



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.78 OF 2018

DAVID KIPKEMBOI.....1ST PLAINTIFF/APPLICANT

FRANCIS NDERITU.....2ND PLAINTIFF/APPLICANT

-VERSUS-

THIKA GIRLS HIGH SCHOOL.....DEFENDANT/RESPONDENT

RULING

The matter coming for determination is the Plaintiffs/Applicants *Notice of Motion* application dated 6th March 2018, wherein the Applicants have sought for these orders against the Defendant/

Respondent:-

- 1) That a temporary injunction be issued restraining the Defendant from carrying out any developments on LR.No.24875, Thika Municipality pending the hearing and determination of this suit interparties.**
- 2) That the Honourable Court be pleased to issue an order restraining the Defendant from further admitting students to carry out studies at Thika Girls High School on LR.No.24875, Thika Municipality.**
- 3) That the Honourable court be pleased to give further orders and directions as it may deem fit and just to grant.**
- 4) That the costs of this application be awarded to the Applicants in any event.**

The application is supported by the following grounds:-

- 1. That the Plaintiffs are the registered proprietors/owners of the suit property LR.No.24875, Thika Municipality.**
- 2. That the Defendants have encroached on LR.No.24875, Thika Municipality, built structures and relocated a Thika Girls High School onto the said parcel of land.**
- 3. That the Defendants have now reneged on its promise to purchase the said parcel of land LR.No.24875, Thika Municipality despite acknowledging illegal possession. The Plaintiffs have now learnt with profound shock that the Defendant is secretly and fraudulently in the process of transferring LR.No.24875, Thika Municipality to further deal or engage in further illegal dealings and/or transactions which if confirmed, will diminish the Plaintiffs' legal rights and interests in the said property.**
- 4. That the conduct of the Defendant smacks malice and in complete denial of the sanctity of the title and rule of law.**

Further, the application is also supported by the *affidavit* of **David Kipkemboi**, the 1st Plaintiff/Applicant who averred that together with the 2nd Plaintiff, they are the registered proprietors/owners of all that parcel of land known as **LR.No.24875 Thika Municipality** as is evident from *annexture DK-1*, a copy of *Certificate of Title*. That in **April 2017**, they discovered that the Defendant/Respondent had encroached on the suit property and had built structures thereon and relocated the School thereon. However, the School through its agent **Leonne Kibaba** approached him and requested to purchase the property from the Plaintiffs since they had actually purchased the same from someone else who turned to be a fraudster. That after negotiations, the purchase price was agreed at **Kshs.20,000,000/=**.

However, the Defendant were in deposit **Kshs.7,500,000/=** as initial

deposit. A **Sale Agreement** was prepared but was never signed since the deposit of **Kshs.7.5 Million** had not been made as agreed. Further that the Defendant has completely failed to honour the said promise and is secretly and fraudulently in the process of transferring the said land parcel to itself (**LR.No.24875-Thika Municipality**). That though the Defendant is a trespasser, it has totally refused and/or ignored to vacate the suit premises nor pay the purchase price. He urged the Court to allow the instant application.

The application is opposed and **Gladys Achieng Omuyeka**, swore a **Replying Affidavit** and denied that they have any intention of selling any land especially **LR.No.24875 IR 180266 Thika Municipality**, the suit land. She further averred that on **20th October 2014**, the Defendant entered into a **Lease Agreement** with one **Elizabeth Muthoni Hussein** who was the allottee of the suit property as she held a letter of allotment dated **28th June 2011**. Further after the **Lease Agreement**, the Defendant also agreed to purchase the suit land for **Kshs.6,000,000/=** and a **Sale Agreement** was drawn. The Defendant or the School commenced construction and admitted students to the said School. It was her contention that the School is now an **Examination Centre** with **69 KSCCE candidates** who are meant to sit for examinations this **year 2018**. Further that they only learnt recently that the suit land belongs to the Plaintiffs/Applicants and not **Elizabeth Muthoni Hussein** who conned them.

It was her contention that the Plaintiffs and Defendant began negotiations for sale and purchase of the suit property. However, even after the Sale Agreement was drawn, the Defendant/Respondent was unable to deposit **Kshs.7,500,000/=** as demanded by the Plaintiffs/

Applicants. That the Defendant are victims of circumstances and Plaintiffs became impatient and commenced this suit. The Defendant/Respondent urged the Court to allow them time to finish the commenced transaction. The deponent urged the court to dismiss the instant application.

