



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC CASE NO.595 OF 2017**

**FLORENCE NJERI MWANGI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**NGATHA MIRINGU.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the *Notice of Motion* application dated 2<sup>nd</sup> June 2017, brought by the Plaintiff/Applicant herein *Florence Njeri Mwangi* brought under various provisions of law and seeks for the following orders:-

1) Spent.

2) Spent.

3) That temporary injunction orders do issue restraining the Defendant/Respondent by himself and/or through his authorized agents from selling, transferring, charging, leasing, developing, trespassing and/or in any manner interfering with land parcel No.Ruiru/Ruiru East Block 2/4096 pending hearing and determination of this suit.

4) That a declaratory order do issue cancelling any entry made in the register at the Lands Office, removing the name of Plaintiff/Applicant and the court do declare that the land Ruiru/Ruiru East Block 2/4096, belongs to the Applicant and that the purported transfer and entry made therein is null and void.

5) That costs of this application be borne by the Respondents.

The application is based on the following grounds:-

a) That the Plaintiff/Applicant is the legal owner of land parcel No.Ruiru/Ruiru East Block 2/4096 and has a title deed duly issued to her.

b) That one James Kimani Wambui had entered into the parcel of land with a view to subdivide the same claiming to have been instructed by the Defendant to do so and sell the parts on her behalf.

c) That the Applicant has on various occasions tried to do a search at the Thika Lands Office without success hence cause interference with the documents at the lands office more particularly the Green Card.

d) That Police Officers from Ruiru Police Station have been investigating the claim of the Defendant over the parcel of land but have failed to conclude the matter.

The application is further supported by the affidavit of *Florence Njeri Mwangi*, who averred that she is the registered owner of land parcel No.Ruiru/Ruiru East Block 2/4096, having been issued with the title deed on 2<sup>nd</sup> March 2006, as per the copy of the title deed *annexture FNM-1*. It was her contention that she had purchased the parcel of land from one *George Nganga Kamau*, and prior to the purchase, she had done a search and made a Sale Agreement as evident from *annexture FNM 1(a)(b) & (c)*. It was her further averment that after she submitted copies of transfer of land documents at the Lands Office, she was duly issued with title deed and on 13<sup>th</sup> August 2008, she carried a search and the results showed that she was the registered owner of the suit property as is evident from *annexture FNM-4*. She also alleged that since she purchased the parcel of land, she has been in occupation and has cultivated the same and planted various crops and has enjoyed quiet possession.

However, sometime in the **year 2016**, the Defendant/Respondent lodged a claim over the parcel of land and claimed that he owns the parcel of land and that his title deed was issued in the **year 2014**. That the parties herein have even appeared at Ruiru Police Station with their respective documents but the Police have not conducted investigations. It was his further contention that when her advocate tried to search on **16<sup>th</sup> February 2017**, at the Lands Office, he could not access the **Green Card** without furnishing clearance documents. Further that the Defendant had even send an intended purchaser to survey the land and subdivide it into various plots.

The Applicant was therefore apprehensive that the Defendant/ Respondent might sell the land if he is in possession of another title deed and hence the need for conservatory orders. It was her further prayers that since the **Green Card** was missing at the lands office, she should be granted orders to rectify the entries therein and that her name be entered as the **bonafide** owner of the suit land and any entry relating to the Respondent be cancelled. She urged the Court to allow her prayers.

The application is contested and **Nkatha Miringu**, the Defendant/Respondent herein filed his Replying Affidavit on **20<sup>th</sup> September 2017** and averred that he is the registered owner of the suit property **Ruiru/Ruiru East Block 2/4096**, as is evident from his **annexture NM-1**. He further averred that the suit property was transferred to him by **Nyakinyua Investments Ltd**, through a transfer executed on **6<sup>th</sup> June 2013**. He further averred that despite being a **bonafide** registered owner of the suit property, he has never entered into any agreement with **James Kimani Wambui** to subdivide the suit property as alleged or at all and there does not exist any such contract over the suit property between him and one **James Kimani Wambui**. He further averred that it is misguided of the Plaintiff to seek orders of this court on the basis of facts she herself believes not to exist.

He also contended that the Plaintiff has admitted of being asked to provide clearance by the **Land Registrar** and thus confirming that her title has been questioned by the person she alleges to have issued it. He also contended that the Plaintiff's suit and application is a backdoor approach by the Plaintiff to acquire ownership of the suit property and an escape route from the ongoing investigations being conducted by the CID to whom she has failed to provide the clearance and other support documents demanded from her. Further that the Plaintiff is guilty of material non-disclosure and she has thus approached the court with dirty hands and should not be granted the equitable relief she seeks from this court. He urged the Court to dismiss the instant application.

The application was canvassed by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and the annexures attached to the instant application and response thereto and makes the following findings;

There is no doubt that the Plaintiff and the Defendant herein each possesses a title deed for **Ruiru/Ruiru East Block 2/4096**. This is therefore a case of competing titles. The Applicant's title was issued on **2<sup>nd</sup> March 2006**, and it is from **Registry Map Sheet 4**. Initially, this parcel of land was registered in the name of **George Nganga Kamau**, which title deed was issued to him on **1<sup>st</sup> March 1996**. The Plaintiff/Applicant purchased the suit property from the said **George Nganga Kamau** on **11<sup>th</sup> August 2005**, vide the **Sale Agreement** marked **FNM 1(c)**, attached to the instant application. Therefore from the Plaintiff's annexures, it is evident that the root of her title can be traced. She purchased the same from **George Nganga Kamau**, who had a title deed in his name and the certificate of official search dated **9<sup>th</sup> August 2005**, marked **FNM 1(b)** clearly shows that indeed the said **George Nganga Kamau** was the proprietor of the suit property **Ruiru/Ruiru East Block 2/4096** as at **9<sup>th</sup> August 2005**.

