



**REPUBLIC OF KENYA**

**IN THE E.L.C. COURT OF KENYA AT EMBU**

**E.L.C. NO. 9 OF 2016**

**HARRIET NAITORE.....PLAINTIFF**

**VERSUS**

**LYDIA MBUCU IRERI.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR EMBU.....2<sup>ND</sup> DEFENDANT**

**COUNTY SECRETARY EMBU COUNTY....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff herein filed a suit against the Defendant on 5<sup>th</sup> February 2016 seeking the following reliefs;

*a) A permanent order of injunction restraining the Defendants from trespassing into, taking possession, processing title, disposing of and transferring land parcel Embu Municipality parcel No. 746 (formerly UNS RESD plot No. 192 Embu).*

*b) A declaration that the Plaintiff is the lawful allottee of land parcel Embu Municipality parcel No. 746 (formerly UNS RESD plot No 192 Embu) and nullification of the lease issued on the 17<sup>th</sup> January 2014 in favour of Lydia Mbuchu Ireri the 1<sup>st</sup> Defendant herein. (sic)*

*c) Costs of the suit.*

*d) Interest on c above.*

2. It was pleaded in the plaint that the Plaintiff was the legitimate allottee of Plot No. Embu Municipality/746 (hereinafter known as “parcel No. 746”) which was formerly unsurveyed residential Plot No. 192 Embu (hereinafter known as “Plot No. 192”). It was further pleaded that she had complied with all conditions of allotment and made all requisite payments to the then Commissioner of Lands.

3. The Plaintiff further pleaded that the Defendants had fraudulently caused her said parcel of land to be registered in the name of the 1<sup>st</sup> Defendant who had been issued with a lease for parcel No. 746. She therefore wanted the court to grant her the reliefs sought in the plaint.

4. Contemporaneously with the filing of suit, the Plaintiff filed a notice of motion dated 3<sup>rd</sup> February 2016 seeking a temporary order of injunction restraining the Defendants from trespassing, entering or remaining upon, taking possession, disposing of, transferring, and processing or issuing a certificate of title for parcel No. 746 pending the hearing and determination of the suit.

5. The said application was based upon the grounds stated on the face of the motion which basically mirrored the allegations in the plaint. The Plaintiff contended that the 1<sup>st</sup> Defendant had unlawfully obtained a lease for parcel No. 746 which she maintained was the same as her unsurveyed Plot No. 192. She further contended that the 1<sup>st</sup> Defendant was in the process of selling the said property to unsuspecting third parties.

6. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 12<sup>th</sup> May 2016 in opposition to the said application. She stated that she was the lawful allottee of parcel No. 746 vide a letter of allotment dated 29<sup>th</sup> November 2003. She further stated that upon complying with all the conditions set out therein, she was issued with a lease and ultimately a certificate of lease for the suit property.

7. She denied knowledge of unsurveyed Plot No. 192 and contended that the Plaintiff had not demonstrated that her parcel No. 746 was the same as unsurveyed Plot No. 192. The 1<sup>st</sup> Defendant pointed out that the Plaintiff had not explained why she had failed to comply with the conditions for allotment of Plot No. 192 since 1994.

8. The Attorney General entered an appearance for the 2<sup>nd</sup> Defendant and filed grounds of opposition only. It was contended by the Attorney General that the order of injunction sought was contrary to the provisions of section 16 of the Government Proceedings Act (Cap 40) and that the application was based upon a wrong assumption that a letter of allotment conferred title over property. It was further contended that the said application was misconceived, mischievous and an abuse of the court process.

9. The 3<sup>rd</sup> Defendant filed a replying affidavit in opposition to the Plaintiff's said application. The affidavit was sworn by Nicholas Mogaka on 13<sup>th</sup> May 2016. It was admitted that the Plaintiff was allocated Plot No. 192 by the Commissioner of Lands and that she had been paying land rent and rates. It was also admitted that the Plaintiff was shown the said plot by a surveyor of the defunct Municipal Council of Embu.

10. The 3<sup>rd</sup> Defendant, however, stated that they had no records indicating that Plot No. 192 was ever assigned a new parcel number. It was also stated that it had no records for parcel No. 746. It was further stated that the consents and approvals issued to the Plaintiff were in respect of Plot No. 192.

11. The court has considered the Plaintiff's said application for injunction in light of the material on record. The main question is whether or not the Plaintiff has satisfied the requirements for the grant of an injunction as enunciated in the case of ***Giella Vs Cassman Brown & Co Ltd [1973] EA 358***. It would appear from the material on record that the Plaintiff was, indeed, allocated plot No 192 as an unsurveyed plot. The 3<sup>rd</sup> Defendant admitted as much in its replying affidavit. However, the 3<sup>rd</sup> Defendant appears to have no records on the alleged change from Plot No 192 to parcel No. 746.

12. The court having carefully considered the material on record has found that there is no material evidence upon which it may be concluded that the Plaintiff's Plot No 192 was actually assigned parcel No. 746 upon survey. It is quite possible that Plot No. 192 and parcel No. 746 are separate and distinct plots. The court is, therefore, not satisfied that Plot No. 192 and parcel No. 746 refer to one and the same Plot. In the event, the court is not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial hereof.

13. The 2<sup>nd</sup> requirement for the grant of an injunction relates to adequacy of monetary damages. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable damage. The Plaintiff has not demonstrated in what manner she might suffer irreparable damage unless the injunction sought is granted. On the contrary, there is documentary evidence on record to show that the Plaintiff had obtained the consent of the defunct Municipal Council of Embu to transfer Plot No. 192 to Ngoviu Investments Ltd. The court is, therefore, not satisfied that the Plaintiff has satisfied the 2<sup>nd</sup> requirement for the grant of an interlocutory injunction.

14. The AG raised an objection to the granting of an injunction against the District Land Registrar Embu, the 2<sup>nd</sup> Defendant herein, on the basis of ***section 16 of the Government Proceedings Act (Cap 40)***. The said section provides that,

***“(1) In any civil proceedings by or against the Government, the court shall, subject to the provisions of this Act, have power to make such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require;***

***Provided that:***

***I. Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant the injunction or specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and***

***II. In any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the Plaintiff is entitled as against the Government to the land or property, or to the possession thereof.***

***(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief which could not have been obtained in proceedings against the Government.***

15. The court is persuaded that on the basis of ***section 16(2) of the Government Proceedings Act (Cap 40)*** the order of injunction against the 2<sup>nd</sup> Defendant is not available. The court is further of the view that the prayer against the 2<sup>nd</sup> Defendant is not available because it has since been overtaken by events. The Plaintiff is seeking to restrain the Land Registrar from processing or issuing a certificate of title whereas there is evidence on record that the 1<sup>st</sup> Defendant obtained her certificate of lease for parcel No. 746 on 17<sup>th</sup> January 2014. A court of law cannot grant an order of injunction in futility.

16. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 3<sup>rd</sup> February 2016 and the same is hereby dismissed with costs to the Defendants.

17. Since it would appear that the value of the subject matter of the suit falls within the pecuniary jurisdiction of the magistrate's court, this suit is hereby transferred to the Chief Magistrate's court at Embu for trial and disposed.

18. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 1<sup>st</sup> day of March 2018.**

In the presence of Mr. Ombachi holding brief for Mr. Muriasi for the plaintiff, Ms Muriuki holding brief for Mr. Okwaro for the 1<sup>st</sup> Defendant, and in the absence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The Plaintiff's Notice of Motion dated 3.2.2016 was dismissed with costs to the Defendants.

Court clerk Njue/Leadys.

**Y.M. ANGIMA**

**JUDGE**

**01.03.2018.**