REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA LAW COURTS

ELC.NO.521 OF 2017

JAMES MWANIKI MUKUA.....1ST PLAINTIFF/APPLICANT

GEORGE MUNYUA MBIRA.....2ND PLAINTIFF/APPLICANT

-VERSUS-

MARK MUGEKENYI KARIUKI.....1ST DEFENDANT/RESPONDENT

CALVARY TEMPLE VICTORY CHURCH.....2ND DEFENDANT/RESPONDENT

BISHOP MUGEKENYI ACADEMY.....3RD DEFENDANT/RESPONDENT

RULING

Coming up for determination is the Plaintiffs/Applicants' ***Notice of Motion*** application dated ***25th April 2017***, brought under Sections 1A, 3A, 63(e) ***of the Civil Procedure Act, Order 40 of the Civil Procedure Rules 2010 and*** all other enabling provisions of law. The applicant have sought for the following orders:-

1. Spent.

2. That this Honourable Court be pleased to issue an interim order of injunction restraining the Respondents by themselves, their servants, agents and/or employees from alienating and/or in any manner and way interfering with land parcel known as LIMURU/KAMIRITHU/3214, situated within Kwambira area, off Nairobi-Nakuru highway in Limuru, Kiambu pending hearing and determination of this suit.

3. That cost of this Application be provided for.

4. *That the cost of this application be borne by the Defendants/Respondents.*

This application is premised on the following grounds:-

1. That the Defendants/Respondents had leased the mother title (LIMURU/KAMIRITHU/596) of the suit land from one WILFRED MUKOMA MBIRA, brother to the 2nd plaintiff sometimes on 2nd January, 1999.

2. That the parcel of land was then registered under the Public Trustee up until 9th May, 2016, when subdivision was done and the 2nd Plaintiff was registered on his own share of the mother title now known as LIMURU/KAMIRITHU/3214, the suit land.

3. That the LIMURU/KAMIRITHU/596, was subject to a Succession Cause 131 of 1984, the estate of Mbira Githahu which was subject to 7 houses of the deceased.

4. The alleged lessee who is brother to the 2nd plaintiff thereof had no mandate to lease the land and had no consent from the 2nd plaintiff whose share he also leased to the 3rd defendant.

5. ***The defendants however utilized the said land and it was believed that the portion leased belonged to the alleged lessee.***

6. That it is until the year 2009, when the family did subdivision on the ground that the 2nd plaintiff found out that his share of land had been encroached by the defendants who had built a school by the name BISHOP MUGEKENYI ACADEMY.

7. That instead of vacating, the School opted to pay for the years they had utilized the land to the 2nd plaintiff and upon agreed terms the defendants proceeded and issued cheque in favour of the arrears.

8. That the arrears for the lease period was at Kenya Shillings One Thousand, Five Hundred (1500/=) per month totaling to Kenya Shillings Eighteen Thousand per year and a total of Kenya Shillings one Hundred and Eighty Thousand (Kshs 180,000) for the ten years.

9. That the 2nd Plaintiff then extended the lease for a further 10 years after receipt of one hundred and eighty (Ksh 180,000) for the arrears whereby the total amount received was Kenya Shillings One Hundred and Twenty (Ksh 120,000), the defendants then neglected to pay Kenya Shillings Sixty Thousand (60,000) which is equivalent to Six Years, Six Months of unpaid rent.

10. That despite numerous attempts to have the defendants pay the arrears, they neglected to do so and it is until last year that the 1st Plaintiff purchased the land but the defendants have been harassing the 1st Plaintiff and denying him access to his own land whereby he is the rightful owner.

11. That in any event, the balance of convenience tilts in favour of granting the said Orders to the applicant who is the registered proprietor to enable justice prevail.

