



**REPUBLIC OF KENYA**

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

**ELC NO. 1505 OF 2013**

**FLORENCE WAIRIMU MBUGUA (Suing as an Administrator of the Estate of  
JOSEPH KIARIE MBUGUA) ..... PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNTY (BEING THE SUCCESSOR OF THE NAIROBI CITY  
COUNCIL & THE NAIROBI CITY COMMISSION.....1<sup>ST</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT  
SATYA INVESTMENTS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff brought this suit on 11<sup>th</sup> December 2013 seeking the following reliefs against the Defendants;

- a) A declaration that the transfer of land reference number L.R No. 1870/IX/54 now known as L.R No. 209/12/32 (hereinafter referred to as “the suit property”) by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant was null and void.
- b) A declaration that the acquisition of the suit property by the 2<sup>nd</sup> Defendant from the 1<sup>st</sup> Defendant was null and void.
- c) An order that the registration of the 3<sup>rd</sup> Defendant as proprietor of the suit property be cancelled.
- d) An order that the certificate of title I.R 62591 relating to the suit property be rectified to reflect the Plaintiff as the owner of the property and the said certificate be delivered to the Plaintiff.
- e) A permanent injunction to restrain the 3<sup>rd</sup> Defendant from evicting the Plaintiff or in any manner interfering with the Plaintiff’s occupation of the suit property pending the determination of this suit.
- f) A permanent injunction restraining the 3<sup>rd</sup> Defendant from dealing in any manner whatsoever with the suit property and in particular not to sell, dispose or alienate the same in any manner whatsoever until the determination of the suit.

In her plaint, the Plaintiff who described herself as the widow and administrator of the estate of Joseph

Kiarie Mbugua (hereinafter referred to only as “the deceased”) averred that the estate of the deceased had been in physical possession of the suit property since 9<sup>th</sup> January 1979 and as such had been in continuous uninterrupted occupation of the same for a period of 34 years and 10 months as at the date of filing of the suit. The Plaintiff stated that the deceased was first granted a Temporary Occupation Licence on 9<sup>th</sup> January 1979 in respect of the suit property and was subsequently granted a lease on 4<sup>th</sup> October 1979 in respect thereof for the remainder of the term of 99 years with effect from 1904. The Plaintiff averred that by a letter to the Plaintiff’s advocates dated 29<sup>th</sup> October 2013 the 1<sup>st</sup> Defendant stated that; the deceased had paid the full purchase price for the suit property, the suit property was registered in the name of the Nairobi City Commission/Council and that the Nairobi City Commission/Council had sold the suit property to the deceased but had not transferred the same to him. The Plaintiff averred that she was entitled to specific performance of the agreement which the 1<sup>st</sup> Defendant entered into with the deceased and/ or damages in the sum of Kshs.200 million. The Plaintiff averred that by a letter of allotment dated 22<sup>nd</sup> July 1993, the 2<sup>nd</sup> Defendant purported to allocate the suit property to a Mr. Magut who sold the same to the 3<sup>rd</sup> Defendant on 18<sup>th</sup> March 1994. In the alternative to her claim for specific performance, the Plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acted fraudulently, illegally, unprocedurally and corruptly to deprive the deceased of the suit property which is valued at Kshs.200,000/=. The Plaintiff averred that the issuance of a title by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant was a nullity as it was based on unlawful, irregular and unprocedural agreement for sale dated 18<sup>th</sup> March 1994 which was executed by the 3<sup>rd</sup> Defendant before it was incorporated on 7<sup>th</sup> June, 1994. The Plaintiff averred that the 3<sup>rd</sup> Defendant acquired suit property in breach of the provisions of Section 26(2) of the Land Registration Act, 2011. The Plaintiff averred that although there had been cases between the parties concerning the suit property, no court had examined the Agreement for sale dated 18<sup>th</sup> March 1994 within the context of Section 26(2) of the Land Registration Act.

