



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MOMBASA**  
**ELC 260 OF 2017**

1. AMOS MUTUNGI
2. CHRISTOPHER SAINARE NGURUWI
3. HASSAN MAVUMO
4. SALLIM MSHANGA
5. FELELIS MWANZO
6. JOSEPH KONGO

**(on their behalf and on behalf of 101 others.....PLAINTIFFS/APPLICANTS**

**VERSUS**

1. BASIL CRITICOS
2. MAMA NGINA KENYATTA
3. AGRICULTURAL FINANCE CORPORATION
4. NATIONAL LAND COMMISSION.
5. CHIEF LAND REGISTRAR
6. ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS

**RULING**

1. This is the Notice of Motion dated 21<sup>st</sup> July, 2017. It is brought under Sections 1A, 3A, Order 40 Rules 1, 2 of the Civil Procedure Act, and Rules respectively, Section 68 of the Land Act, Section 5 and 6 of the Fair Administration Action Act of 2015 and all other enabling provisions of the law.

2. It seeks orders;

a) Spent.

**b) Spent.**

**c) That the court be pleased to issue an injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their agents, servants, employees or anybody acting on their instructions from consolidating, trespassing, selling, subdividing and/or transferring Plot Nos. 6731 and 6732 and or any subsequent subdivision until this suit is heard and determined.**

**d) That the court to be pleased to issue inhibition orders inhibiting any dealings on Plot No. LR. 6731 and 6732 until this suit is heard and determined.**

**e) That the court to be pleased to order the 3<sup>rd</sup> Defendant to give details of all money paid to an account owned by it in respect to the 2008-2009 sales and publish all names of the persons who have deposited money in that account and the account balances and give details to where the deposit is being held.**

**f) That costs of this application be provided for.**

3. The application is supported by the affidavit of Amos Mutungi, one of the Plaintiffs/Applicants sworn on the 21<sup>st</sup> July, 2017.

4. The application is opposed. There are grounds of opposition filed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants dated 6<sup>th</sup> December, 2017 and a notice of the preliminary objection dated 6<sup>th</sup> December, 2017. The 2<sup>nd</sup> Defendant has also filed grounds of opposition dated 16<sup>th</sup> October, 2017. There is a replying affidavit sworn by Basil Criticos, the 1<sup>st</sup> Defendant/Respondent on the 15<sup>th</sup> December, 2017. There is also a replying affidavit sworn by Rose Akinyi Ochanda, the corporation secretary of the 3<sup>rd</sup> Defendant/Respondent sworn on the 5<sup>th</sup> January, 2018. The 4<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents did not file any responses.

5. On the 31<sup>st</sup> October, 2017 the court directed, following consent of all parties that the application be disposed by way of written submissions. The court also directed that the preliminary objection dated 6<sup>th</sup> December, 2017 be canvassed together with the application.

#### **6. The Plaintiffs/Applicants Submissions.**

It is the Plaintiffs/Applicants contention that they are residents living on Plot Numbers LR. 6731 and 6732. They have constructed their homes and undertake farming activities. They claim the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have without notifying them embarked on a process of sub-dividing the said properties and selling the same.

7. That some of the Plaintiffs/Applicants entered into agreements with the Defendant to buy portions of this land in the year 2008. A suit was filed between the 1<sup>st</sup> and 3<sup>rd</sup> Defendants which suit was heard and concluded without the input of the Plaintiffs. That from the entries in the title the 2<sup>nd</sup> Defendant had no good title to pass to the 1<sup>st</sup> Defendant as no valid transfer was made on 11<sup>th</sup> June, 1975 hence the 1<sup>st</sup> Defendants title is a nullity.

8. The Defendants have no legal right to collect money form the Plaintiffs without following the Agricultural Finance Act and that as at 29<sup>th</sup> January, 2009 the 2<sup>nd</sup> Defendant was still the registered owner of the suit properties hence the issues regarding to sale of this land in 2008 cannot be determined without her participation. The 2<sup>nd</sup> Defendant was an intended signatory in the agreements of 2008 and must be enjoined so that she does not continue interfering with the land.

9. The Plaintiffs/Applicants have satisfied the conditions for issuance of an injunction as laid down in the case of **Giella –versus- Cassman Brown And Company Limited (1973) EA 358.** Further that the 1<sup>st</sup>

Defendant concedes the existence of a decree in HCCC No. 44 of 2009 in paragraph 14(b).

The decree in that case supports the Plaintiffs claim for having paid money to purchase the property and that it was an obligation on that part of the 1<sup>st</sup> Defendant to do certain things which he has not done so.

