



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 650 OF 2013**

**JOHN KAMAU NJOROGE**

**STEPHEN MUYA NJOROGE ( Suing as Administrators of the Estate of**

**ANNE MUGANE NJOROGE ALIAS**

**MUGANE NJOROGE & NJOROGE KAMAU) .....APPLICANTS**

**VERSUS**

**MARY NJERI KIMORI.....1<sup>ST</sup> DEFENDANT**

**RULING**

The matter coming up for determination is a Notice of Motion application dated 30<sup>th</sup> May, 2013, brought by the Plaintiffs/Applicants herein, *John Kamau Njoroge* and *Stephen Muya Njoroge* suing as Administrators of the Estate of *Anne Mugane Njoroge alias Mugane Njoroge and Njoroge Kamau*.

The applicants have sought for various orders against the Defendant/Respondent herein, *Mary Njeri Kimori*. The orders sought are:-

- a. That the *honourable Court be pleased to issue an order of temporary injunction to restrain the Respondent, her agents, and or servants from developing, alienating , disposing , charging , selling and or in any manner whatsoever dealing with parcels of land known as plot No. 6824/114 and 6824/117 pending the hearing and determination of this suit.*
- b. *That costs of this application be provided for.*

The application was premised on the grounds set out on the face of the application and on the Supporting and further Affidavits of **Stephen Muya Njoroge**. These grounds are:

- i. *That the Respondent has illegally, wrongfully and without any color of right commenced construction on the applicants premises without the applicants authority and/ or consent.*

- ii. *That the applicants are the proprietors of the suit premises and they have requested the Respondent to stop her illegal acts of constructing on the Applicants' land but the Respondent has refused thus necessitating this application and suit.*
- iii. *That upon purchase of the suit premises the deceased were given vacant possession of the suit premises and they occupied the same but did not develop due to lack of funds and many family demands that they had.*
- iv. *That the Respondent has no approved development plan and is not capable of obtaining a valid development plan because she is not the owner of the suit premises and the Applicant has not authorized any construction on the suit premises.*
- v. *That the applicants have good suit with high chances of success.*

In his supporting affidavit, the deponent, **Stephen Muya Njoroge** averred that he is one of the Administrators of the Estates of **Anne Mugane Njoroge and Njoroge Kamau**, as per annexure SMN1. He further averred that **Mugane Kungu and Njoroge Kamau** are the rightful owners of parcels of land known as Plot No. 6824/114 and 6824/117 respectively , having purchased the same from **Kamuingi Housing Company Limited** in 1976 and 1973 respectively. He annexed SMN2, which are copies of share certificates issued in respect of the plots by **Kamuingi Housing Co.Ltd**.

It was his contention that upon purchase of the suit premises, the two deceased were given vacant possession of the suit premises and they occupied the same but they did not develop due to lack of funds. The Deponent further contended that the Respondent has trespassed and/ or encroached on the suit premises and have even commenced construction on the said premises.

The applicants further averred that they have never sold the Land or assigned their interest on the land to the Respondent and she has no right to interfere with their land and therefore all the construction undertaken on the land are illegal and violates their constitutional rights to property. He also contended that the Respondent is not the registered owner of the suit premises and she is illegally trespassing on the suit premises by putting up an illegal structure. It was further deposed that the applicants will suffer irreparable loss and damage if the Respondent proceeds with her illegal acts of trespass and construction on the applicants land. The applicant further deposed that if the Respondent proceeds with the construction and interference with the suit premises, the suit will be rendered nugatory and the applicants stands to suffer loss and damages.

