



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC NO. 1474 OF 2014**

**CHRIS NYAKUNDI (Suing through his attorney**

**JEREMIAH MATAGARO.....PLAINTIFF**

**VERSUS**

**MIMOSA PLANTATIONS LTD.....1<sup>ST</sup> DEFENDANT**

**EZEKIEL MISANGO MUTISYA.....2<sup>ND</sup> DEFENDANT**

**ZEPHR HOLDINGS LTD.....3<sup>RD</sup> DEFENDANT**

**NAIROBI DISTRICT LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT**

**REMU JEWELLARIES LTD.....6<sup>TH</sup> DEFENDANT**

**SUE MURIUKI.....7<sup>TH</sup> DEFENDANT**

**JOSEPH KAMUNYU.....8<sup>TH</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1. This is a ruling in respect of a Notice of Motion dated 8<sup>th</sup> April, 2019 brought by the 7<sup>th</sup> and 8<sup>th</sup> proposed Defendants/Applicants. The Plaintiff/Respondent had filed this suit on 24<sup>th</sup> November, 2014 against five Defendants. The plaint was later amended to include the sixth Defendant.
2. The Plaintiff had purchased LR No Nairobi/Block 112/127 (suit property) from the first Defendant and had a transfer registered in his name. The Plaintiff later learnt that third Defendant had filed a suit against the first Defendant in which a decree had been obtained in favour of the third Defendant who caused the suit property to be sold in a public auction wherein the second Defendant purchased the suit property.
3. The second Defendant then sold the suit property to the sixth Defendant. In 2015, the sixth Defendant commenced construction on the suit property. This forced the Plaintiff/Respondent to file an application for injunction dated 5<sup>th</sup> November, 2015. Lady Justice Gacheru directed that the application be canvassed by way of Written Submissions. The Judge was however transferred before she could deliver a ruling.
4. When this file was placed before me on 26<sup>th</sup> November 2018, Counsel for the Plaintiff/Respondent indicated to me that there was a pending application in respect of which parties had filed Written Submissions. The Court then advised that there was no need of pursuing an application filed in 2015 when nothing was happening. The Court advised that the case be fixed for main hearing which was then set for 16<sup>th</sup> January, 2019.
5. On 16<sup>th</sup> January 2019, Counsel for Plaintiff, second, fourth and sixth Defendants were present. The Counsel for the Defendants who were present indicated that they were not ready to proceed. The case was then adjourned to 23<sup>rd</sup> October, 2019. On 12<sup>th</sup> March, 2019 the Plaintiff/Respondent filed a Notice of Motion dated 8<sup>th</sup> March, 2019 seeking injunction against the sixth and seventh and eighth proposed Defendants. Through this application was filed under certificate of urgency on 12<sup>th</sup> March 2019, the file was not placed before me until 22<sup>nd</sup>

March, 2019 and when I inquired from my Court assistant where the file was, I was explained that the file was traced in the bundle for the June, 2019 files at the registry.

6. As the Applicant in the application dated 8th March, 2019 had demonstrated that there was an ongoing construction in the suit property yet the matter had been fixed for hearing of the main suit, I granted an ex-parte injunction and directed that inter-partes hearing be on 4<sup>th</sup> April, 2019. Come 4<sup>th</sup> April 2019, the Respondents were not ready to proceed. The application was adjourned to 19<sup>th</sup> June, 2019. In the meantime the present application was filed on 8<sup>th</sup> April, 2019.

### **Applicants' contention**

7. The Applicants are seeking variation of the injunction which was granted on 22<sup>nd</sup> March, 2019 and subsequently extended on 4<sup>th</sup> April, 2019 to the extent that they be allowed to continue having possession of the suit property and continue to construct the house on it to completion. The Applicants argue that they purchased the suit property from the sixth Defendant for Kshs.42,000,000/= and a further Kshs.500,000/= paid as penalty; that they did not know that there was a pending suit in Court and that they had sold the house in which they were staying in and rented a house for a few months in anticipation of moving into their new house by end of May, 2019. The Applicants further argue that they have already moved some of their household goods in a container into the suit property and that if they are not allowed to complete the house, the construction materials will be vandalized.

