



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC NO. 381 OF 2017.**

**BARSIL KIUNGU MWACHUGHA.....PLAINTIFF**

**VERSUS**

**DEPHINA WAKESHO KILILO.....1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF LANDS, WUNDANYI.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF, MURUNGU (MAUNGU) LOCATION.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 17<sup>th</sup> October, 2017. It is brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and any other enabling provisions of the law.

2. It seeks orders that;

**i) Spent.**

**ii) That the Honourable Court be pleased to issue a temporary injunction order restraining the Defendants by themselves, their servants, and agents from trespassing, interfering, entering, transferring, selling and doing anything in reference to Plot No. 1782 in Maungu Bughuta Scheme until further orders from this court or until the determination of the suit.**

**iii) That the Honourable Court be pleased to issue a temporary injunction order invalidating the title issued to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent until further orders from this court.**

**iv) That the Honourable Court be pleased to order the letter written by the 3<sup>rd</sup> Defendant dated 29<sup>th</sup> June, 2016 to act as a stay in reference to a dispute between the Applicant and the 1<sup>st</sup> Respondent on Plot No. 1782 Bughuta Settlement Scheme until the determination of this suit.**

**v) Costs of this application be provided for.**

3. The grounds are on the face of the application and are;

**a) The Applicant is the bona fide owner of the land in dispute No. 1782 Bughuta Settlement Scheme since 1981 and has indeed extensively developed the same.**

**b) The 1<sup>st</sup> Respondent illegally obtained the title of ownership by fraudulent means notwithstanding the Applicants occupation of the same.**

**c) The Respondent is a total stranger on the ground but is existing in the air and through dubious deals used paperwork to assume and get ownership.**

**d) The 1<sup>st</sup> Respondent will not suffer any prejudice if these orders are granted because she has nothing on the ground.**

4. The application is supported by the affidavit of Barsil Kiungu Mwachuga, the Plaintiff/Applicant herein sworn on the 17<sup>th</sup> October, 2017. He also filed written submissions on 22<sup>nd</sup> February, 2018.

5. The application is opposed. There is a replying affidavit sworn by Delphina Wakesho Kililo, the 1<sup>st</sup> Defendant/Respondent sworn on the 16<sup>th</sup> January, 2018. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents though served did not file any responses.

6. It is the Plaintiff/Applicants case that he is the owner of Plot No. 1782 Bughuta Settlement Scheme. He has occupied the same since 1981 and has initiated some projects for the benefit of the community. He further told the court that the 1<sup>st</sup> Defendant/Respondent fraudulently obtained title to the said land.

That being a teacher by profession, he was always transferred and that the 1<sup>st</sup> Defendant/Respondent and some people took advantage of his absence and attempted to take away his land.

7. It is the 1<sup>st</sup> Defendant's/Respondent's case that she and her husband bought the suit land from one Peter Makau in 2003. She also told the court that she has been issued with a title deed.

8. I have considered the pleadings, the Notice of Motion and the Supporting affidavit. I have also considered the Replying affidavit and the annexures. I have also considered the written submissions by the Plaintiff/Applicant.

The issues for determination are;

**i) Whether the Plaintiff/Applicant's application meets the threshold for grant of temporary injunction.**

**ii) Who should bear costs?**

9. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an interlocutory injunction the onus is on the Applicant to satisfy the court that it should grant an injunction.

An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

10. In the celebrated case of *Giella –versus- Cassman Brown And Company Limited, (1973) EA 385,* the court set out the principles for grant of temporary injunctions.

In the case of *Mrao Limited –versus- First American Bank of Kenya And 2 Others (2003) KLR 125,* the Court of Appeal in determining what amounts to a prima facie case stated;

**“..... A prima facie case in a Civil Case includes but is not confined to a “genuine and arguable” case. It is a case which on the material presented to the 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.”**

I am guided by the above authorities.

11. The Plaintiff/Applicant avers that he has been in occupation since 1981, he told the court that the 1<sup>st</sup> Defendant/Respondent fraudulently and in collusion with the 3<sup>rd</sup> Defendant/Respondent had the suit land registered in her name.

12. The 1<sup>st</sup> Defendant/Respondent on her part, claimed she and her husband bought the suit land from one Peter Makau. In paragraph 3 of the Replying affidavit she states;

**“That on or about 21<sup>st</sup> December, 2003 my husband and I purchased Plot No. 1782 measuring approximately 5.8 hectares at Maungu Bughuta Squatter Settlement Scheme, Voi district from one Peter Makau and a sale agreement was written to that effect. Attached and marked “DW1” is a copy of sale agreement.”**

I have gone through the alleged sale agreement. I find that the agreement between Peter Makua and Kioko Kithuku does not amount to a sale agreement. It appears to have been a gift.

There is no description of the property being purchased. There is no consideration. The same is not dated except for a date after the signature of Kioko Muthami. The averment by the 1<sup>st</sup> Defendant/Respondent that they bought the land cannot be true.

13. Under section 26 1 (b) a certificate of title issued by the Registrar is held as conclusive evidence of proprietorship except where the same has been acquired illegally, un-procedurally or through a corrupt scheme. I am of the view that the Plaintiff/Applicant ought to be given an opportunity to present evidence to prove that the title deed issued to the 1<sup>st</sup> Defendant/Respondent was acquired un-procedurally.

14. I find that the Plaintiff/Applicant has demonstrated that he has a prima facie case with a probability of success at the trial.

15. Article 50 (1) of the Constitution of Kenya 2010, guarantees the Plaintiff/Applicant the right to a fair hearing. I find that it is fair and just that he be given an opportunity to ventilate his claim.

16. The Plaintiff/Applicant’s apprehension that the suit land may be disposed of to a third party if these orders are not granted is real.

I find that he has demonstrated that he is likely to suffer irreparable injury which cannot be compensated by an award of damages if these orders are not granted.

17. All in all, I find merit in this application and I grant the orders sought namely;

**a) That an order of temporary injunction do hereby issue restraining the Defendants by themselves, their servants and/or agents from trespassing, interfering, entering, transferring, selling and doing anything in reference to Plot No. 1782 in Maungu Bughuta Settlement Scheme until the hearing and determination of this suit.**

**b) That an order of inhibition be and is hereby issued and is directed that the 2<sup>nd</sup> Defendant/Respondent to prohibit any dealings on the said title until the hearing and determination of this suit.**

**c) That costs of this application do abide the outcome of the main suit.**

**It is so ordered.**

**Dated, Signed and Delivered at *Mombasa* on the 19<sup>th</sup> day of *April* 2018.**

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**L. KOMINGOI**

**JUDGE**

**19/4/2018.**