The application is vehemently opposed. The Respondent herein , **Mary Njeri Kimori** swore her Replying Affidavit and stated that she is the legal owner and proprietor of parcels of land known as Plot No. **6824/114** and **6824/117** respectively. She averred that she executed a sale agreement with **Kamuingi Housing Co. Ltd** for **Plot No. 6814/114** on **14/4/2011** and for **Plot No. 6824/117** on 7<sup>th</sup> February 2013 as evidenced by annexure **MNK 1** and **MNK 2**. She was further issued with the share certificate cards by **Kamuingi Housing Co. Ltd** for Plots No. **6824/114** and **6824/117** as exhibited by annexure **MNK 3** . She contended that she followed the right procedure before she was allocated Plots No. **6824/114** and **6824/117**. The Respondent further averred that the new plots No. **6824/114** and **6824/117** are subdivision of LR No. 6824 which was purchased and conveyed to **Kamuingi Housing Co. Ltd** by an indenture of conveyance dated 6<sup>th</sup> may, 1974 as shown by annexure **MNK 6** .

However, the applicants had alleged in their affidavit that the said plot was allocated to them on 20<sup>th</sup> November, 1973 as evidenced by the share certificate marked as SMN2. It was also the Respondent contention that the share certificate marked **SMN2** does not clearly show they are in respect of which land reference number and plot numbers as they are only shares without plot numbers She also averred that the applicants lacked capacity to file the suit against her.

The Respondent deposed that she is the only bonafide purchaser for value for **plots No. 6824/114** and **6824/117** from **Kamuingi Housing Co.ltd** and if the applicants have any valid claim on the suit plots , the said claim cannot be determined without **Kamuingi Housing Co.Ltd** been a party to the suit. Further,

that the applicant did not produce any documentary ownership evidence to support their allegation of ownership of the said suit plots **No. 6824/114** and **6824/117** . She therefore urged the court to disallow the applicants' application dated 30<sup>th</sup> May 2013.

Further, one **Bernard Kariuki Mwangi**, filed an opposing Affidavit and he averred that he is the chairman of **Kamuingi Housing Co. Ltd** . He also averred that there was no evidence that **Mugane Kungu** and **Njoroge Kamau** ( both deceased) purchased Plot **No. 6824/114** and **6824/117** respectively.

He further averred that the attached share certificates cannot be in respect of the said plots as the subdivision of LR No. 6824 which was purchased and conveyed to the said company was by an indenture of conveyance dated 6<sup>th</sup> May 1974 months after the share certificates attached to the applicants affidavit. He also stated that he has never seen the applicants on the alleged plot but he admitted that the company executed a sale agreement with **Mary Njeru Kimori**, the Respondent herein and she is therefore the bonafide original allottee and a fully paid member of the company.

The applicant **Stephen Muya Njoroge** filed a further Affidavit and denied the contents of the Respondent's Replying Affidavit. He reiterated that the late **Mugane Kungu** and **Njoroge Kamau** are the lawful owners of the parcels of land known as Plot No 6824/114 and 6824/117 respectively which they purchased from **Kamuingi Housing Company Ltd** in 1976 and 1973 respectively. The applicant also attached Affidavit of **Francis Muturi Njuguna, Lucial Ngoiri Gituamba and Racheal Wanjiku**, who averred that they were member of **Kamungi Housing Co. Ltd** and that they knew **Mugane Kungu** and **Njoroge Kamau** (both deceased) who were also shareholders of the said company and were allocated parcels of land known as Plot **No. 6824/114** and **6824/117** respectively after purchasing the same from **Kamuingi Housing Co. Ltd** in 1976 and 1973 respectively.

The parties herein consented to canvass this Notice of Motion by way of Written Submissions. I have now carefully considered the pleadings generally, the relevant law and the written submissions and I have also taken into account that I need not to dwell with disputed facts at this interlocutory stage. I now make the following findings.

The applicants have sought for an injunctive order to restrain the Defendant from dealing whatsoever with parcels of land known as plots No. 6824/114 and 6824/117 until the matter is heard and determined. It was the contention of the applicants that they are the Administrators of the Estate of **Anne Mugane Njoroge** alias **Mugane Njoroge and Njoroge Kamau** (both deceased) who owned the above stated parcels of land respectively.