Together with the Plaint, the Plaintiff brought an application by way of Notice of Motion dated 16<sup>th</sup> December 2013 seeking a temporary injunction to restrain the 3<sup>rd</sup> Defendant from evicting the Plaintiff or her tenants or in any manner interfering with her occupation of the suit property pending the hearing and determination of this suit. The Plaintiff’s application for injunction is still pending hearing and determination. The 3<sup>rd</sup> Defendant also filed an application by way of Notice of Motion dated 14<sup>th</sup> July 2014 seeking to strike out this suit which application is also pending hearing herein.

What is now before me is the Plaintiff’s application which was brought on 5<sup>th</sup> April 2016 by way of Notice of Motion dated 4<sup>th</sup> April 2016 seeking; a temporary injunction to restrain the 1<sup>st</sup> Defendant from in any manner howsoever evicting the Plaintiff and/or the Plaintiff’s tenants or in any manner whatsoever interfering with the Plaintiff’s occupation of the suit property pending the hearing and determination of this suit and a temporary injunction restraining the 1<sup>st</sup> Defendant from dealing in any manner whatsoever with the suit property and in particular from selling, disposing or alienating the same pending the hearing and determination of this suit.

The application was brought on the grounds that the Plaintiff had occupied the suit property for over 34 years and had brought this suit under Section 26(2) of the Land Registration Act, 2012 after the Court of Appeal had determined the rights of the parties in the context of Section 23 of the Registration of Titles Act (now repealed). The Plaintiff averred that the National Land Commission had made a determination in respect of the suit property in which it had directed the 1<sup>st</sup> Defendant to repossess the suit property without taking into consideration the Plaintiff existing rights over the suit property. The Plaintiff contended that she had over 50 tenants on the suit property who will suffer irreparable damage if evicted. The Plaintiff contended further that in the event that the said tenants are evicted, her suit would be rendered nugatory.

The Plaintiff’s application was opposed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants through grounds of opposition dated 6<sup>th</sup> October 2016 and 28<sup>th</sup> July 2016 respectively. In its grounds of opposition, the 1<sup>st</sup> Defendant contended that the Plaintiff had not satisfied the conditions for granting the orders sought. The 1<sup>st</sup> Defendant contended further that the orders sought are not available to the Plaintiff because the same are

not sought in the plaint. The 1<sup>st</sup> Defendant contended further that in revoking the 3<sup>rd</sup> Defendant's title to the suit property, the National Land Commission was discharging its constitutional mandate and the Plaintiff had not demonstrated that it acted without jurisdiction, unreasonably or in breach of the rules of natural justice. The 1<sup>st</sup> Defendant contended that the Plaintiff's suit and the application herein are *res judicata* the issue in dispute having been heard and determined by the Court of Appeal in Civil Appeal No. 164 of 2004, Satya Investments Ltd. –vs- J. K. Mbugua. The 1<sup>st</sup> Defendant contended that Section 26(2) of the Land Registration Act which had been invoked by the Plaintiff as the basis of this suit does not act retrospectively.

On its part, the 3<sup>rd</sup> Defendant averred that the Plaintiff had no legal interest in the suit property and that no further claim can be maintained at the instance of the Plaintiff in view of the judgment of the Court of Appeal dated 22<sup>nd</sup> March 2013 in Civil Appeal No. 164 of 2004 referred to above. The 3<sup>rd</sup> defendant termed the Plaintiff's application an abuse of the process of the court.

The Plaintiff's application was argued before me on 10<sup>th</sup> October 2016 when Mr. Oigara appeared for the Plaintiff, Mr. Mokua for the 1<sup>st</sup> Defendant and Mr. Nyawara for the 3<sup>rd</sup> defendant. In his submission, Mr. Oigara argued that the Plaintiff was apprehensive that after the revocation of the 3<sup>rd</sup> Defendant's title over the suit property, the 1<sup>st</sup> Defendant could move in and take possession of the same. The Plaintiff's advocate submitted that the Plaintiff had purchased the suit property from the 1<sup>st</sup> Defendant and that the Plaintiff would suffer irreparable injury if the suit property is taken over by the 1<sup>st</sup> Defendant. Counsel urged the court to preserve the property pending the hearing of the suit. In his submission in reply, Mr. Mokua reiterated the contents of the 1<sup>st</sup> Defendant's grounds of opposition dated 6<sup>th</sup> October 2016. He submitted that the Plaintiff had not exhibited any title over the suit property to support her claim over the same. Mr. Mokua submitted that the suit property had always been public land and that fact had been confirmed by the National Land commission. Counsel submitted that the suit property was not available for alienation. Mr. Mokua submitted further that the loss if any which may be suffered by the Plaintiff was quantifiable and the Plaintiff could be adequately compensated. He submitted further that the suit was *res judicata* the issues raised having been heard and determined between the parties by the Court of Appeal.