10. The transfer by the 2<sup>nd</sup> Defendant is illegal as no title could be passed due to the charge. The Plaintiffs have raised pertinent issues which require the court to determine and the same can only be properly addressed upon staying of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants activities on the suit property by way of an injunction.

**11. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Respondents' Submissions.**

The Plaintiffs/Applicants have no *Locus standi* to raise and litigate on the grounds that;

- i) The 1<sup>st</sup> Respondents title is not genuine.**
- ii) They cannot challenge the mode of transfer of the interest between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**
- iii) They cannot litigate in respect of alleged public utilities in a non-public interest suit.**

12. There is no legal of valid documentation attached to show that they purchased land from the 1<sup>st</sup> Respondent with consent of the 3<sup>rd</sup> Respondent who held a valid charge. There is no evidence that the transactions were sanctioned by the Land Control Board as the parcel in dispute is Agricultural Land (see Section 6-8 of the Land Control Act) they have put forward the case of **Kariuki –versus- Kariuki (1983) KL R 225.**

13. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have valid court orders detailing how the suit land should be dealt with and the orders are valid and in existence. The Plaintiffs did not apply to be enjoined. The orders require eviction of the Plaintiff from the suit land.

14. That pursuant to the consent from the Land Control Board and subsequent amalgamation fresh titles were issued. There is no title capable of being enforced.

15. They have put forward the case of ;

- 1. Giella –versus- Cassman Brown And Company Limited (1973) EA 358.**
- 2. Mrao Limited –versus- First American Bank of Kenya Limited And 2 Others (2003) KR 125.**

The 1<sup>st</sup> Respondent has demonstrated ownership of the suit property. The Plaintiff have failed to prove a prima facie case against the 1<sup>st</sup> Defendant/Respondent. They have failed to demonstrate what damages they would suffer if the orders sought are not granted.

The balance of convenience tilts in favour of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Respondents as the Plaintiffs have failed to demonstrate to the court how they acquired their interests to the parcel of land.

16. They have also relied on the case of;

- 1. Joshua Selelo –versus- Esther Kanini & Another, Nairobi ELC No. 1 of 2013.**
- 2. Panari Enterprises Limited –versus- Mrs. Lijoodi & Others, Nairobi ELC No. 779 of 2013.**
- 3. Nyayo Embakasi Residents Association –versus- National Social Security Fund & Another,**

4. East African Development Bank –versus- Hyundai Motors Kenya Limited, Nairobi, Court of Appeal Civil Appeal No. 194 of 2004.

17. **The 2<sup>nd</sup> Defendants/Respondents Submissions.**

The Plaintiffs suit against the 2<sup>nd</sup> Defendant is unsustainable and ought to be dismissed. The Plaintiffs claim against the 2<sup>nd</sup> Defendant is for breach of contract. That the said breach of contracts occurred when the Defendants failed to complete the agreements entered into in 2008/2009 and purported to negotiate new agreements of sale with the Plaintiffs.

18. The burden of proof is in the Plaintiffs to adduce evidence to show and prove that the 2<sup>nd</sup> Defendant was a party to the said contracts or agreements for sale as pleaded in paragraph 16 of the plaint. They also failed to adduce evidence to show that the 2<sup>nd</sup> Defendant received the deposits and has breached the said contracts.

19. The 2<sup>nd</sup> Defendant has no proprietary interest or the suit property having transferred the same to the 1<sup>st</sup> Defendant. The Plaintiffs suit and application against the 2<sup>nd</sup> Defendant is a gross abuse of the court process and both the suit and the application ought to be dismissed.

20. I have considered the pleadings, the notice of motion dated 21<sup>st</sup> July, 2017, the affidavits in support and the annexures. I have considered the preliminary objection dated 6<sup>th</sup> December, 2017, the grounds of opposition and the replying affidavits. I have considered the written submissions of counsels together with the oral highlights. I have considered the authorities cited. The issues for determination are;

**i) Whether the preliminary objection is merited.**

**ii) Whether the Plaintiffs/Applicants application meets the threshold for grant of temporary injunctions.**

**iii) Who should bear costs?**

21. I have considered the grounds on which the preliminary objection is based. In the case of Mukisa Biscuits Company Limited –versus- West End Distributors Limited (1969) EA 696, the court stated thus as per Sir Charles Mecobold P;

**“..... A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercised of judicial discretion.**

I have considered the description given above and the preliminary objection dated 6<sup>th</sup> December, 2017. I am satisfied that the same is a preliminary objection. I agree with counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Respondents that the Plaintiffs/Applicants cannot raise issues as to the legality of the 1<sup>st</sup> Defendants. As to whether it is genuine or not I find that they lack the *Locus Standi*. I also find that the Plaintiffs/Applicants are in no position to challenge the mode of transfer of the entire interest between the 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Respondents. They have also failed to prove that they purchased the said plots. The Plaintiffs have annexed what seem to be correspondences between their Advocate and the 1<sup>st</sup> Defendant's Advocates but it seems the contracts of sale were not completed.