However, the Respondent contended that she was the bonafide and legal owner of the two parcels of land having purchased the same from **Kaimungi Housing Co.Ltd** on 14<sup>th</sup> April, 2011 and 7<sup>th</sup> February 2013 as per the two sale agreements attached to her Replying Affidavit annexure **MNK1** and **MNK2**.

The applicants have sought for injunctive relief premised under **Section 3A and 63 (e) of the Civil Procedure Act and Order 40 Rule 1 2 and 3 of the Civil Procedure Rules**. The injunctive Order sought by the applicant is an equitable remedy or relief which is granted at the discretion of the court. However, this discretion must be exercise judicially (See **Daniel Mukwaya Vs Administrator General , Kampala High Court, Civil Suit No. 630 of ( 1993)**).

The courts in Kenya have variously dealt with the issue of grant of interlocutory injunction. The principles upon which an interlocutory injunction can be granted are well laid out in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 ( EA) 358** and many other judicial decision. In the case of **Geoffrey Orao Obura Vs Housing Finance Company of Kenya Ltd , Nairobi ( Milimani) High Court , Civil case No 497 of 2000** , the court held that.

***“The principles upon which an interlocutory injunction can be granted are:- First, an applicant must show a prima –facie case with 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***". (Also see **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.**

The applicants in this case must establish the above stated principles. The court herein will be guided by the laid down principles for grant of injunctive relief and the relevant laws.

The applicants have premised their application under section 3A of the Civil Procedure Act which provides that:-

***"Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court"***.

In the case of **Naju Investment Ltd Vs George Adongo & Another , Nairobi High Court, Civil Case No. 1418 of 1994 ,** it was held that:-

***" The Court can invoke the provisions of Section 3A of the Civil Procedure Act to grant interlocutory injunction"***.( Also see **Belle Manson Ltd Vs Yaya Towers Ltd, Nairobi High Court, Civil Case No. 2225 of 1992).**

Order 40 Rule 1 (a) provides that:-

***" where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to a suit , or wrongful sold in execution of decree; 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 , alienating , sale , removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders"***.

In either granting or rejecting to grant a temporary injunction, the court will therefore be exercising its power donated by **Order 40 Rule 1 of the Civil Procedure Rules**. The applicants herein have averred that they are the Administrators of the Estates of **Anne Mugane Njoroge** and **Njoroge Kamau** . The applicants attached annexure **SMNI** to confirm that position. The Respondent argued that the applicants have no capacity to bring this suit as the **letters of Administration Ad litem**, were only limited to filling a civil suit against the Nairobi City Council.

I have considered the two **letters of Administration Ad Litem**, marked **SMN I** and it is indeed true that the same are only limited to filing a suit against the Nairobi City Council and not the Defendant herein. The applicants have no capacity or **locus standi** to sue the Defendant herein. **Locus Standi** herein signifies a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a court of law (See **BV Navayana Reddy Vs State Kamataka Air ( 1985) (KAN 99).**

However, assuming the applicants have **Locus Standi** to sue the Defendant, have they established the laid down principles for grant of an injunction?.

Firstly the applicants must establish that they have a **prima-facie case** with probability of success.

The applicants alleged that the late **Anne Mugane Njoroge** and **Njoroge Kamau** were the rightful owners of parcels of land known as plot No. 6824/114 and 6824/117 respectively. The applicants attached annexure SM2 which are share certificates. Certificate N0. 073 showed that **Mugane Kungu & Partner** was the registered proprietor of thirty ordinary shares at **Kamuingi Housing Co.Ltd** . Share certificate No. 361 showed that **Mugane Kungu & Partner** was registered proprietor of 70 ordinary shares and certificate No. 019 showed **Njoroge Kamau** was the registered proprietor of **sixty two (62) ordinary shares** at **Kamuingi Housing Company Ltd**. The Three share certificates did not indicate the land reference number or where the land was. However, the Respondent has attached two sale agreements MNK 1 and MNK 2 which confirm that she bought land Reference **No.6824/114** and **68724/117** from

**Kamuingi Housing Co. Ltd.** The share certificates marked SM2 do not indicate that they are in respect of plots No 6824/117 and 6824/117 which were sub divisions of LR No. 6824.