The application is also supported by the ***affidavit*** of ***James Mwaniki Mukua***, the 1st plaintiff and the further affidavit of ***George Munyua Mbira,*** the ***2nd Plaintiff*** filed on ***16th October, 2017***. However, the said ***further affidavit*** by ***2nd Plaintiff*** is ***not dated*** or even ***commissioned***. It does not meet the ***provisions of Oaths and Statutory Declaration Act, Cap 15*** as it is not signed and/or commissioned. The said ***affidavit is defective*** and cannot be salvaged by ***Article 159(2)(d) of the Constitution,*** which states that court should deal with substantive justice without paying too much attention on procedural technicalities. However, the ommission herein contravenes clear provisions of law. Therefore the court finds that the said further ***affidavit is defective*** and is ***struck out and/or expunged from the court records.***

In his ***supporting affidavit***, the ***1st Plaintiff/Applicant*** alleged that he is the registered proprietor of land parcel no ***Limuru/Kamirithu/3214***, having purchased the same from ***George Munyua Mbira,*** which parcel of land was a resultant subdivision of ***LR No. Limuru/Kamirithu/596,*** as per the copy of the Green Card ***JMM2.*** He further averred that on this parcel of land, there are permanent structures erected thereon, which are used as a ***nursery school*** and are owned by ***Calvary Temple Victory Church,*** and which is managed by ***Mark Mugekenyi Kariuki,*** the Pastor in charge of the said church. He alleged that even after the said purchase of the suit land from ***2nd Plaintiff***, the ***Defendants/Respondents*** have refused and/or neglected to vacate his said parcel of land and have gone to further alienate the same without his consent. He also alleged that the ***Defendants/Respondents*** have denied him access to the said parcel of land especially on ***23rd March, 2017,*** when he went to place beacons on the suit land. He further alleged that the said ***Defendants*** without his consent removed the said beacons and thus this application which is meant to prevent the defendants from alienating the said parcel of land.

This application is vehemently opposed by the ***Defendants/Respondents*** who ***filed grounds of objection*** on ***8th May, 2017,*** and averred that;

1. That the said Application is vexatious, frivolous, oppressive and an abuse of the court process.

2. The Applicants have not disclosed the true material facts.

3. The Respondents have been in possession of the suit property since 1999.

4. That any registration and transfer of Land Parcel LIMURU/KAMIRITHU/3214, was fraudulently done by the plaintiffs behind the Defendants back.

5. That the current value of the suit property is over Kshs. 9 Million.

6. The Defendants bought the said suit property from the 2nd Plaintiff and any transaction between the 1st and 2nd Plaintiffs is illegal, fraudulent and void abnitio.

7. The Plaintiffs are guilty of misrepresentation of material facts, lies and generally not being truthful.

8. The Plaintiffs herein are in violation of the mandatory procedure of Order 5 rule (1) of the Civil Procedure Act Cap 21.

Further, ***Bishop Mark Mugekenyi Kariuki***, the ***1st Defendants/***

Respondents, filed a ***Replying Affidavit*** sworn on ***12th July, 2017,*** and averred that the ***Defendants*** have been in ***possession*** and

occupation of the suit property since ***1999,*** and they have put up a Church and a School by virtue of having purchased the same from the ***2nd Plaintiff/Applicant***. He also averred that the agreed ***purchase price*** was ***Ksh 400,000/=*** and the ***2nd Plaintiff*** has so far been paid ***Ksh 300,000/=*** leaving a ***balance*** of ***Ksh 100,000/=*** as is evident from ***MMK1***. It was his contention that the ***1st Plaintiff*** should have done due diligence properly before dealing with the suit property since the defendants developments and structures were visible and he should have established who owns them.

He also contended that the ***Defendants*** only came to know of the ***1st Plaintiff*** on ***23rd January, 2017***, when he attempted to place beacons on the suit property whereas the beacons should have been placed before the transfer but not after the transfer. The ***3rd Defendant*** alleged that the ***2nd Plaintiff*** had showed him beacons before the sale of suit property to the ***Defendants.*** He therefore claimed that the sale of the suit property to the ***1st Plaintiff*** by the ***2nd Plaintiff*** was done behind the ***Defendants*** back and is therefore fraudulent as he concealed material facts and also misrepresented facts at the ***District Land Registry, Kiambu***. He urged the Court to dismiss the Plaintiffs' application with costs.

