



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC NO 1471 OF 2013**

**VERONICA NDITI NZOMO.....1<sup>ST</sup> PLAINTIFF**

**GEORGE NZOMO MUINDI NTHENGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SIMON MUEMA NZAU.....1<sup>ST</sup> DEFENDANT**

**STEPHEN PATRICK MUTUA MUEMA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application for the courts consideration is the Notice of Motion dated **2<sup>nd</sup> December 2013**, brought under section 13 of the **Environment and Land Act No 19 of 2011, Section 3 and 3A** of the **Civil Procedure Act**, seeking for orders that this court be pleased to issue an order of injunction restraining the defendants jointly and severally or their servants and or agents from selling, transferring ,disposing, alienating, charging, shifting, altering, changing the common boundary, parting with possession or in any manner interfering with the plaintiff's peaceful and quiet use and enjoyment of their two parcels of land measuring approximately **0.567 acres** and **0.283** acres or thereabouts being part of the title number **Muvuti/Kaani/1789** ,registered in the name of the first defendant and which parcels are clearly marked on the ground and fenced pending the hearing and determination of this suit.

ALTERNATIVELY the court be pleased to grant orders preserving the status of the common boundaries marking the plaintiffs' two parcels of land measuring **0.567 and 0.283** acres being part of title number **Muvuti/ Kaani/1789** until further or other orders of this court.

This application is premised on the grounds stated on the face of the application and supporting affidavit of the 1<sup>st</sup> plaintiff who stated that together with the 2<sup>nd</sup> plaintiff who is her husband, they bought land from the 1<sup>st</sup> defendant and his wife Yula Muema Semeon on 13th July 1998,being parcel of land measuring **0.48acres** being **LR No Muvuti/Kaani/1610**, and obtained title to the said parcel of land wherein they settled and constructed a home .They further bought another parcel of land **measuring 0.567 areas** out of title number **LR No Muvuti/Kaani/1128** at a consideration of **Ksh 350,000/=**which was paid in full which was paid in two installments of **Ksh 170,000/=** and **Ksh 180,000/=** and planted 23 sisal plants to mark the boundary.

On **8<sup>th</sup> July 2006**, they got into a sale agreement for a portion of **Muvuti/Kaani/1128** measuring **0.283 hectares** or thereabouts at an agreed price of **Ksh 190,000/=** which agreement was deduced into writing and was duly signed. That the 1<sup>st</sup> defendant was to seek and obtain consent to subdivide the said portion together with the portion sold earlier and that the 1<sup>st</sup> defendant would bear the costs of the

subdivision and the transfer costs and valuation would be paid by the plaintiffs.

The plaintiffs now contend that the 1<sup>st</sup> defendant has refused to obtain the requisite consent letter and refused to refund the sum of **Ksh 30,000/=** which had earlier been given to him by the plaintiffs. The plaintiffs further claimed that the 1<sup>st</sup> defendant borrowed **Ksh 30,000/=** and gave his original number of title to **LR No Muvuti/Kaani/1584** as lien. That the 1<sup>st</sup> defendant trespassed on the plaintiffs' property purporting to take measurements and started planting pegs on the ground which actions amounted to an infringement of their right to property. They also feel threatened by the 1<sup>st</sup> defendant's actions for they fear they would lose their property because he has not appeared before the Land Control Board or may not transfer the land to them. The deponent further deposed that when they conducted a search at the Lands Office, they discovered that the 1<sup>st</sup> defendant had subdivided title no **Muputi/Kaani/1128** and created two parcels of Land which are **Muputi/Kaani/1788 and Muputi/Kaani/1789** and had not informed them of the subdivision. That portion **0.567 and 0.283 hectares** lie with the new title number **Muputi/Kaani/1789**, registered in the 1<sup>st</sup> defendant's name. They also discovered that the 2<sup>nd</sup> defendant who is the 1<sup>st</sup> defendant's son had registered a caution on **Muputi/Kaani/1789** claiming purchaser's interest thereby blocking his transactions including the possibility of having their portion transferred to them.

This application is opposed by the 1<sup>st</sup> defendant who swore a replying affidavit on **10th March 2014**, acknowledging that he sold to the plaintiffs **Muputi/Kaani/1610 at Ksh 350,000/=** then obtained consent from the Land Control Board and subsequently transferred the suit property to the plaintiffs. He added that he was given **Ksh 30,000/=** by the plaintiffs out of which **Ksh 15,000/=** was to facilitate valuation and transfer charges. He acknowledged borrowing **Ksh 30,000/=** as a soft loan and used his title deed as security. He also stated that on or about June or July 2001, he got into another sale agreement with the plaintiffs for the sale of a portion out of **Muputi/Kaani/1128**, for **Ksh 265,000/=** and **Ksh 190,000/=** was paid to him leaving a balance of **Ksh 75,000/=** which has not been paid. He also confirmed that he sold land that had no measurement therefore he does not know the exact portion sold to the plaintiffs. He further deposed that the plaintiffs frustrated the agreement entered into on **30<sup>th</sup> October 2007** because he obtained consent for the subdivision of **Muputi/Kaani/1128**, into two portions but the 1<sup>st</sup> plaintiff requested that she be given the copies of the consent but refused to surrender the signed copies of the application for consent and as a consequence the consent was not approved as the surveyor was not able to do his work without the original application forms. He confirmed that indeed he applied for the subdivision of **Muputi/Kaani/1128** into two portions and obtained two new titles being **Muputi/Kaani/1788 and Muputi/Kaani/1789** with his names and subsequently **Muputi/Kaani/1128** was closed. That the portion bought by the plaintiffs for **Ksh 350,000/=** lay on **Muputi/Kaani/1789** and he is yet to transfer it to the plaintiff as they had not agreed on the measurements. That the 2<sup>nd</sup> portion of land sold to the plaintiffs for **Ksh 265,000/=** also lay on **Muputi/Kaani/1789**. He further stated that he was ready to transfer the said portion on condition that the plaintiffs completes paying **Ksh 75,000/=**. He explained that the 2<sup>nd</sup> defendant lodged a caution on the land because the Plaintiffs had not completed paying the balance of the purchase price and that the acreage claimed by the Plaintiff is exaggerated because they had not agreed on the measurements of the sold portion of land.

The 1<sup>st</sup> plaintiff made a rejoinder by filing a reply to the Replying affidavit that was filed in court on **26<sup>th</sup> March 2014** wherein she reiterated the contents of her supporting affidavit.

The parties canvassed this application by way of written submissions. The plaintiffs in their submissions stated that they purchased land from the 1<sup>st</sup> defendant three times and the 1<sup>st</sup> defendant had only transferred to them the title to the first transaction but had failed to transfer the other two purchases. She also submitted that for every portion they purchased, the 1<sup>st</sup> defendant would point out the extent of the land sold and a clear boundary would be marked and a survey would be marked and the expected survey was meant to adopt the already agreed boundary. The plaintiff stated that there are developments on the suit property and because the 1<sup>st</sup> defendant has shown to be untrustworthy, him having the title to the plaintiffs property meant that there is a possibility that the 1<sup>st</sup> defendant may sell the land to third parties therefore the injunction if granted would be confirming status quo and will not adversely affect or

prejudice the defendants.

The defendants filed their submissions on 21<sup>st</sup> October 2014 wherein they submitted that the plaintiffs did not complete the payment of the purchase price therefore the transaction was incomplete. That as much as planting sisal as beacons was well accepted in the Kamba custom, that custom cannot supersede Land Statutes especially regarding the issue of surveyors not ascertaining the parcel of land for sale.

I have considered the affidavits, submissions and the case law relied by the parties herein and the issue for determination is whether the plaintiffs have made out a case to warrant the orders of injunctions sought.

Injunctive reliefs are governed by the principles set out in the case of **Giella Vs Cassman Brown & Co. Ltd 1973 E.A 358** and these are:-

1. ***The applicant must make out a prima facie case with a probability of success at the trial.***
2. ***An injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages, and***
3. ***If in doubt, the Court will decide the application on a balance of convenience.***

Even as the Courts apply the above principles while considering whether or not to grant an injunction, a further fundamental principle was acknowledged in the English Case of **Films Rover International Ltd and others v. Cannon Film Sales Ltd [1986] 3 ALL E.R.772** by Hoffman J when held that,

***“A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ----”***

Therefore, even as the Courts adopt the basic test set out in the principles of granting injunction on the Court it should always decide on the lower rather than the higher risk of injustice.

Do the plaintiffs have a prima facie case? In **Joseph Kinuthia Kuria v. Housing Finance Company of Kenya Ltd & Another [2006] eKLR**, the Court defined prima facie case as a case which on the material presented to 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. It includes but is not confined to a ***“genuine and arguable case.”***

Bearing the above principles in mind, both the plaintiffs and defendants would appear, prima facie, to have an arguable case. The plaintiffs on the basis of purchaser’s rights having bought and developed the suit property and the 1<sup>st</sup> defendant being the registered proprietor and claiming that the plaintiffs did not complete paying the purchase price to the portions of suit properties and the allegation that the sale agreements did not provide for the acreages of the portions being sold to the plaintiffs. Whether the plaintiffs or defendants will establish their respective claims to the land is a matter for trial. If the 1<sup>st</sup> defendant sells the land, the plaintiffs loss would, be irrevocable taking into account that they have heavily invested on the parcels of land. It is also clear at this stage that the plaintiffs are in occupation of the land and cultivating it.

Having considered the above, the pleadings generally, the written submissions and the circumstances of this case, the Court makes the following Orders:-

1. ***The status quo now prevailing on the land is to remain until this suit is heard and determined. That status is that the plaintiffs continue in occupation of the land and more specifically parcel of land comprising Muvuti/Kaani/1789.***

**2. Both the plaintiffs and the defendants are hereby restrained from selling, transferring, disposing, alienating, charging, shifting, altering, changing the common boundary and/ or parting with possession the land pending the determination of this suit.**

**3. Each party to bear their own costs.**

It is so ordered.

Dated, Signed and delivered this **8th** day of **May 2015**

**L. GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the presence of

Nakhone for the 1<sup>st</sup>, and 2nd Plaintiff

None attendance for the 1st Defendant

None attendance for the 2nd Defendant

Hilda : Court Clerk

**Court:**

Ruling read in open Court in the presence of Mr Nakhone for the Plaintiff/Applicants and none attendance for the Defendants.

**L. GACHERU**

**JUDGE**