However, from the Respondent's annexures, it is evident that this suit property **Ruiru/Ruiru East Block 2/4096** is registered in the name of the Defendant/Respondent and the title deed was issued to him on **25<sup>th</sup> September 2014**. That was almost **8 years after** the Plaintiff/Applicant had been issued with her title deed.

From the title deed, the **Registry Map Sheet** number is not given but from the other annexures, it is clear that the Defendant purchased the suit property from **Nyakinyua Investments Ltd** in the **year 2014**. By the time of this purchase, the suit property had long been registered in the name of the Plaintiff/Applicant.

It is evident that the Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **David Kamau Gakuru...Vs...National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001, (2001) LLR 4951**, where the Court held that:-

***“It is trite that the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it is shown that that discretion has not been exercised judicially”.***

Further, the Court is cautious that at this interlocutory stage, it is not supposed to decide the disputed issues with a finality. All that the Court is supposed to do is to determine whether the Applicant is 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 that the Court is entitled at this stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”***

The criteria to be considered is the one laid down in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358**. These criterias are:

- 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 Applicant herein needed to establish that she has a *prima-facie* case with probability of success at the trial. It is evident that the Plaintiff and Defendant have each competing titles. However, the Applicant's title deed was issued in the **year 2006**. Therefore the Applicant's title is the first in time and as equity teaches in its maxim that; **"when two equities are equal, the first in time prevails"**, then the Plaintiff's title deed is the first in time and prima facially, it should prevail until when evidence is called by the parties during the main hearing which evidence might resolve which of the two titles is the genuine one. See the case of **Gitwany Investment Ltd & 3 Others...Vs...Commissioner of Lands, HCCC No.1114 of 2002**, where the Court held that:-

***"The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail"***.

By holding that the Plaintiff's title deed is the one that should prevail for now does not mean that this Court has conclusively decided that the Plaintiff is the genuine and legitimate proprietor of the suit property. All the Court is saying is that evidence must be called to confirm how the 2<sup>nd</sup> title deed came into being and whether the title deed held by **George Nganga Kamau** who sold the land to the Plaintiff was genuine or not. However for now, the Court finds that the *status quo* should remain as it was before the Defendant acquired his title deed. This is because the Plaintiff was in occupation and was cultivating on the suit property and enjoying quiet possession. For the above reasons, the Court finds that the Applicant has established that she has a *prima-facie* case with probability of success at the trial.

On the second limb, though the suit land is verifiable and quantifiable and can be compensated by monetary terms or through damages, it is evident that a crystallized right cannot be traded with any form of monetary compensation See the case of **Joseph Siro Mosioma...Vs...Housing Finance Corporation of Kenya & 3 Others, Nairobi HCCC No.265 of 2007 (4R)**, where the Court held that:-

***"On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction"***.

On the third limb, this Court is not in doubt, but even if the Court was to decide on a balance of convenience, the same would tilt in favour of maintaining the *status quo* and the *status quo* herein is that the Plaintiff/Applicant is in possession and she should remain in such possession and occupation until the suit is heard and determined. See the case of **Agnes Adhiambo Ojwang...Vs...Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 o 2000**, where the Court held that:-

***"the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act"***.

On prayer No.4, the Court finds that the Applicant is seeking for a final order which is equivalent to mandatory injunction. The principle to be considered in determining whether to allow or not to allow mandatory injunction are the ones laid down in the case of **Kenya Breweries Ltd & Ano...Vs...Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109**, where the Court held that:

***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application"***. See **Volume 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948**.

From the above finding of the court, it is evident that mandatory injunction can be issued at an interlocutory stage but in very special and exceptional circumstances. As the Court held earlier both the Plaintiff and the Defendant have title deeds for the suit property. There is need to call evidence and unravel the mystery of who is the genuine owner of the suit property herein. There is no special circumstances that would warrant the court grant a mandatory injunction at this stage and declare that the suit property herein belongs to the Plaintiff/Applicant. That falls under the reims of the decision of the main suit after calling of evidence and testing the same through the usual manner of cross-examination.

For the above reasons, the Court finds that the **Applicant is not deserving of the order sought in prayer No.4** at this interlocutory stage. However, the **Applicant is deserving of the orders sought in prayer No.3**. Consequently, the Court allows the Plaintiff/Applicant's **Notice of Motion** dated 2<sup>nd</sup> June 2017 in terms of **prayer No.3** but **declines** to allow **prayer No.4**. **Costs of this application shall be in the cause.**

It is so ordered.

**Dated, Signed and Delivered at Thika this 31<sup>st</sup> day of May 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Macharia for Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Ruling read in open court in the presence of the above stated advocate.

**L. GACHERU**

**JUDGE**

**31/5/2018**