



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC CASE NO.662 OF 2017**

**(FORMERLY ELC CASE NO.1475 OF 2016 – NAIROBI)**

**WILLIAM WAINAINA NGUGI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**SAMUEL NJOROGE WANJIKU.....DEFENDANT/RESPONDENT**

**RULING**

Coming for determination is the *Notice of Motion* application dated *25<sup>th</sup> November 2017*, brought under various provisions of law, among them Order 40 Rules 1,2 & 8 of the Civil Procedure Rules wherein the Plaintiff/Applicant has sought for the following orders:-

**1) Spent.**

**2) Spent.**

**3) Spent**

**4) That this Honourable Court be pleased to issue an order of injunction to restrain the Defendant, his servant, workmen, licensees, agents or any other persons acting on their own behalf or on behalf of the Defendant from howsoever trespassing, disposing, dispossessing, alienating, reclaiming, tilting, claiming, curving out, excising, constructing, building, developing or taking any action that would be adverse to the Plaintiff's interests in Title No. Ndumberi/**

**Riabai/3278, pending the hearing of this suit.**

**5) That this Honourable Court be pleased to issue an order of inhibition of any dealings of any nature whatsoever on title**

**No.Ndumberi/Riabai/3278, without the express approval and**

**consent of the Plaintiff pending the hearing of this suit.**

**6) That the costs of this application be borne by the Defendant.**

The application is premised on the following grounds:-

**a) That the Plaintiff/Applicant was the registered owner of title No. Ndumberi/Riabai/3278.**

**b) The Plaintiff/Applicant was approached by the Defendant with an offer for some loan against his title.**

**c) The Plaintiff/Applicant executed a commitment note but never received any monies from the Defendant/Respondent or at all.**

**d) The Defendant/Respondent has now illegally and fraudulently transferred the property to his name.**

**e) The Plaintiff/Applicant has never gone for any Land Control Board or executed any application for Land Board Application at all.**

- f) *The Defendant/Respondent is most likely to sell the property to other third parties.*
- g) *That the Plaintiff/Applicant has never given the PIN or passports photos for any transfer process.*
- h) *That the property is extremely price and valued at over Kshs.20 million.*
- i) *There is urgent need to stop any dealings whatsoever with the subject parcel of land.*
- j) *It is in the interests of justice that the instant application be considered and allowed.*

The application is further supported by the *affidavit* of **William Wainaina Ngugi**, who averred that he is the owner of title **No.Ndumberi/**

**Riabai/3278**, which was registered in his name. He further reiterated that on **13<sup>th</sup> April 2016**, the Defendant offered to lend him some **Kshs.600,000/=** for starting a business and they executed an **agreement** before an advocate marked as **WVN-1**. He alleged that the Defendant did not give him the money but he left his title deed with the said Defendant. However, on **7<sup>th</sup> November 2016**, when he went to the offices of the said Advocate to collect his title deed, the advocate refused to release it. It was his contention that he became suspicious and when he carried a search, he was surprised to find that the same had already been transferred to the Defendant herein on **6<sup>th</sup> October 2016**, without his knowledge or consent. He averred that he has never attended any **Land Control Board**, for purpose of transferring his land to the Defendant nor given out his PIN number for purposes of transfer of **Ndumberi/Riabai/3278**. He alleged that he has now reported the matter to **Kiambu Police Station** vide **OB No.15/18/11/2016**. He urged the Court to revoke and/or cancel the purported transfer immediately as the Defendant is planning to sell his property to other parties and thus deprive the Applicant of the suit property herein. He also contended that he will suffer great prejudice and irreparable harm if the orders sought herein are not granted.

The application is contested and the Defendant/Respondent herein **Samuel Njoroge Wanjiku**, filed a **Replying Affidavit** and averred that he offered to advance a personal loan to the Plaintiff/Applicant who accepted the offer by depositing his title deed and duly executed transfer forms as security. Further that the Plaintiff/Applicant executed a **commitment note** upon receipt of the fully pledged amount as is evident from **annexture SNW-1**. He also contended that the Plaintiff/Applicant deposited the duly executed transfer and Land Control Board Forms as security at their mutual advocate, that the Respondent was to use in transferring the land in the event of default. He reiterated that the Plaintiff/Applicant processed all transfer documents including passport photographs, PIN and National Identity Card. He also alleged that the Plaintiff/Applicant borrowed more money and signed a **further commitment note** which was witnessed by his mother and is marked as **NW-2**.

It was his contention that the Plaintiff/Applicant did **acknowledge receipt** of the said money in the presence of witnesses particularly his mother whose account was debited with some of the amount as is evident from **SNW-3**. He further contended that he has an indefeasible title and as such an injunctive order would be prejudicial to him as the Plaintiff/Applicant would be unjustly rewarded for breaching the commitment terms. He further reiterated that the portion of land is a small one measuring **0.013 Hectares** and is **not worth Kshs.20 million** as alleged by the Applicant herein. He urged the Court to dismiss the instant application with costs.

The 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. Further the Court has considered the cited authorities and the relevant provisions of law and it renders itself as follows:-

The orders sought herein are injunctive orders which are 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 Limited, Civil Appeal No.84 of 2001** where the Court held that:-

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

Further at this juncture, the court is not called upon to determine the disputed facts herein conclusively. All that the court is supposed to determine is whether the Applicant is deserving of the injunctive orders sought and based on the usual criteria laid down in the case of **Giella...Vs...Cassman Brown & Company Ltd 1973 E.A 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.*

Therefore, this Court will juxtapose the available evidence together with the above stated principles and determine whether the Applicant is deserving of the orders sought herein.