8. The Applicant also argue that the Respondent will not suffer any prejudice if they moved into the suit property because if the Respondent finally wins this case, he will take the suit property with the house which will be to his advantage and that in any case, the Respondent in the alternative prayer is seeking compensation for the suit property.

9. The Applicants argue that they are innocent purchasers for value without notice of any defect in title; that they carried out all due diligence and established that the suit property was in the name of the sixth Defendant. The Applicants argue that they have engaged various contractors to ensure that the house is complete as soon as possible. The Applicants further argue that though they are yet to be enjoined in this suit the Respondent has no prima facie case as the suit property was sold to the second Defendant in a genuine way and that the power of attorney which the Respondent was given has two different names. The Applicants also argue that they too purchased the suit property from the sixth Defendant who had a genuine title.

### **Respondent's Response**

10. The Respondent argues that the sixth Defendant transferred the suit property to the seventh Applicant while this suit is still pending and that therefore such transfer cannot confer any interest in the seventh Applicant and therefore the prayer for review of the Court's orders cannot be granted. The Respondent therefore contends that the seventh Applicant cannot enjoy protection of an innocent purchaser for value.

11. The Respondent further argues that the seventh Defendant/Applicant had only annexed a copy of an undated sale agreement without any other documents in support of transfer and cannot therefore seek a review of the orders given by Court on that basis. The Respondent argues that there have been two transfers of the suit property during the pendency of this suit and therefore the Court should not vary the orders granted in view of the doctrine of *lis pendens*.

### **Analysis**

12. I have considered the application by the Applicants as well as the opposition to the same by the Respondents. The Applicants and particularly the seventh Defendant/Applicant is seeking to be allowed to proceed with the construction on the suit premises. The Respondent on the other hand argues that the orders should not be varied in order to protect the suit property pending determination of the dispute herein. The only issue for determination in this matter is whether the injunction should be varied in the manner sought.

13. It is not contested that the Respondent was the registered owner of the suit property as at 8<sup>th</sup> July, 1994. The Respondent purchased the suit property from the first Defendant who was the previous owner of the same. The second Defendant purchased the suit property during a public auction. The auction was alleged to be as a result of a suit between the third Defendant and the first Defendant. The proceedings took place in 2012. The question which will be asked is whether it was possible for a property not registered in the name of the first Defendant to be sold in a public auction.

14. The second Defendant transferred the suit property to the sixth Defendant while this suit was pending. The sixth Defendant further transferred this suit to the seventh Proposed Defendant/Applicant and her husband. The agreement annexed to the Applicants application is not dated. It is therefore not known when the agreement took place. However from the documents annexed to the Applicants application, the sale may have been done in late 2018. This is after this suit had been re-activated for hearing the same having remained dormant since mid-June, 2016.

### **Conclusion**

15. What is clear from the photographs annexed to the Applicant's application is that the house which is being constructed is far from over. It is just a skeleton. The issue of the Applicants being innocent purchasers cannot be addressed at this stage. The concern of this Court at this stage is to preserve the property and this is why the injunctive orders were granted even though the Applicants had not been formally enjoined in the proceedings. The injunction was aimed at stopping the construction. This suit is fixed for hearing on 23<sup>rd</sup> October, 2019. The application for injunction is set for hearing on 19th June, 2019. The injunctive orders cannot in the circumstances be varied as to allow the construction to go on. I therefore find no merit in the application dated 8<sup>th</sup> April, 2019 which is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 19<sup>th</sup> day of June, 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of Mr. Olalo for Plaintiff, Mr. Mulandi for 6<sup>th</sup> Defendant and Mr. Nyamu for 7<sup>th</sup> and 8<sup>th</sup> Defendants.

Court Assistant Hilda