



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**LAND AND ENVIRONMENT DIVISION**  
**CIVIL CASE NO. 937 OF 2012**

<b>MAVJI KANJI HIRANI.....</b>	<b>1<sup>ST</sup></b>
<b>PLAINTIFF</b>	
<b>LALJI KANJI HIRANI.....</b>	<b>2<sup>ND</sup></b>
<b>PLAINTIFF</b>	
<b>KUVERJI GAVID PATEL &amp; SONS LTD.....</b>	<b>3<sup>RD</sup></b>
<b>PLAINTIFF</b>	
<b>-VERSUS-</b>	
<b>THE ATTORNEY GENERAL.....</b>	<b>1<sup>ST</sup></b>
<b>DEFENDANT</b>	
<b>MINISTER OF LANDS .....</b>	<b>2<sup>ND</sup></b>
<b>DEFENDANT</b>	
<b>NATIONAL AIDS AND STI's CONTROL PROGRAMME ( NASCOP).....</b>	<b>3<sup>RD</sup></b>
<b>DEFENDANT</b>	
<b>MINISTER OF MEDICAL SERVICES.....</b>	<b>4<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>THE COMMISSIONER OF LAND.....</b>	<b>5<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>REGISTRAR OF TITLES.....</b>	<b>6<sup>TH</sup></b>
<b>DEFENDANT</b>	

**RULING:**

The Applicants herein through a Notice of Motion dated 4<sup>th</sup> December, 2012 have sought for various orders:-

1. Spent.

2. Spent.
3. Spent.
4. Spent.
5. Spent.
6. That the Defendants/Respondents be restrained whether by themselves , their servants or agents from entering into, being on, excavating, taking away soil, depositing sand and other building materials on the said LR No. 9094/1 and LR No. 9094/2 pending the hearing and determination of this suit.
7. That the Defendants by themselves, servants, agents be restrained from entering into, depositing building materials, excavating alienating or otherwise interfering with the Plaintiffs and their employees peaceful occupation and possession of property known as LR No. 9094/1 and LR No. 9094/2 pending the hearing and final determination of this suit.

The application is based on the grounds stated on the face of the application notably; that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants are the owners of LR No. 9094/1; that 3<sup>rd</sup> Plaintiff /Applicant is the owner of LR No. 9094/2, that the 6<sup>th</sup> Respondent purported to revoke the Plaintiffs titles via Gazette Notice No. 5558 of 2011 without any notice to the Plaintiffs and allocated the same to the 3<sup>rd</sup> Respondent; that the 3<sup>rd</sup> Respondent is constructing on the said property thus depriving the Plaintiffs of the said property in contravention of Article 40(3) of the Constitution; that unless restraining Orders sought are granted, the deprivation of their property LR No. 9094/1 and LR No. 9094/2 will continue and the Plaintiffs right to seek remedy against contravention of their rights will be rendered nugatory.

The application is also supported by the Supporting Affidavit of **Mavji Kanji Hiran** the 1<sup>st</sup> Plaintiff herein.

The application is opposed by the Respondents and the Interested Party herein, **Kenya Medical Supplies Agencies ( Kemsas)**.The Respondents opposed the application through the Replying Affidavits sworn by **Edwin Munoko** who averred that the suit properties LR No. 9094/1 and LR No. 9094/2 formed part of Public Land and were reserved for **public use**.That the government allocated the suit properties on 20<sup>th</sup> December, 2005 to KEMSA vide an allotment letter from the Commissioner of Lands reference No. 229052/3 and KEMSA paid **Kshs.3,596/=** as the Stand Premium on 26/4/2006 vide Banker's cheque No. 00926 in favour of the Commissioner of Lands.

The Interested Party through the Replying Affidavit of **Fredrick Wanyonyi** opposed the Notice of Motion.The deponent stated that KEMSA was allocated the two suit properties LR No. 9094/1 and LR No. 9094/2 on 20/12/2005. However, the applicants alleged that they had purchased the land in 2007 whereas the suit properties formed part of Public land and were reserved for public use.

That the applicants got into the suit properties in December, 2009 and as a result the Government through Legal Notice No. 5558 dated 21<sup>st</sup> May, 2010 revoked the two title deeds.Through a Presidential Grant, the Interested Party was issued with two Certificates of Titles No. 28464 and 28465 marked FW4. That the applicants acquired the suit properties illegally and are not entitled to conservatory orders.

