



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT & LAND DIVISION**

**CIVIL SUIT NO.1298 OF 2013**

**SAMUEL NYANCHAMA MAUGO.....PLAINTIFF**

**VERSUS**

**STEPHEN MOSHI PEROCH.....1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, KAJIADO.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

The application for this court's determination is the Notice of Motion dated 30<sup>th</sup> October 2013 brought under sections 1A,1B,3A of the Civil Procedure Act and Order 40 Rule 1 and 51 of the Civil Procedure Rules seeking for orders that :-

1. Spent

2. Spent

3. There be an order restraining the 1<sup>st</sup> defendant either by himself his servants and/or agents from any trespassing, developing and in any way dealing with the suit property known as **LR No Ngong/Ngong/6311** pending the hearing and determination of this suit.

4. There be an order staying registration or any dealing with regard to piece of land Known as **LR No Ngong/Ngong/6311** pending the hearing and determination of this application.

5. There be an order staying registration or any dealing with regard to piece of land Known as **LR No Ngong/Ngong/6311** pending the hearing and determination of this suit.

6. There be conservatory orders of this suit property known as **LR No Ngong/Ngong/6311** pending the hearing and determination of this application.

7. There be conservatory orders of this suit property known as **LR No Ngong/Ngong/6311** pending the hearing and determination of this suit.

## 8. Costs be provided for.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of the plaintiff **Samuel Nyanchama Maugo** who deposed that he is the duly registered owner of the suit property and have never at any given time either by himself, servants and/or agents transferred the suit property to the 1<sup>st</sup> defendant either by himself, his servants and/or agents or any other person for that matter. That he used the suit property to secure a charge in favour of Barclays Bank of Kenya Limited in January 1998 and on 10<sup>th</sup> December 2012 in the course of registering a discharge of charge at Kajiado Lands registry, he discovered that the property had fraudulently been transferred to the 1<sup>st</sup> defendant and when he carried out a search at the Kajiado Lands Registry he search showed that the 1<sup>st</sup> defendant was issued a title deed of the suit property on 23<sup>rd</sup> July 1999. That besides the title indicating that it was issued to the 1<sup>st</sup> defendant there was a charge against the suit property registered the previous year on the 21<sup>st</sup> January 1998. He believes that it is against the law to transfer land or issue new title if the title to the land has a registered charge or an encumbrance that is yet to be discharged therefore the title issued to the 1<sup>st</sup> defendant was fraudulently obtained. That on the discovery of the fraudulent title he reported the matter to the 3<sup>rd</sup> defendant so that they could carry out their investigations. However he noted that the 1<sup>st</sup> defendant had taken possession of the suit property and was constructing permanent structures on the suit property. He avers that unless the orders sought are granted the 1<sup>st</sup> defendant will complete the unfinished structures on the premises to his detriment.

This application is opposed. The 1<sup>st</sup> defendant, **Stephen Moshi Peroh** filed his replying affidavit on 26<sup>th</sup> November 2013 and stated that in June 2009 the 1<sup>st</sup> defendant and his brother were desirous of procuring land for purposes of erecting flats. They therefore scouted for land and were informed that there was land which was the suit property and on enquiring they discovered that the land belonged to one **Samuel Gatugi Kimani** and a search at the Lands Registry revealed that indeed the said Samuel owned the land. The 1<sup>st</sup> defendant and his brother purchased the property at a consideration of Ksh 3,700,000/= and they later sought and were granted consent at the Land Control Board on 7<sup>th</sup> July 2009. Further, they executed the sale agreement and paid stamp duty and had the property transferred to and title issued to them. They thereafter constructed flats in December 2009 after obtaining the necessary approvals from the respective offices. It was averred that they have completed the first block of flat and are now leased and that they are now constructing the second block. He further averred that the plaintiff in the company of two other men visited the site on 3<sup>rd</sup> September 2012, and claimed that the suit property belonged to him and when they tried to verify the plaintiff's allegation at the lands office they were asked to supply original title deed to the suit and in view of their inability to verify the status of the suit property through an official search, they opted to request the Ministry of Lands to carry out investigations into the issue. They later received a demand letter from the plaintiff asking them to vacate the suit property but they declined since they were awaiting the finding from the Ministry of Lands which they have not received to date. He believes that the plaintiff has not been candid for the reasons that he was issued with title to the suit property on 26<sup>th</sup> November 1997 while that of Gatugi shows that it was issued on 21<sup>st</sup> April 1995. That the plaintiff had waited for over a period of one year to claim ownership of the suit property and that they have extensively carried out development on the suit land. He believes that the plaintiff is guilty of laches having waited for the suit property to be developed and is now attempting to unjustly enrich himself at the 1<sup>st</sup> defendant's expense and which disentitles the plaintiff the exercise of this court's discretion.

Parties canvassed this application by way of written submissions. The plaintiff filed his submissions on 16<sup>th</sup> January 2014. He submitted that the only issue for this court's consideration is whether the plaintiff had established a prima facie case to warrant the grant of the injunctive orders sought. He relied on the case of **Giella –vs- Cassman Brown Ltd**. He stated that he had established that he obtained a certificate of title to the suit property on 1<sup>st</sup> March 1985 and a re- issue of the title by the 3<sup>rd</sup> defendant on 26<sup>th</sup> November 1997. He also added that the suit property was charged to National Bank on 7<sup>th</sup> March 1990 and to Barclays Bank on 21<sup>st</sup> January 1998.