It is evident that the Applicant did borrow a friendly loan from the

Defendant/Respondent herein in the **year 2016**. The Applicant signed his **first commitment note** on **13<sup>th</sup> April 2016**, after borrowing **Kshs.600,000/=** from the Defendant/Respondent. Though the Plaintiff/Applicant alleged that he did not receive the stated amount, he

allegedly left behind his title deed. However, the Defendant/Respondent has alleged that he indeed gave the Plaintiff **Kshs.600,000/=** on **13<sup>th</sup> April 2016** and a further **Kshs.100,000** on **27<sup>th</sup> June 2016** as per the further commitment note. The Court finds that indeed the Applicant received the said friendly loan and that is why he left behind his title deed. In the said commitment note, there are three **significant Clauses** herein. The first one is **Clause No.(d)** which stated that the Plaintiff's original title deed for the suit property **Ndumberi/Riabai/3278**, was to be kept in custody of their mutual advocate who in this case was **Ngugi Waithuki Advocate**.

The second **Clause is No.(e)** which stipulated that in the event the borrower was **in default** of any one instalment, he was liable to pay a **penalty of 30%** of the **remaining balance**, within **30 days** of such default.

Thirdly, **Clause No.(f)** stated that is the borrower **falls behind** in making monthly payments, as stated in the commitment note, the **lender was at liberty to transfer the land in his names**.

It is therefore evident that the lender had discretion to transfer the land to his name only if the borrower (Plaintiff) was behind in making the monthly payments.

It is also not in doubt that the Defendant/Respondent did transfer the suit land to his name on **6<sup>th</sup> October 2016**, which was only **six months** after the Plaintiff/Applicant had borrowed money from him. There was no evidence that the Plaintiff/Applicant was in default and that the **Defendant/Respondent did send** any **Demand Notice** to him on intention to transfer the land to his name.

The Defendant has alleged that he is the **absolute and indefeasible** proprietor of the suit property and therefore injunctive orders cannot be issued against him. However, the Applicant has alleged that the Defendant did transfer the said suit property to his name without the knowledge and consent of the Plaintiff/Applicant. If that was the case, then the said transfer was fraudulent. On whether the said transfer to the Defendant was fraudulent or not is not a determination that can be done at this juncture. A determination on whether the Plaintiff/Applicant did sign the transfer documents and consented to the transfer of the suit land can only be done after calling of evidence at the main trial. However before the calling of evidence, the suit property should be preserved and this preservation can only be done by issuance of an injunctive order. As was held in the case of **Noormohammed Janmohammed...Vs...Kassam Ali Virji Madham (1953) 20 LRK 8**, "**the purpose of injunction is to preserve the status quo**".

Though the Defendant/Respondent is now the registered proprietor of the suit property, his proprietorship can be challenged as provided by **Section 26(1)(a)&(b)** of the **Land Registration Act**, if such registration was acquired through **fraud, misrepresentation** or **unprocedurally**. The above Section provides as follows:-

**"The certificate of title issued by the Registrar upon registration, or to a purchase 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 Plaintiff/Applicant has alleged that the Defendant/Respondent transferred the suit land to himself fraudulently. That is one of the grounds for challenge of any proprietor's Certificate of title, even though it is deemed to be absolute and indefeasible. The Plaintiff is apprehensive that the Defendant/Respondent may proceed to dispose off the suit property to unsuspecting 3<sup>rd</sup> parties if the suit property is not preserved through an order of injunction. Indeed in the **Noormohammed Case (supra)**, the Court held that:-

**"To justify temporary injunction, there must be evidence of immediate danger to property by sale or other disposition".**

The Plaintiff/Applicant herein has demonstrated that there is sufficient apprehension on his part that the Defendant/Respondent may dispose off the suit property before the disputed issues of whether Plaintiff/Applicant transferred the same to the Defendant has been resolved by calling of evidence.

For the above reasons, the **Court finds that the Applicant has established** that he has a **prima-facie** case with probability of success at the trial.

On whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it is apparent that the suit property is now in the name of the Defendant/Respondent herein, who as a registered proprietor has rights to dispose it off or deal with it as he so wishes. If the Defendant/Respondent was to sell the suit property or charge the same and the Applicant turns out to be the successful litigant, then it means the Applicant might completely lose his property which he might also have some sentimental attachment to and which is not capable of being compensated by an award of damages. See the case of **Notco (mbsa) Ltd & Another...Vs...Halima Bakali Ramadhani, Civil Appeal No.158 of 1992**, where the Court of Appeal held that:-

**"Where the plaintiff has been residing in the suit premises and that has been her home and the seat of the family for more than four decades, that place which she fondly calls her home has a value of which cannot be measured purely in economic terms as money cannot buy for the respondent a home with the same sentimental value and attachment as the suit property".**

On the third principle, the Court finds that the balance of convenience tilts in favour of preserving the *status quo* and the *status quo* herein is what existed before the Defendant/Respondent transferred the land to himself. See the case of *Agnes Adhiambo Ojwang...Vs...Wycliffe Odhiambo Ojjo, Kisumu HCCC No.205 of 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”.***

Having now carefully considered the available evidence and the instant *Notice of Motion* application dated **28<sup>th</sup> November 2016**, the *Court finds it merited* and consequently, ***the Court allows the said application entirely in terms of prayers No.4 and 5 with costs to the Applicant herein.***

Further the parties are directed to comply with Order 11 of the Civil Procedure Rules within a period of **45 days** from the date hereof. Thereafter, the parties to ***fix the matter for Pre-trial directions*** before the Deputy Registrar of this Court and then set down the main suit for hearing expeditiously so that the issues in dispute can be resolved at once.

It is so ordered.

***Dated, Signed and Delivered at Thika this 18<sup>th</sup> day of May 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

No appearance for Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**