The Parties herein canvassed the application through written submissions which I have carefully examined.The Court has also considered the pleadings, the relevant Law and cited authorities.The issue for determination is whether the applicants have established the threshold principles for grant of injunctive relief as was laid down in the case of **Giella Vs Cassman Brown and Co .Ltd ( 1973) EA 358**.The Court held that the applicant must show that :-

- a. He has a prima facie case with probability of success.
- b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.
- c. When the court is in doubt, to decide the case on a balance of convenience.

In the instant case, have the applicants established that they have a prima-facie case with probability of

success?. In the case of **MRAO LTD VS FIRST AMERICAL BANK OF KENYA LTD & 2 OTHERS [2003] KLR**, prima-facie case was described as :-

***“ 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 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”.***

From the available documents, interested party annexures FW1, the two suit properties were allocated to KEMSA on 20<sup>th</sup> December, 2005 and KEMSA proceeded to pay stand-premium to the government of Kenya vide receipt No. ....it is also alleged by the applicants that they purchased the two suit properties in the year 2007. That was two years after the said properties had been allocated to the Interested Party. The applicants were issued with certificate of titles , annexures MKHLKHI and mkhkh2 on 4<sup>th</sup> days of April, 2007. However, the said Certificates of titles were cancelled vide Kenya gazette No. 5558 of 2010. It is also evident that two other titles were issued to the Interested Party on 1/6/2010 as per FW4.

The applicants have alleged that the said revocation was illegal and unconstitutional. The Interested Party on the other hand have alleged that the applicants' titles are challenged as the suit properties were irregularly acquired.

Though the applicants have alleged that the act of revocation of their certificates of title were illegal, the court cannot determine that issue at this interlocutory stage. The said issue will effectively be determined during full trial of the matter.

There are two sets of certificates of titles. The ones issued to the applicants in the year 2007 (though revoked) and the ones issued to the Interested Party in the year 2010. So which sets of certificates of titles are valid? That is also a question to be observed and determined after evidence has been called and tested in court.

**Section 26 of the Land Registration Act 2012**, gives instances when certificates of titles can be challenged:-

- a. *On the grounds 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.*

The Interested Party has challenged the certificates of Titles that the applicants herein are relying on.

That is an issue to be determined by the trial court. This court will therefore be unable to find and hold that the applicants herein have established a ***prima facie case*** with high ***probability of success***.

Have the applicants established that they will suffer irreparable damages which cannot be compensated by an award of damages?.

The applicants alleged that they have invested heavily on the suit property and have been in occupation of the same since it was allocated to them. That if Defendants are allowed to interfere with the suit land; the applicants will not recover the investment made on the suit properties.

However, the applicants also alleged that the Interested Party has put up a perimeter wall on the suit properties. That therefore means that the applicants are not in exclusive possession of the suit properties. The Interested Party averred that the applicants have attached a plan to construct a go down facility but have failed to show any developments on the suit properties. Indeed the photographs attached to the Notice of Motion do not show any development or construction on the suit properties.

The Court would find it hard to conclude that indeed the applicants herein have invested on the said suit properties and that they would suffer irreparable harm if the said injunction is not granted. The Court will

rely on the case of **Isaack Gathungu Wanjohi & Another Vs The Attorney General and 6 others (2012) eKLR** where the court held that;

*“ in the event the Court comes to the conclusion that the property was not illegally acquired then State would be able to satisfy the claim for damages”.*

In the instant case, the court finds that in the event that the case will be decided in favour of the applicants, the Respondents would be ordered to pay damages to the applicants.

Having found that the applicants herein have failed to establish the first two principles for grant of injunction, the Court finds no reason to deal with the 3<sup>rd</sup> principle of: - ***in the event of doubt, the court to decide on a balance of convenience***. However, even if the Court was to dwell on that issue, the balance of convenience would tilt in favour of the Interested Party herein.

There is allegation that, the suit properties were Public Land. For the public interest, the Court finds that issuing injunction Orders at this juncture would not augur well.

In a nutshell, the Court finds that the Applicants Notice of Motion dated 4<sup>th</sup> December, 2012 is not merited. The same is dismissed with costs to the 3<sup>rd</sup> Respondent and Interested Party herein.

The main suit to be set down for hearing and be decided on merit. It is so ordered.

**Dated and delivered this 2<sup>nd</sup> day of October, 2013.**

**L.N. GACHERU**

**JUDGE**

**In the Presence of:-**

..... **For the Plaintiffs**

..... **For the Defendants**

**Muna :Court Clerk**

**L.N. GACHERU**