The said application was canvassed by way of ***written submissions*** which this Court has carefully read and considered. The court has also considered the pleadings in general and the annexures thereto and it renders itself as follows;

There is no doubt that the suit property herein ***Limuru/Kamirithu/ 3214,*** is a resultant subdivision of ***Limuru/ Kamirithu/596,*** which subdivision was done after distribution of the estate of ***Joshua Mbira Githahu (deceased).*** It is not in doubt that the mother title ***Limuru/Kamirithu/596,*** was owned by ***Joshua Mbira Githahu (deceased),*** who was a father to the 2nd plaintiff and many other siblings. It is also not in doubt that after the distribution of the said estate, a number of the beneficiaries and siblings to 2nd Plaintiff sold their portions of land to the ***Defendants*** herein vide the various ***sale agreements*** attached to the ***Replying Affidavit*** that was sworn by the ***3rd Defendant***. It is also not in doubt that the ***Defendants,*** have put up permanent structures on the suit property or what used to be ***Limuru/Kamirithu/596,*** now subdivided into various parcels of land in favour of the beneficiaries of the late ***Joshua Mbira Githahu***.

From the photographs attached to the pleadings herein, these structures are not new structures and they house a ***nursery school*** and a ***church*** which are being used by ***2nd*** and ***3rd Defendants***. The ***Defendants*** alleged that they entered into the suit property in ***1999,*** and put up the said structures. From the look of the photographs attached to the pleadings, this court would have no reasons to doubt that indeed the structures on the suit property were erected a long time ago and the ***Plaintiffs*** have been aware of their existence. It is therefore clear by the time the ***1st Plaintiff*** purchased the suit property, the structures and the developments which are owned by the ***Defendants*** were in existence.

It is also evident that the ***1st Plaintiff*** herein is the registered proprietor of the suit property ***Limuru/Kamirithu/3214,*** which was registered in his favour on ***9th June, 2016***. If the said title deed was issued on ***9th June, 2016***, then it was issued while the ***Defendants*** were occupying the suit property. As a registered proprietor of the suit property, then as provided by ***section 26(1) of the Land Registration Act***, the ***1st Plaintiff/Applicant*** is deemed to be the ***absolute*** and ***indefeasible*** owner of the said property. However, ***section 26(1)(a)&(b)*** of the said Act further provides that such proprietorship can be challenged on grounds of ***fraud***, ***misrepresentation*** or if the said certificate of title was acquired ***illegally*** or through ***corrupt scheme***.

Section 26(1) of the **Land Registration Act** states that:-

> **"The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-**
>
> a. ***On the*** **ground 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 ***Plaintiffs/Applicants*** have alleged that the ***1st Plaintiff*** is the owner of the suit property but the ***Defendants*** have refused and/or neglected to give him vacant possession and allow him to access to the same and thus this application. However, the ***Defendants/Respondents*** have alleged that they purchased the suit property from the ***2nd Plaintiff,*** who had allowed them to put up developments on the said suit property and if he sold the same to the ***1st Plaintiff,*** that was fraudulent and misrepresentation of facts.

However, the ***2nd Plaintiff,*** denied selling the said suit property to the ***Defendants*** and averred that if the ***Defendants*** were in occupation of the suit property, they occupied the same through a lease agreement between themselves and ***Wilfred Mukoma Mbira,*** a brother to the ***2nd Plaintiff*** and ***2nd Plaintiff*** had not allowed his said brother to lease out his portion of land. Further that any payments made to the ***2nd Plaintiff,*** by the ***Defendants*** was for the period of time occupied by them but not for purchase of the suit land.

This court finds that the issue of whether the ***2nd Plaintiff*** sold the suit property to the defendants or not is a disputed fact which can only be resolved by calling of witnesses at the full trial. The court is also cautious that at this interlocutory stage, it is not called upon to decide on the disputed facts with finality. All that the court is called upon at this stage, is to determine whether the applicants are deserving of the injunctive orders sought, based on the usual criteria. See the case of ***Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002***, where the Court held that:-

> **"In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the applicant is entitled to an Injunction sought on the usual**

criteria…"

The criteria that will guide this court is the one laid down in the case of ***Giella vs Cassman Brown & Co. Ltd 1973 EA 358*** where the Court held that;

a. The Applicant must establish that 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.

