



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 441 OF 2009**

**MUCHANGI NDUATI NGINGO**

**T/A MUCHANGI NDUATI & CO. ADVOCATES.....PLAINTIFF**

**VERSUS**

**THE COMMISSIONER OF LANDS..... 1<sup>ST</sup> DEFENDANT**

**MBOI-KAMITI FARMERS CO. LTD.....2<sup>ND</sup> DEFENDANT**

**SAMIA PROPERTIES LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Notice of Motion before the court for determination is dated 21<sup>st</sup> July 2011 and is brought by the Plaintiff under Sections 1A,1B, 3A and 63(e) of the Civil Procedure Act. The Plaintiff withdrew one of the orders sought on 10<sup>th</sup> July 2013 seeking to commit the 1<sup>st</sup> Defendant to cited for contempt and committed to civil jail. The outstanding substantive orders he is therefore seeking are as follows:-

1. The Registrar of this Court be empowered and direct to execute/sign the leases/transfer and all the other necessary documents pertaining to plots Nos. L.R RUIRU/KIU BLOCK 4/1723, 1726, 2042, 2043 and 2044 (hereinafter referred to as the suit properties) on behalf of the 2<sup>nd</sup> Defendant company, to enable 1<sup>st</sup> Defendant comply with the order made on 22<sup>nd</sup> February 2011 and eventual registration into the Plaintiff's name.
2. The 1<sup>st</sup> Defendant be ordered to immediately and not later than 14 days of the order present the said leases to the Registrar of the High Court for the necessary endorsement/execution.

The main grounds for the Notice of Motion are that 2<sup>nd</sup> Defendant company has been for a long time engaged in leadership wrangles, and does not currently have a legitimate board of directors as the leadership disputes for the various groups are pending in court, and there is no likelihood for their being determined in the near future to the applicant's prejudice. Further that some of the directors whose leadership disputes are in court will not be willing to execute the necessary leases/documents as the Plaintiff was involved in the case that had led to their removal from office in year 2006.

The Notice of Motion is supported by an affidavit sworn by the Plaintiff on 21<sup>st</sup> July 2011, wherein he stated that the suit properties herein were assigned and/or transferred to him by the 2<sup>nd</sup> Defendant company to cover part of legal fees due for professional services he rendered, as the said company did not have the funds at the time. The Plaintiff attached a copy of the agreement and minutes to this effect dated 15<sup>th</sup> June 2007 and 2<sup>nd</sup> May 2007 respectively.

The Plaintiff further stated that said company's board of directors also executed transfer forms in his favour, but due to the problems occasioned at the Lands office both in Nairobi and Thika he could not register the transfers in good time and they are now not registrable due to passage of time and dates would have to be altered. He attached as further evidence copies of the executed transfer forms for the 5 plots, a copy of bankers cheque dated 20<sup>th</sup> April 2009 and of pay-in-slips to Kenya Revenue Authority dated 22<sup>nd</sup> April 2009 with respect to the plots and receipts.

It is also averred by the Plaintiff that subsequent directors of the 2<sup>nd</sup> Defendant company have fraudulently and unlawfully transferred some of the said plots to third parties to his prejudice. The Plaintiff stated that in compliance with the order made by this court in 12<sup>th</sup> October 2009, the 1<sup>st</sup> Defendant has now indicated that five (5) plots are ready and available for release, and he attached a copy of a letter from Attorney General's Office dated 13<sup>th</sup> June 2011 in this regard. Further, that the leases need to be executed by the 2<sup>nd</sup> Defendant company to enable eventual registration into his name, which cannot be done due to the leadership wrangles in the company. The Plaintiff urged the Court to intervene and grant the orders sought to avoid further delays and in the interests of justice.

The 1<sup>st</sup> Defendant initially filed Grounds of Opposition to the said Notice of Motion dated 19<sup>th</sup> April 2013. However, during the hearing of the Notice of Motion on 10<sup>th</sup> July 2013 its counsel submitted that she would not oppose the Notice of Motion following the withdrawal by the Plaintiff of the prayers seeking to commit the 1<sup>st</sup> Defendant for contempt of court. The counsel for the 3<sup>rd</sup> Defendant also submitted that they would not oppose the Notice of Motion. The service of the application and hearing notice was ordered to be effected upon the 2<sup>nd</sup> Defendants by way of advertisement in a daily newspaper which service was effected, and the 2<sup>nd</sup> Defendant did appear nor respond to the said Notice of Motion.

I have read and carefully considered the pleadings, evidence and submissions by the made by the parties. The issue before the court is whether the Plaintiff has shown a *prima facie* case and special circumstances to entitle them to the mandatory injunction sought.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of the sale agreement entered into with the 2<sup>nd</sup> Defendant dated 15<sup>th</sup> June 2007 with respect to the suit properties, minutes of the 2<sup>nd</sup> Defendant held on 2<sup>nd</sup> May 2007 on the payment of the Plaintiff by way of allocation of 15 plots, and transfer of lease forms for the said plots signed by the 2<sup>nd</sup> Defendant Directors and the Plaintiff. To this extent I do find that the Plaintiff has established a *prima facie* case.

The second question then to be decided is whether the Plaintiff is entitled to the mandatory injunction sought. The Court of Appeal as held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

I note in this regard that it is stated in the Amended Plaint and supporting affidavit that some of the plots that were the subject of the agreement between the Plaintiff and 2<sup>nd</sup> Defendant have since been sold to third parties. The Amended Plaint in particular seeks a declaration that any transaction between the Defendants and any third parties in respect of the suit properties is null and void, and that the transfers to third parties be revoked.

In addition, no evidence was provided by the Plaintiff to show that the suit properties with respect to which he seeks to have leases and transfer forms executed by the Registrar are still registered in the 2<sup>nd</sup> Defendant's name. This is therefore not a clear case for such final mandatory orders as are sought by the Plaintiff, and it is my opinion that this matter should proceed to full trial and further evidence adduced and canvassed before a determination is made on the orders sought with regard to the suit properties.

I accordingly decline to grant the prayers sought in the Plaintiff's Notice of Motion dated 21<sup>st</sup> July 2011.

The costs of the said Notice of Motion shall be in the cause

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_7<sup>th</sup>\_\_\_\_ day of  
\_\_\_\_October\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**