On the limb of whether the reparable injury cannot be compensated by way of damages, the plaintiff

submitted that since the title was registered in the 1<sup>st</sup> defendant's name, he may transfer the suit property to a third party any time before the hearing and determination of the suit property. He also submitted that the plaintiff had owned the property for 29 years and the loss cannot be adequately compensated by way of monetary damages. On a balance of convenience the plaintiff relied on section 24 and 25 of the Land Registration Act where it provides that 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. He added that both the plaintiff and the 1<sup>st</sup> defendant have title in respect to the suit property issued by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants thereby making both of them registered proprietors. He however adds that he will suffer inconvenience if the orders of injunction are not granted since the 1<sup>st</sup> Respondent may transfer or charge the suit property to innocent third parties before the hearing and determination of the suit property therefore the balance of convenience is to preserve the property pending the hearing and determination of the suit.

The 1<sup>st</sup> defendant filed his submissions on 7<sup>th</sup> April 2014 wherein he submitted that he is a bonafide purchaser for value and that the plaintiff had failed to dislodge this presumption. He also submitted that there was no evidence that the 1<sup>st</sup> defendant has the intention to dispose the suit property and speculative argument cannot be the basis for the grant of the equitable remedy of injunction and therefore the plaintiff has failed to establish a prima facie case. On the balance of convenience the 1<sup>st</sup> defendant submitted that by the time the plaintiff was laying claim on the suit property, he had already finished the first block of flats and was in the process of constructing the second flat therefore the balance of convenience tilts in favour of the 1<sup>st</sup> defendant. He relied on the case of **James Jamwa Ndeda-vs- Dorine Aluoch Oluoch** where the court held that, “..... the balance of convenience would tilt in favour of the defendant who is in actual possession of the suit property rather than the plaintiff who may be in occupation by remote control”.

The 1<sup>st</sup> defendant also submitted that he was willing to give an undertaking as to damages while the plaintiff has failed to do so and the fact that the plaintiff had not given an undertaking as to damages and he is therefore not entitled to the orders sought.

The basic issue for determination is whether the plaintiff is entitled to the orders of temporary injunction he has sought against the defendants pending the hearing and disposal of this suit. The parameters enunciated in the **Giella V. Cassman Brown Limited, (1973) EA 348**, case must be met. ***“The applicant in each application must demonstrate prima facie case with a probability of success at the trial. They must also show that unless an order of injunction is granted, they will suffer such loss that is not capable of compensation by an award of damages. However, in case the court is in doubt, then it must decide the application on a balance of convenience”.***

In considering whether the plaintiff has a prima facie case, the court is not at this stage expected to delve into the merit of each of the party's case. The court is only required to inquire whether there is an apparent violation of the plaintiff's rights which would necessitate the calling upon the defendants to offer a rebuttal. In the case of **Mrao Limited V. First American Bank of Kenya Limited (2003) KLR 125**, it was held that,

***“a prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”***

From the pleadings, the plaintiff has produced a copy of his title deed to the suit property. He however produced a certificate of search that showed that the 1<sup>st</sup> defendant was current registered owner of the suit property. He claims that the 1<sup>st</sup> defendant acquired his title fraudulently. In response the 1<sup>st</sup> defendant stated that he bought the suit property after undertaking the necessary due diligence at the Land Registry to ascertain the true owner of the property. He stated that after confirming that .....was the legal owner of the suit property as per the records at the Lands registry he proceeded with the transaction and

even went ahead to construct flats on the suit property. He claims to be an innocent purchaser for value without notice. This is a difficult question which cannot be decided on affidavit evidence. Oral evidence has to be presented by each party to prove their respective claim as regarding how they acquired their respective title deeds and whose title precedes the other. It follows that while the plaintiff in the main suit has a title issued in 1997, the 1st defendant claims that the previous buyer they bought the property from had his title issued in 1995. There are allegations of fraud against the defendants. The cardinal principle of the law on evidence is that he who alleges must prove. This issue can therefore only be fully determined at the trial since at this stage the plaintiff has not established a strong case on the ground of fraud. Because each party has a legitimate claim to the suit property, it is therefore just and reasonable that no orders should be made that may affect the status quo.

Having considered the pleadings severally and the submissions, the court orders that status quo herein should be maintained in the following terms:-

- 1. The 1<sup>st</sup> defendant must stop any development and /or construction of flats in the suit property LR No. Ngong/Ngong/6311 pending the hearing and determination of this suit.**
- 2. Both the plaintiff and the 1<sup>st</sup> defendant are restrained from selling and/or disposing or registering or any dealing with regard to LR No Ngong/Ngong/6311 pending the hearing and determination of this suit.**
- 3. Costs of the application will be in the cause.**

Dated, signed and delivered this **11<sup>th</sup>** day of **November** 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....for the Plaintiff/Applicant

.....for the 1<sup>st</sup> Defendant/Respondent

.....for the 2<sup>nd</sup> Defendant/Respondent

.....for the 3<sup>rd</sup> Defendant/Respondent

.....for the 4<sup>th</sup> Defendant/Respondent

.....Court Clerk

**L.N. GACHERU**

**JUDGE**

**11/11/2014**