Firstly the applicants had a duty to establish that they have a ***prima facie case*** with probability of success at the trial. In the case of ***Mrao Ltd…Vs…First American Bank of Kenya & Others (2003) KLR 125,*** the Court held that:-

"A prima-facie case means more than an arguable case.

That the evidence must show an infringement of a right and the probability of success of the Applicant's case at the trial".

Though the ***1st Plaintiff/Applicant*** is the holder of a certificate of title issued on ***9th September, 2016*** and ***prima facilely*** he can be deemed to be the absolute and indefeasible proprietor, the said certificate can be challenged if the same was issued ***fraudulently***, through ***misrepresentation***, ***illegally*** or through ***corrupt scheme***.

The ***Defendants*** have alleged that the ***2nd Plaintiff*** sold the suit property to the ***1st Plaintiff,*** through material non-disclosure and misrepresentation of facts to the ***Kiambu District Land Registry.*** The Defendants submitted that the 1st Plaintiff certificate of title was acquired ***fraudulently*** as he purchased the said property while well aware that the Defendants were in occupation and had even erected permanent structures and development thereon. However, the ***2nd Plaintiff*** has denied ever having sold the suit property to the Defendants. These are disputed facts which cannot be resolved through affidavits evidence in an interlocutory application. These disputed facts can only be resolved by calling of evidence at the main trial and testing the same through cross examination.

That being the case, this court cannot find and hold that any right of the 1st Plaintiff/Applicant herein has been infringed as he purchased the suit property while Defendants were in occupation. Therefore, this court finds and holds that the Plaintiffs/Applicants have not established that they have a ***prima facie case*** with probability of success at the trial.

On the second limit of irreparable loss which cannot be compensated by an award of damages, it is evident that the 1st Plaintiff/Applicant portion of land that he allegedly purchased is defined and identifiable. It is about 0.07Ha, which land can be quantified and paid for in monetary terms. The Plaintiffs have not been in occupation of the suit property as the Defendants have been occupying the same allegedly since ***1999***. The Defendants have put up structures thereon including permanent developments that house a ***nursery school*** and a ***church.*** Therefore, If injunctive orders are not issued, the Applicants will not suffer any irreparable loss. However, if injunctive orders are issued before the disputed facts are resolved, the Defendants stand to suffer loss, which loss might be irreparable and not capable of compensation in damages as they will be forced to close the nursery school and the church.

The court finds that in the instant matter, the Applicants have not established that they will suffer irreparable loss which cannot be compensated by an award of damages. See the case of ***Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322***, where the Court held that:-

"However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them".

On the 3rd limb of if, the court is in doubt to decide on balance of convenience, this court finds that it is not in doubt. However, if the court is to decide on balance of convenience, the court finds that the same tilts in favour of maintaining the ***status quo.*** The ***status quo*** is the one that existed before the 1st plaintiff purchased the suit property. The defendants were in ***possession*** and ***occupation*** then. This court finds that the balance of convenience herein tilts in failure of maintaining the ***status quo*** and the status quo is that the Defendants are in possession and occupation of the suit property. However, none of the parties herein should ***alienate, charge*** and ***sell*** the suit property until the suit is heard and determined. See the case of ***Virginia Edith Wambui…Vs…Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR***, where the Court of Appeal held that:-

"The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial".

Having now carefully considered the instant ***Notice of Motion*** application dated ***25th April 2017***, the court finds it ***not merited*** and the same is consequently ***dismissed*** entirely with costs to the Defendants/Respondents.

Further the court do enter an order of ***status quo*** and the ***status quo*** herein is that the defendants are to remain in possession and ***occupation*** of the suit property, but none of the parties herein should ***sell, alienate***, ***charge*** or ***transfer*** the suit property to any 3rd parties, until the matter

is heard and determined.

The parties are also directed to ***comply with Order 11,*** within a period of ***45 days*** from the date hereof and thereafter set the matter down for ***pre-trial directions before the Deputy Registrar*** so that the suit can go for full trial expeditiously.

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this **9th** day of **March 2018**.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs/Applicants (though aware of date)

Mr Kahuthu for Defendants/Respondents

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated advocate for Defendants/Respondents and absence of the Plaintiffs/Applicants and their advocate.

L. GACHERU

JUDGE

9/3/2018