



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 328 OF 2017**

**MUTANU KIEMA .....PLAINTIFF**

**VERSUS**

**DAVID KIRATU NGANGA.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, KITUI COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Application dated 17<sup>th</sup> July, 2017, the Plaintiff is seeking for the following orders:

***a. That an order of injunction do issue pending hearing and determination of the suit herein restraining the Defendants, their agents and/or servants or any of them from alienating, disposing off, transferring or in any other way interfering with Land Parcels Number Kisasi/Nguuni/1455, 1456, 1457 and 1458.***

***b. That costs of this Application be paid by the Defendants/ Respondents.***

2. According to the Affidavit of the Plaintiff, the parcels of land known as Kisasi/Nguuni/1455, 1456, 1457 and 1458 (*the suit properties*) are a resultant of an illegal sub-division of parcel of land number Kisasi/Nguuni/324; that parcel number 324 was registered in the joint name of the Plaintiff and his son, Charles Kiema (*deceased*) and that on 11<sup>th</sup> September, 2001, the 1<sup>st</sup> Defendant entered into a written agreement with his son and himself to purchase from him a motor vehicle registration number KAH 841N.

3. The Plaintiff deponed that after signing the said agreement, the 1<sup>st</sup> Defendant took the original Title Deed for parcel of land known as Kisasi/Nguuni/324; that the 1<sup>st</sup> Defendant then sued them in Kitui SPMCC No. 171 of 2004 for specific performance which suit was dismissed and that when he conducted a search, he discovered that the title for parcel number 324 had been closed on sub-division, and the suit properties created.

4. The Plaintiff finally deponed that he has never consented to the transfer of the suit land to the 1<sup>st</sup> Defendant and that the said transfer and subsequent sub-division of the land by the 1<sup>st</sup> Defendant was fraudulent and illegal.

5. In his Replying Affidavit, the 1<sup>st</sup> Defendant deponed that he is the registered proprietor of the suit properties and that parcel of land known as Kisasi/Nguuni/324 was transferred to him as a result of a Power of Attorney executed by the Plaintiff after she failed to honour the terms of the Sale Agreement.

6. The Defendant finally deponed that the Plaintiff was unable to pay the purchase price of the vehicle that he had sold to her and that he realized the security that the Plaintiff had offered and that having retained the motor vehicle, he retained the land which he has since sub-divided.

7. The Plaintiff's advocate submitted that although the Plaintiff executed a Sale Agreement in respect of a motor vehicle, the Defendant never delivered the said motor vehicle to the Plaintiff; that the legality of the Power of Attorney is disputed and that it is the Plaintiff who is on the ground.

8. Counsel submitted that the Plaintiff has a home on the suit land and that she will suffer irreparably unless the injunctive orders are granted.

9. The 1<sup>st</sup> Defendant's counsel submitted that the Plaintiff executed a Power of Attorney in respect of the suit land; that the suit land was transferred to the 1<sup>st</sup> Defendant on the basis of the said Power of Attorney after the Plaintiff failed to pay for the motor vehicle that the 1<sup>st</sup> Defendant had sold to her and that the principles for the grant of an injunction have not been made.

10. The evidence before me shows that the Plaintiff and the late Charles Kiema were registered as the proprietors of parcel of land known as Kisasi/Nguuni/324. The Plaintiff has admitted that they entered into an agreement with the 1<sup>st</sup> Defendant to purchase from the 1<sup>st</sup> Defendant motor vehicle registration number KAH 841N, Nissan matatu. According to the said agreement, the Plaintiff and her son were required to pay to the 1<sup>st</sup> Defendant Kshs. 350,000 in installments of Kshs. 25,000 per month with effect from 30<sup>th</sup> October, 2001.

11. The agreement further provided that the Plaintiff and her son were to offer to the 1<sup>st</sup> Defendant a Title Deed in respect of parcel number 324 which land the 1<sup>st</sup> Defendant was at liberty to realize in default of the payment of the agreed upon installments. The agreement further provided that the Plaintiff and her son were to execute a Power of Attorney.

12. The 1<sup>st</sup> Defendant has annexed on his Affidavit an executed Power of Attorney dated 26<sup>th</sup> September, 2001. The same was registered on 3<sup>rd</sup> October, 2001. The Plaintiff has disputed the validity of the Power of Attorney which is the document that the 1<sup>st</sup> Defendant used to have the suit land transferred in his name.

13. Considering that the validity of the Power of Attorney has been disputed by the Plaintiff, and in view of the fact that that is the document that the 1<sup>st</sup> Defendant used to procure the consent of the Board and Transfer of the land, the validity of the said Power of Attorney can only be determined after *viva voce* evidence has been taken.

14. Until the issue of the validity of the Power of Attorney is heard, and in view of the fact that it is the Plaintiff who is in possession of the suit land, an order of injunction should issue.

15. For those reasons, I allow the Application dated 23<sup>rd</sup> November, 2017 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

**JUDGE**