property based on an ownership claim. Has the Plaintiff established a prima facie case with a probability of success? A prima facie case was defined in the case of ***Mrao Limited Vs First American Bank of Kenya Limited & 2 Others (2003) eKLR*** as follows:

> *"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 is 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*." (emphasis mine)

25. The Plaintiff/Applicant has not presented a letter of allotment to the suit property issued to Mwakandi or a sale agreement transferring ownership of the same to himself from the original allottee Mwakandi Ngao. The special Power of Attorney dated 26th September 1992 in paragraph one wherein the donnee, Mwakandi Ngao confers upon the Plaintiff authority stated thus:

> *"To attend to, look after, and superintend all affairs relating to ALL THAT House standing in the records of the Municipal Council of Mombasa in my name, being House No. HD/MRS/20 situated at Mikindani, Mombasa, Second Urban World Bank Project and erected on a portion of Plot Number 392 of Section VI Mainland North Mombasa District in the Republic of Kenya and belonging to the Municipal Council of Mombasa."*

26. The rest of the document spells out acts with respect to the aforestated house. The 2nd Respondent on the other hand pleads that she took vacant possession of the property while it was a bushy open area with no sign of previous occupation. Current photographs of the same show a small brick structure labelled as the Guard House and Garage, trucks and underground tanks. There is no permanent house in existence. Further, the letter to the 1st Respondent's predecessor is undated, unsigned and unstamped hence its authenticity and proof of receipt is indeed in doubt as pointed out by the 1st and 2nd Respondents.

27. The Respondents on the other hand presented a seamless chronology of events with respect to dealings in the property. It is not in dispute that the property was first allocated to the Mwakandi in 1987. The 1st Respondent did not receive any rent, rates and loan repayments from the said allottee from 1987 culminating in the repossession of the suit plot. The postal address on the notice for repossession as well as its preceding reminders bears the same postal address belonging to Mwakandi as stated in the Power of Attorney i.e **P.O Box 93603 Mombasa**. Whether these notices were duly served is an issue to be proved by way of evidence. However, the Court takes cognizance of the fact that it is the lessee's prerogative to ensure payment of land rates.

28. The question of concern is; at the time the Mwakandi purportedly sold his interest in the property to the Plaintiff; did he himself have good title which he could pass? The 2nd Respondent also urged that the Applicant is not a rateable owner yet he fully bases his case on the Rating Act. The inordinate delay with which this case has been instituted is also an inescapable fact. Equity aids the vigilant and not the indolent hence it is unconscionable that the Plaintiff seeks court redress over two decades after he purportedly acquired rights in the property. It has also been demonstrated that indeed the Applicant has not been in possession and occupation of the property from 1992.

29. The Plaintiff/Applicant has thus failed to demonstrate that he has a "genuine and arguable" case and therefore a prima facie case with a probability of success at the main trial. The essentials set out in ***Giella versus Cassman Brown (supra)*** are to be attained sequentially. Having failed to demonstrate the first, the Court need not venture into the other grounds; in accordance with the Court of Appeal case of ***Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR,*** where the Court of Appeal stipulated thus:

> ***"If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."***

30. However, on the issue of irreparable harm the Court notes that in the Plaint the Applicant seeks the following Orders in prayer **(g)** "***In the alternative and without prejudice to the above prayers, an order for payment of a sum equivalent to the market value of the property as at the date of judgment***"

There is a possibility that the plaintiff can be refunded his money if he succeeds in his suit according to the alternative prayer hence he clearly does not stand to suffer irreparable harm that cannot be compensated by way of damages.

31. The upshot of the foregoing is that the Application dated 19th December 2018 is determined as lacking in merit and is hereby dismissed with costs to the 1st and 2nd Respondents.

Dated and signed at BUSIA this 4th day of June, 2020.

A. OMOLLO

JUDGE

Ruling delivered electronically by email this 9th Day of June, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE