



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI
ELC CASE NO. 281 OF 2013

ST.THOMAS ACADEMY LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

GITHUMU KANGEMA LIMITED.....1ST DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....3RD DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

By a Notice of Motion dated 21st February, 2013 and brought under **Section 13 and 19 of the Environment and Land Act, Section 68 of the Land Registration Act, Section 158 of the Land Act** and all the enabling provisions of the Law, the Plaintiff/Applicant herein of **St.Paul Thomas Academy Ltd** has sought for these orders against the Defendants herein.

- a. *Spent*
- b. *Spent*
- c. *That an interim injunction or prohibition do issue prohibiting the 2nd and 3rd Defendants, their officers, Servants or agents or otherwise whomsoever from releasing the original title L.R. No. 209/3007/1, Nairobi (the suit premises herein) to the 1st Defendant, its officers, agents and if already collected the 2nd and 3rd Defendants be restrained from charging, leasing or transferring or in any other way from dealing with the title pending the hearing and determination of this suit.*
- d. *That costs of the application be provided for.*
- e. *That the Honourable court be pleased to make such further orders or other orders as it may*

deem just and expedient in the circumstances of this case.

The Notice of Motion was supported by the grounds stated on the face of the application and by the annexed affidavit of **Peter Munga**. These grounds are: -

- a. *That the Plaintiff/applicant is the legal and beneficial owner of the property. No. 209/3007/1, Nairobi having purchased the same from the 1st Defendant in the year 2003.*
- b. *That the Plaintiff purchased the property on the written undertaking of the 3rd Defendant that the lease would be extended for a term of 50 years from 1st January, 2004.*
- c. *That the Plaintiff/Applicant had paid Stamp duty and lodged the transfer of the property for registration with the Registrar of Lands in 2004. However, the registration was not completed as the Deed file was missing and it was only in July 2005 that the transfer was finally registered erroneously as having been presented on 14th July, 2005 instead of 4th March, 2004.*
- d. *The Plaintiff applied for extension of the lease and was issued with letter of allotment on 26th September, 2005 and was to be given a new lease over the property for term of 50 years effective from 1st January, 2005.*
- e. *That the property now vests in the Plaintiff since 2003 and the Plaintiff is in possession and wanted to be issued with new Grant. Equity treats as and done that which ought to have been done.*
- f. *That unless the 2nd and 3rd Defendants are restrained they will act in gross violation of the ownership rights of the plaintiff and the plaintiff stands to suffer irreparable loss and damage.*

The deponent averred that a transfer instrument dated 2nd December, 2003 for a consideration of **Kshs.5,000,000/-** was duly executed by the 1st Defendant and presented to the Plaintiff for registration. Further that the Plaintiff paid a Stamp Duty of **Ksh.200,000/-** as evidenced by receipt dated 3rd December, 2003. The transfer was booked for registration on 4th March, 2004 vide day book No. 226. However the same was not registered as it was alleged the Deed file was missing.

Eventually, the transfer was registered in the year 2005 vide entry No. 25, dated **14th July, 2005** though the same was booked for registration on 4th March, 2004 and this should have been the effective date but not when the Deed File was found to enable registration.

It was further deposed that the Plaintiff is in quiet and peaceful possession and enjoyment of the property and had diligently paid the Land Rent to the government up and including the Land Rent for the year 2013. However, the Plaintiff was shocked to learn that the title to the property was being processed in the name of the 1st Defendant who has no interest in the property whatsoever. The Plaintiff feels aggrieved by the action of the 2nd defendant and thus this suit.

The application was vehemently opposed by all the Defendants.

One **Jacob Nduati Gicheru** swore a Replying affidavit on behalf of the 1st Defendant. He deposed that he is one of the founder members of Githimu Kangema United Traders who purchased the suit land in the year 1976.

That since the time the suit land was acquired, they had the physical and legal possession of the same and in the year 1985, they incorporated a company known as Githimu Kangema Ltd, the 1st Defendant herein which took over possession of the suit land and is still in possession. That they have been receiving rent from the tenants who occupy the houses that stands on the suit property. He further deposed that as

Director of the 1st Defendant, he is aware that the Company has never sold the suit property to any person and Company at all. He, therefore, denied that the plaintiff is the legal and beneficial owner of the suit property as alleged.

However, sometime in the Month of September, 2004, they received a report that some of the shareholders were colluding with third parties to sell the suit property without the knowledge and consent of other shareholders. That the said members had obtained deposits from various persons, the Plaintiff herein included. The shareholders then followed up the matter with the Commissioner of Lands and discovered that the property had been transferred to the Plaintiff on 14th July, 2005.

The 1st Respondent further stated that after frantic effort and a court case, the Registrar of Titles expunged from the Register by way of cancellation the entry No. 25 which was a transfer of the land to the Plaintiff dated 14th July, 2005. It was further averred that the issue of the lease in the name of the 1st Defendant was proper as the Plaintiff had not paid any consideration to the 1st Defendant.

Further, One **Gordon Ochieng**, swore a Replying Affidavit on behalf of the 2nd, 3rd and 4th Defendants. The Deponent gave history of the transactions over the suit land since 1948. He averred that **Githumu Kangema Traders** bought the suit land in 1976. He stated that on 25th August, 2003, **Githumu Kangema Traders** applied to the Commissioner of Lands for consent to transfer the suit land as per annexure **G.O2**. The consent to transfer was issued vide Reg. No. 37855 marked G O3. He further deponed that a transfer document between **Githumu Kangema Ltd** and **St Paul Thomas Academy Ltd** dated 2nd December, 2003 was presented to the Department of Lands for the purpose of registration. Further on 9th September, 2005, **St. Paul Thomas Academy** Ltd applied to the Commissioner of Lands for renewal of lease in respect of

the suit property and the annexure **G.O. 4**. Ultimately, the suit property was transferred to St. Paul Thomas Academy Ltd on 14th July, 2005. He also stated that on 26th September, 2005, St. Paul Thomas ltd was issued with a letter of allotment over the suit property as per annexure **G.O. 6**. However, the Commissioner of Lands prepared a fresh Grant on 10th January, 2013. He, therefore, urged the Court to make any corrective orders in view of the fact that a title has already been prepared and registered in favour of the 1st Respondent.

The parties herein canvassed this Notice of Motion by way of written submissions. Which I have now carefully considered together with the pleadings. I have also considered the relevant law and I make the following findings.

The Applicant herein in its Notice of Motion has sought for injunctive relief. The Plaintiff/Applicant needed to establish that he deserves the injunctive orders as prayed in its Notice of Motion.

As was stated in the celebrated case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**, the applicant must establish the three fundamental principles.

- i. **The Plaintiff must establish that he has a prima facie case with high chances of success.**
- ii. **That the Plaintiff must establish that it would suffer irreparable loss that cannot be compensated by an award of damages.**
- iii. **If the court is in doubt, it will decide on a balance of convenience.**

Has the Applicant herein satisfied the above principles to warrant grant of injunctive orders sought?

Order 40 Rule 1 deals with the Grant of injunction it states as follows;

1. **Where in any suit it is proved by affidavit or otherwise—**

- a. *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*
- b. *that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;*

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

I have noted that the applicant relied on **Section 13** and **19** of the Environment and Land Court Act and Section 68 of the Land Registration Act 2012 and also section 158 of the Land Act. Section 13 of the Environment and Land Court Act re-emphasized the jurisdiction of the court to hear and determine all disputes relating to land and environment as provided by **Article 162(2) of the Constitution**.

Section 19 of the same Act empowers this court to deal with the matters brought before it expeditiously without undue regard to technicalities.

Further Section 68 of the Land Registration Act gives the court the

Power to make any order inhibiting for a particular time or until occurrence of a particular event or generally until a further order, the registration of any dealing with land, lease or charge.

Finally Section 158 of the Land Act deals with corrupt transactions. The deponent had pleaded that he suspects that corrupt transaction could have led to the cancellation of the Plaintiffs Certificate of lease. The applicant also relied on all other enabling provisions of law and thus the invocation of **Order 40 Rule 1 of the Civil Procedure Rules**.

I have considered the annexures attached to the pleadings herein and I find that there is no doubt that 1st Defendant was the registered proprietor of L. R. No. 209/3007/1 as at December 2003. The Plaintiff alleged that in the year 2003, (2nd December, 2003) the 1st Defendant transferred this parcel of Land to **St Paul Thomas Academy Ltd** for a consideration of **Ksh.5,000,000/-** this is evidenced by the Plaintiff/Applicants annexure No. 3, 5 and entry No. 25 which reads: -

“Transfer to St. Paul Thomas Academy Ltd – through presentation No. 677 dated 14th July, 2005.”

The above position was also deponed by one **Gordon Ochieng**, a Chief Land Officer who stated in paragraph 12 of his Replying Affidavit that on 25th August, 2003, Githimu Kangema Traders applied to the Commissioner of Land for consent to transfer the suit property.

There was evidence that the said consent was granted under annexure G.O. 3. This fact was deponed by the said Chief Land Officer. There was also annexure 7 by the Plaintiff which showed that on 3rd December, 2003, the Plaintiff paid Stamp Duty and on 26th September, 2005, the Plaintiff was issued with Letter of Allotment. This was after an assurance by the Commissioner of Lands that the Lease would be renewed for another period of 50 years. The Plaintiff had paid a further 80,000/- as an additional Stamp Duty as per annexure 9 of its supporting affidavit.

It was the Plaintiff contention that the Registrar of Titles issued a Certificate of Titles in the names of St. Paul Thomas Academy ltd on 23rd march, 2007. However, the said Certificate of Title was later cancelled in circumstances that the Plaintiff alleges were surrounded by corruption. It was further contended by the Plaintiff that it is in possession of the suit land since it acquired the same for a consideration. The 2nd Respondent

has however renewed the lease and issued it in the name of the 1st Defendant. Therefore, the Plaintiff alleges that it will suffer loss if the said state of affairs is not reversed.

The Defendants have all denied the allegation by the Plaintiff and have asked the court to dismiss the plaintiff's case.

I will now proceed to consider the pleadings in totality, the annexures therein and the written submissions to arrive at a conclusion on whether the applicant has satisfied the threshold principles for grant of the injunctive orders.

Firstly, the applicant has to establish that he has a prima facie case with high chances of success. In the case of **Mrao Ltd vs First American Bank of Kenya and 2 others (2003) KLR 125**, the Court of Appeal held that

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

The Plaintiff in its plaint and instant application has alleged that it purchased the suit property from the 1st Defendant and had the same registered in its favour on 14th July, 2005. It was further alleged that the

Plaintiff applied for the renewal of the Grant and was issued with the allotment letter dated 26th September, 2005. A new Grant was registered in the Plaintiff's favour on 23rd March, 2007 but it later learnt that the same was corruptly cancelled and another Grant issued in the name of the 1st Respondent. On the other hand the 1st Respondent denied that it ever transferred the said suit land to the Plaintiff. It was alleged that the Registrar of Title cancelled the entries on the titles relating to the Plaintiff as the same was done fraudulently. The Plaintiff has alleged the only explanation it can give for the cancellation of the Grant is corruption. At this stage, the court cannot establish whether there was corruption or not whether there was fraud or not. These are issues which can only be determined after a full trial.

The Plaintiff alleges that it is in the possession of the suit land. The 1st Defendant denies that allegation. That is also another fact that would need to be determined by calling evidence and interrogating the same

In a full trial. If indeed the Plaintiff is in possession of the suit land and had legitimate expectation that, the suit land would be registered in its name, but as it is now, the same is registered in the name of the 1st Respondent, then the Plaintiff has a right to advance his claim in court and the Defendants have a right to call for an explanation on rebuttal from the former (Plaintiff). The court therefore finds that there is a prima facie case established.

At this juncture, the court is not dealing with the merit and demerits of the case. However, the Plaintiff has established that at some point in time, there was a transfer to itself of the suit property. Later the said transfer was cancelled and new Grant was issued in the name of 1st Defendant. That position was confirmed by the Chief Land Registrar.

The Plaintiff had paid for stamp duties and continued to pay Land Rent. The 2nd and 3rd defendants should be granted an opportunity to explain how and why the transfer and the Grant were cancelled. However Plaintiff had produced documents to show that he had paid for Stamp Duty and the transfer had been effected and even entry entered on the Certificate of Title. The plaintiff has consequently established that he has a prima facie with a likelihood of success.

The plaintiff also needed to establish that it would suffer irreparable loss that cannot be compensated by

an award of damages.