From the Respondent annexure **MNK6**, the parcels of land 6824/114 and 6824/117 were subdivisions of LR 6824 which was purchased and conveyed to **Kamuingi Housing Co. Ltd** by an indenture of conveyance dated 6<sup>th</sup> May 1974 . The applicants share certificates No. 073 and 019 are dated 20<sup>th</sup> November, 1973. That was before the company **Kamuingi Housing Co. Ltd** purchased LR No. 6824. The applicants did not avail any documents to show that the late **Anne Mugane Njoroge** and **Njoroge Kamau** were allocated the two parcels of land respectively. There is no doubt that the two deceased persons were members of Kamuingi Housing Company in issue. But were they allocated the two parcels of land?.

I have considered the further affidavit by the applicants herein which has several annexures and averments. However, all the averments therein can be canvassed in a trial. At this interlocutory stage, the court is not required to determine the way issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria of whether the principles for grant of such orders have been satisfied ( See **Edwin Kamau Muiru Vs Barclays Bank of Kenya ltd , Nairobi ( Milimani) High Court Civil Case No. 118 of 2002**).

The applicants herein needed to establish a prima facie case as described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125**, as:-

***“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”.***

In the instance case, a prima facie case means more than an arguable case, that the evidence must show an infringement of right and probability of success of the applicants’ case at the trial.

The applicants did aver that the two deceased persons did not put up any structure or building on the suit land. There is no document to show that the two deceased persons owned the suit land herein. I find that the applicants have failed to establish that they have a prima- facie case with probability of success.

The second principle is that the applicants must establish that they will suffer irreparable loss which cannot be compensated by an award of damages. The applicants confirmed in their supporting affidavit that the two deceased persons did not develop the value of the two parcels of land. The two parcels of land can be assessed and the applicants paid the equivalent of the market value in case they succeed in their case in future.

The purpose of seeking of injunction is to protect the rights of the applicant from violation or threatened violation of an act he cannot be compensated by an award of damages (See **Mrao Ltd Vs First American Bank of Kenya ( Supra)**). Since the two parcels of land can be valued then it cannot be said that the applicants will suffer an irreparable loss which cannot be compensated by an award of damages. (See **Samuel Benjamin Obura Vs Kenya Commercial Bank ltd, Kisumu High Court, Civil Case No. 91 of 2003**).

The applicants herein have therefore failed to establish that they will suffer loss which cannot be compensated by an award of damages.

On the third principle, the court is not in doubt; I find no reason to consider it. However, if I was to consider it, I find that the balance of convenience tilts in favour of the Respondent who has two sale agreements in respect of plots No. 6824/114 and 6824/117. I will be guided by the case of **East African Development Vs Hyundai Motors Kenya Ltd Civil Appeal No 194 of 2004**, where the court held that:-

***“The judge having satisfied himself that the respondent had failed to establish the two conditions of prima facie case with probability of success and irreparable injury which cannot adequately be***

***compensated by an award of damages, he was right not to consider the balance of convenience as the court considers balance of convenience where there is doubt”.***

I have no doubt in this matter and I will not deal with the balance of convenience.

Having now carefully considered the Notice of Motion dated 30<sup>th</sup> May, 2013, the relevant laws, and the written submissions, I find that the applicants have failed to meet the threshold for grant of injunctive orders. For the above reasons, the court dismisses the applicants’ Notice of Motion dated **30<sup>th</sup> May, 2013** with costs to the Respondent.

It is so ordered.

Dated, signed and delivered this **9<sup>th</sup> day** of **May, 2014**

**L.GACHERU**

**JUDGE**

In the Presence of:-

.....for the Applicant

.....for the Respondent

Lukas: Court Clerk

**L.GACHERU**

**JUDGE**