They have adduced no evidence to show that the consent form the Land Control Board was obtained. In the absence of consent from the Land Control Board the agreements would be void.

These are valid grounds for striking out the Plaintiffs application. I will however go ahead and consider the merits of the application.

22. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In 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.

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 as follows;

- i) The Applicant must establish that he has a prima facie case with a high chances of success.**
- ii) That the Applicant would suffer irreparable loss that cannot be compensated by an award of damages if the orders are not granted.**
- iii) If the court is in doubt it would decide on a balance of convenience.**

23. In the case of *Mrao Limited –versus- First American Bank of Kenya & 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 application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

24. I have considered the facts as presented. There is no doubt that the 1<sup>st</sup> Defendant/Respondent is the owner of the suit property. The 2<sup>nd</sup> Defendant/Respondent has no proprietary interest on the suit property having transferred the same to the 1<sup>st</sup> Defendant/Respondent. The 2<sup>nd</sup> Defendant/Respondent was not a party to the agreements entered into in 2008/2009. The Plaintiffs/Applicants have annexed correspondences between their Advocate and the firm of M/s Wekesa And Company Advocates who were acting for the 1<sup>st</sup> Defendant/Respondent. I agree with the counsel for the 2<sup>nd</sup> Defendant/Respondent that claim against the 2<sup>nd</sup> Defendant/Respondent is unsustainable.

25. The Plaintiff/Applicant claim against the Defendant is based on the agreements for sale entered into in the year 2008.

I have gone through correspondences between the Plaintiffs/Applicants Advocate and the 1<sup>st</sup> Defendant/Respondents. It confirms the transactions were not completed. The Plaintiffs/Applicants have not adduced evidence to show that they purchased the said portions.

26. Section 26(1) of the Land Registration Act, 2012 states;

**“The certificate of title issued by the registrar upon registration ..... Shall be taken by all courts as prima facie evidence that the person named as 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, un-procedurally or through a corrupt scheme.”**

The Plaintiffs/Applicants have failed to challenge the 1<sup>st</sup> Defendant/Respondent’s title.

In the correspondence between the Plaintiffs Advocates and the Advocates for the 1<sup>st</sup> Defendants, it is clear that the purchasers in the 2008/2009 scheme would be accommodated under fresh terms.

27. In the case of *Kenleb Cons Limited –versus- New Gatitu Service Station & Another* it was held by Bosire J.(as he then was) that;

**“to succeed in an application for injunction an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”**

I find that the Plaintiff/Applicants herein have failed to demonstrate that they deserve this kind of protection.

28. I find that they have failed to demonstrate that they have a prima facie case with a probability of success at the trial. The Plaintiffs/Applicants concede that the process of sale in 2008/2009 was not completed. No further steps were taken after some Plaintiffs allegedly deposited monies into a certain account. As earlier stated, the consent from the Land Control Board was not sought. They have been given an opportunity to purchase the portions of suit property under new terms.

I find that they have failed to demonstrate that they are likely to suffer injury which cannot be compensated by an award of damages if these orders are not granted.

29. In the case of *Paul Gitonga Wanjau –versus- Gathuti Tea Factory Company Limited & 2 Others (2016) eKLR*, Mativo J. held;

**“The court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on one hand would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the Applicant will suffer if the injunction is refused is greater than that which the Respondent will suffer if it is granted lies on the Applicant.”**

I am of the view that in the present case, the Plaintiffs/Applicants have failed to discharge this burden to the required standard. The balance of convenience tilts in favour of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Respondents as there is a valid court order detailing how the suit land should be dealt with.

The Plaintiffs/Applicants had the option of seeking to be enjoined in HCCC No. 446 of 2009.

30. All in all, I find no merit in this application and the same is dismissed. The costs of the application do abide the outcome of the main suit.

**It is so ordered.**

**Dated, Signed and Delivered at Mombasa on the 26<sup>th</sup> day of April 2018.**

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**L. KOMINGOI**

**JUDGE**

**26/4/2018.**