From the documents attached by the Plaintiff, the alleged transaction between the Plaintiff and the 1st Defendant began in the year 2003. The suit property was allegedly sold for **Kshs.5,000,000/-**. The transfer to the Plaintiff was effected on 14th July, 2005. It was later cancelled by the Registrar of Titles. The Plaintiff alleges that it is indeed in possession of the suit land. The Defendants have conceded that the Grant is now registered in the name of the 1st Defendant. The Plaintiff has a claim or dispute over the said cancellation. It alleges that the 1st Defendant sold the suit property to it and Plaintiff had legitimate expectation that the suit property would be registered in its name. The Plaintiff relied on the case of **Doge Vs Kenya Cannery Ltd 1989 IKLR 127** where the Court of Appeal held that:-

“When a man by his conduct has led another to believe that he may safely act on the facts of them and the other does not act on the facts of them, he would not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so.”

Since there is no doubt that the Grant is now registered in the name of the 1st Defendant, if the same is released to the 1st Defendant, the 1st Defendant can deal with it as it deems fit. This is in accordance with **Section 24 of the Land Registration Act.**

Section 24(1) reads as follows:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

There is therefore nothing to stop the 1st Defendant from exercising any of its rights as and when the Grant is released to him. Therefore if the Grant is released to the 1st Defendant, the 1st Defendant can sell, charge and alienate the said land. The 1st Defendant would also resort to the eventuality of evicting the Plaintiff, if indeed Plaintiff is in actual possession. In the event that after full trial, the court rules in

favour of the Plaintiff, then Plaintiff would have nothing to resort to. The Plaintiff would have lost what it had purchased and also loss of expectation of ownership of the suit property and economic benefit. The Plaintiff herein would suffer loss which cannot adequately be compensated by way of damages.

On the third threshold principle, if the court is in doubt, it will decide on a balance of convenience. There is no doubt that the new Grant has been issued in the name of the 1st Defendant. **Section 26(1) of the Land Registration Act** provides as follows:-

“26. (1) 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 are allegations of corruption and counter allegations by the Plaintiff and the 1st Defendant herein. There are issues that the trial court will be called upon to determine. At this juncture, the court is in doubt as to which party is presenting the correct facts. However the Plaintiff has alleged that it is in possession of the suit property since the year 2003. The 1st Defendant has alleged that it has been in possession of

the suit land and has been collecting rent and paying electricity bills for the houses on the suit property. No annexures were attached to the Replying Affidavit to support that allegation.

Since the Grant is in the name of the 1st Defendant, the court finds that the Plaintiff is the one who stands to suffer loss if the same is released at this stage before issues are ventilated in court. The court finds that the balance of convenience shifts in favour of the Plaintiff.

Having considered all the submissions herein, the court finds that

Section 68(1) of the Land Registration Act empowers the court to issue restraints on disposition until a particular event occur or generally until a further order is issued.

In the instant case, I will not hesitate to issue such Order as prayed by the Plaintiff herein.

Further Section **158(2)** invalidates transactions that are tainted or induced by corruption. The Plaintiff has alleged corruption and 1st Defendant has alleged fraud. The trial court needs to interrogate all the issues herein and make a finding on the said allegations based on the evidence adduced in court.

However, as the matter awaits such interrogations, the court needs to preserve the **Status Quo**, or preserve the property until the conclusion of the main suit. For the reasons stated above, the court finds that it is desirable to restrain the 2nd and 3rd Defendant's from releasing the Grant in issue to the 1st Defendant. The plaintiff/applicant has been able to satisfy the court that it has met the threshold principles to warrant grant of injunctive relief.

Having now considered the instant application and all the annexures therein, the court finds that the Plaintiff/Applicant's Notice of Motion dated 21st February, 2013 is merited.

The Court allows the Plaintiff/Applicants Notice of Motion dated 21/2/2013 entirely and costs be in the cause.

However, the Plaintiff/Applicant to set down the matter for hearing of the main suit within the next 12 months from today's date so that the underlying issues can be ventilated expeditiously.

It is so ordered.

DATED and DELIVERED at Nairobi this 14th day of March, 2014

L.N. GACHERU

JUDGE

In the Presence of:-

Mr.Nyakundi holding brief for Mr.Ochieng for the Plaintiff/ Applicant

M/s Kagiri holding brief for M/s Mwihaki for 1st Defendant/Respondent.

M/s Wambui for 2nd,3rd and 4th Defendant/Respondent.

Lukas: Court Clerk

L.N.GACHERU

JUDGE

14/3/2014