At the commencement of the suit, the court allowed **prayer No.2** of the **Notice of Motion** and therefore there exists **Exparte Orders** of injunction against the Defendant/Respondent herein. The issue that the Court will determine is whether the same should be confirmed or dismissed entirely.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the whole pleadings and the annexures thereto. The Court makes the following findings:-

The Applicants have sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However this discretion must be exercised judicially. Further at this interlocutory stage, the Court is not bound to determine the disputed issues with finality. At this juncture, the court is only called upon to determine whether the Applicants are deserving

of injunctive orders basing the same on the laid down criteria in the case of **Giella...Vs...Cassman Brown & Co. 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.**

There is no doubt that the Plaintiffs/Applicants are the registered proprietors of the suit property wherein they were registered as such on **5th August 2016**. As the registered proprietors of the suit property, the Plaintiffs/Applicants have their rights protected by **Section 24(a)** and **25(1)** of the **Land Registration Act**, which provides:-

24(a) Subject to this Act—

(a) the registration of a person as the proprietor of land

shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

25(1)The rights of a proprietor, whether acquired on first

registration or subsequently for valuable consideration or

by an order of court, shall not be liable to be defeated

except as provided in this Act, and shall be held by the

proprietor, together with all privileges and appurtenances

belonging thereto, free from all other interests and claims

whatsoever...”

One such right is access to the suit property, use and possession of the same. However, by the time the Plaintiffs/Applicants acquired the suit property, the Defendants were already in occupation of the suit property. From the **annexture GAO-1**, the Defendant entered into a **Lease Agreement** with one **Elizabeth Muthoni Hussein**. It is also evident that after the commencement of the Lease, the Defendant started a School on the suit property which School is now registered as an **Examination Centre** with **69 KSCE Candidates** for **2018**.

However, the suit property is owned by the Plaintiffs and the Defendant has admitted that fact. The Plaintiffs and the Defendant had even commenced the process of sale and purchase of the said land and a Draft Sale Agreement was drawn but was not executed.

The Defendant does now own the School and has not paid the purchase price. However the Plaintiffs/Applicants as the owners of the suit property should enjoy the fruits of such proprietorship. The Defendant has alleged that it has not paid the demanded deposit of **Kshs.7,500,000/=** because of the on-going construction. However, that is not a god reason for failure to pay up for the property owned by the Plaintiffs/Applicants. The Defendant should first pay the deposit of **Kshs.7,500,000/=** before commencing any constructions.

The Plaintiffs/Applicants have alleged that the Defendants are secretly trying to transfer the suit property to themselves. That allegation has been denied by the Defendant. Though the Defendant contends that it needs time to commence the transaction it has not stated what time it needed. The Defendant cannot use the Plaintiffs/Applicants land without

paying rent and or paying the purchase price.

The Plaintiffs'/Applicants' apprehension is founded and this Court would find it prudent to protect their interests. Since the Plaintiffs/

Applicant are the registered proprietors of the suit property, the Court finds that they have established a prima-facie case will probability of success.

Further, as a proprietors of the suit property, they have to pay the purchase price or rent for use of the suit property. Therefore the Court finds that the balance of convenience tilts in favour of the Applicants.

Further, even if the suit property can be quantified and damages assessed, the fact that the Defendants are alleging that they are facing financial hardship is a pointer that the Defendant may not be in a position to pay any damages or compensation to the Plaintiffs/Applicants. Therefore the Court finds that the Applicants are deserving of prayer No.3 of the instant **Notice of Motion** application.

However, **prayer No.4** is tantamount to issuing an order of eviction or final order as sought in the Plaintiff. The Applicants are desirous of being paid the purchase price. If the Court would cripple the Defendants by ordering them not to admit any students to the School, where would the Defendant find money to pay the expected purchase price? Therefore the Court finds that **prayer No.4** cannot be allowed at this interlocutory stage.

On **prayer No.5**, the Court finds that the Defendant cannot occupy the suit property without making any payments to the Plaintiffs/Applicants

herein. The Defendant cannot be heard to say that it is carrying on with construction of more development on the suit property but it is unable to raise the deposit of **Kshs.7,500,000/=** as earlier agreed. The Court therefore directs the Defendant to make a deposit of **Kshs.7,500,000/=** towards commencement of the agreed transaction by **31st December 2018**.

Failure to do that, then the Court will allow the Applicant's **prayer No.4** and the Defendant will be restrained from admitting students to its School, which is situated on **LR.No.24875, Thika Municipality**.

Having now carefully considered the instant **Notice of Motion** dated **6th March 2018**, the Court finds it merited in terms of **prayer No.3 and 5** and to the extent that the Defendant should deposit **Kshs.7,500,000/=** in favour of the Plaintiffs/applicants as earlier agreed and the deposit to be done on or before **31st December 2018**. **In default**, prayer No.4 will take effect. The Applicants are entitled to costs of this application.

Further, the parties are also encouraged to attempt an out of court settlement of this matter for the interest of justice and for purpose of saving precious judicial time.

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of November 2018.

L. GACHERU

JUDGE

16/11/2018

In the presence of

No appearance for Plaintiffs/Applicants

M/S Kahindi holding brief for Mr. Kanyi for Defendant/Respondent

Lucy - Court clerk

Court – Ruling read in open court.

L. GACHERU

JUDGE

16/11/2018