



**REPUBLIC OF KENYA**

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

**ELC CASE NO 748 OF 2013**

**DAVID MBURU GITHERE.....1 ST PLAINTIFF**

**GEORGE JONATHAN MAARA.....2 ND PLAINTIFF**

**VERSUS**

**JOHN PETER KAMAU RUHANGI.....1 ST DEFENDANT**

**GUMCHEM KENYA LIMITED.....2 ND DEFENDANT**

**PARAMOUNT UNIVERSAL BANK LIMITED.....3 RD DEFENDANT**

**ELIZABETH MUIGAI T/A**

**INTEGRA AUCTIONEERING (K) COMPANY.....4 TH DEFENDANT**

**RULING**

1. The dispute in this suit relates to Land Reference Number 27/326 measuring approximately 0.8017 hectares (2 acres) situated in Ridgeways Estate, Nairobi (the **suit property**). The land was parceled as a public utility plot out of Land Reference Number 27/8 as a mandatory condition for approval of a subdivision scheme relating to Land Reference Number 27/8 which belonged to David Mburu Githere (1st plaintiff), George Jonathan Maara (2nd plaintiff) and Gumchem Kenya Limited (2nd defendant). Land Reference Number 27/8 measured approximately 21 acres. The suit property was surrendered to the City Council of Nairobi as a public utility plot. The 1st defendant, John Peter Kamau Ruhangi, is a shareholder and director of Gumchem Kenya Limited, which together with the plaintiffs, co-owned Land Reference Number 27/8.

2. The plaintiffs' case is that the 1st and 2nd defendants fraudulently procured a title in respect of the suit property and charged the title to the 3rd defendant. The 1st and 2nd defendants thereafter failed to service the loan and the 3rd defendant, through the 4th defendant, put up the property for sale through public auction. Aggrieved, the plaintiffs brought a plaint dated 26/6/2013 seeking a nullification of the title and a permanent injunction against the four defendants. Together with the plaint, they brought a notice of motion dated 26/6/2013 seeking the following interlocutory orders:

**1. Spent**

**2. That a temporary injunction do issue against the defendants/respondents by themselves, their servants and/or agents or otherwise however, restraining them from selling, alienating, transferring with, trespassing upon, erecting structures, wasting and /or interfering with Land Reference Number 27/326 original number 27/8/26 pending the hearing and determination of this application.**

**3. That a temporary injunction do issue against the defendants/respondents by themselves, their servants and / or agents or otherwise however, restraining them from selling, alienating, transferring with, trespassing upon, erecting structures, wasting and/or interfering with Land Reference Number 27/326 original number 27/8/26 pending the hearing and determination of this suit and/or further orders of this Court.**

**4. The costs of this application be borne by the respondents.**

3. The 1st and 2nd defendants opposed the application. The case of the 1st and 2nd defendants was that the suit property was surrendered to the City Council and the 1st defendant subsequently applied to the Council to allocate him the suit property for the purpose of developing the envisaged public utilities. The Council considered his application and granted his request. He thereafter requested the plaintiffs to contribute part of the requisite re-allocation fee of Kshs 1.2 million but they declined. He subsequently paid the re-allocation fee. He added that due to

his earlier relationship with the plaintiffs, he agreed to pay the plaintiffs Kshs 6,000,000, a decision which was informed by the fact that the suit property still bore the joint names of the plaintiffs and the 2nd defendant. He further contended that he duly paid to the plaintiffs the agreed sum of Kshs 6,000,000 whereupon a deed of conveyance was drawn by M/s Kingori Kariuki and Company Advocates and duly executed by all the parties. He was subsequently registered as proprietor of the suit property. He subsequently sought financing from the 3rd defendant with a view to developing public utilities on the suit property.

4. The 3rd and 4th defendants similarly opposed the application. The case of the 3rd and 4th defendants was contained in a replying affidavit sworn by Michael Riitho on 15/10/2013. He stated that at all material times, the 1st defendant was the registered proprietor of the suit property. On the basis of a charge entered into between the 3rd defendant and the 1st defendant, the 3rd defendant granted the 1st defendant banking facilities. The 1st defendant subsequently failed to honour the terms of the charge. As a consequence of the default, the 3rd defendant sought to realize the security to safeguard its interests. The 3rd and 4th defendants contended that there was no legitimate basis for injunctioning them against exercising the chargee's statutory power of sale.

5. I have considered the application together with the parties' respective affidavits and submissions. I have also considered the relevant statutory provisions and jurisprudential principles. The broad issue falling for determination in this application is whether the applicants have satisfied the criteria for grant of an interim injunction. The criteria was outlined in the case of **Giella v Cassman Brown & Co. Ltd (1973)EA 358**. Firstly, an applicant is required to demonstrate a prima facie case with a probability of success. Secondly, the applicant is required to demonstrate that unless the injunction is granted, he stands to suffer injury that cannot be indemnified through an award of damages. Lastly, if the court is in doubt as to whether the above two conditions have been met, the application is to be decided on a balance of convenience.

6. What emerges from the materials placed before the court at this point is that the suit property was parceled as a public utility plot and surrendered to the City Council as a condition for the approval of the sub-division scheme relating to Land Reference Number 27/8. The 1st defendant subsequently applied to be allocated the suit property on the understanding that he was going to develop the intended public utilities. He contends that the City Council duly re-allocated the plot to him and he thereafter processed title and approached the 3rd defendant for financing. Whether or not indeed the City Council properly conveyed the public utility plot to the 1st defendant is not clear at this point. Similarly, at this point, it is not clear what proprietary interest the plaintiffs retained in the surrendered public utility plot after the surrender.

7. Secondly, the plaintiffs have not challenged the City Council's purported re-allocation of the plot to the 1st defendant. *Prima facie* evidence on record in fact suggests that they were paid Kshs 6,000,000 by the 1st defendant to forgo any claim to the public utility plot. Thirdly, there is no evidence that they have taken steps to procure criminal prosecution in relation to the alleged fraud. Fourthly, they have not sued the County Government and the National Land Commission who would ordinarily be the custodians of the suit property which was surrendered for development of public utilities.

8. The totality of the foregoing is that the plaintiffs have not established a proprietary interest in the surrendered public utility plot and I am therefore not satisfied that they have demonstrated a prima facie case to warrant grant of an injunctive order against the lender who granted a loan facility on the basis of the title held by the 1st defendant. There is similarly no evidence of fraud or complicity on part of the 3rd defendant to warrant an injunctive order against them.

9. More importantly, it is my view that if at the substantive hearing the plaintiffs are able to prove their case, an award of damages equivalent to their respective share in the market value of the suit property will adequately indemnify them.

10. It is therefore my finding that the plaintiffs have not satisfied the criteria for grant of an interim injunctive order sought in the present application. Consequently, the Notice of Motion dated 26/6/2013 fails and is accordingly dismissed for lack of merit. Costs of the application shall be in the cause.

11. Lastly, I have observed that the present application was filed on 26/6/2013. The file was allocated to me late last year. It ought to prick the conscience of the litigants, the advocates and the judges involved in this matter that an application for interim injunctive order has taken six years to be disposed. In my view, this is inordinarily long. I therefore direct the parties to file and exchange their bound, paginated and indexed bundles containing pleadings, witness statements and evidentiary documents within 60 days to facilitate allocation of a hearing date for the main suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JUNE 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Managene for the applicants/plaintiff

Mr Ochieng holding brief for Mr Gitau for the 1st and 2nd

Mr. Nyawara holding brief for Mwaniki for Gachoka for 3rd defendant