On his part, Mr. Nyawara also relied on the 3<sup>rd</sup> Defendant's grounds of opposition. He reiterated Mr. Mokua's submission that the Plaintiff had not established a prima facie case and that the suit was *res judicata*. Mr. Nyawara submitted that the Court of Appeal had made a finding that the 1<sup>st</sup> Defendant had no title in the suit property which it could pass to the deceased. Mr. Nyawara submitted that in the absence of a title, the Plaintiff has no prima facie case with a probability of success on the basis of which the orders sought could be granted. Counsel submitted that an order for the eviction of the Plaintiff has already been issued by this court and that what the Plaintiff was seeking to achieve in the present application was to continue in occupation of the suit property.

I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition which were filed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants in opposition to the application. Finally, I have considered the other material on record and the submissions which were made before me by the parties' respective advocates. What is before me is an application for injunction. The principles upon which the court exercises its discretion in applications of this nature are well settled. As was submitted by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, an applicant for a temporary injunction must establish a prima facie case against the respondent and must also demonstrate that he will suffer irreparable harm which cannot be compensated in damages unless the order is granted. If the court is in doubt as to the above, the application would be considered on a balance of convenience. See, the case of Giella Vs. Cassman Brown & Co. Ltd. (1973) E. A 358. I am not satisfied that the Plaintiff has met the conditions for granting the orders sought. I am in agreement with the submissions by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants that the Plaintiff has not demonstrated the interest which she has in the suit property which should be protected by the injunction sought. In its decision rendered in Nairobi Civil Appeal No. 164 of 2004, Satya Investments Ltd. –vs- J. K. Mbugua, on 22<sup>nd</sup> March 2013, the Court of Appeal held that the 1<sup>st</sup>

Defendant herein had no valid title over the suit property which it could lawfully transfer to the deceased on behalf of whose estate this suit has been brought. The court ordered the deceased to vacate the suit property within 45 days from the date of the Court of Appeal decision in default of which the deceased was to be evicted.

The deceased did not vacate the suit property as ordered by the Court of Appeal and there is already an order for the police to assist the auctioneers to evict the deceased, his agents or anyone residing on the suit property. The said decision of the Court of Appeal has not been stayed. An application by the plaintiff for leave to appeal against the same to the Supreme Court was dismissed by the Court of Appeal on 20<sup>th</sup> September 2013. In the face of the Court of Appeal decision aforesaid in which the deceased was found to have no valid title over the suit property, I am not persuaded that the Plaintiff has a prima facie case against the Defendants with a probability of success. Without determining the issue with finality, I am of the view that the issues raised herein are the same as the issues which were raised in the Court of Appeal which were determined in favour of the 3<sup>rd</sup> Defendant. The argument by the 1<sup>st</sup> and 3<sup>rd</sup> defendants that the suit herein is res judicata is therefore not far fetched. Having come to the conclusion that the Plaintiff has not established a prima facie case, I am not under an obligation to consider whether the Plaintiff would suffer irreparable harm if the injunction sought is not granted. If I was to determine the issue, I would have ruled against the Plaintiff. In paragraphs 8 and 10 of the Plaintiff's pleadings, the Plaintiff has quantified her possible loss to be Kshs.200 million. There is no evidence that the 1<sup>st</sup> Defendant would be incapable of compensating the Plaintiff if she succeeds at the trial of this suit.

The upshot of the foregoing is that the Plaintiff has not met the conditions for granting a temporary injunction. Consequently, I find no merit in the Notice of Motion dated 4<sup>th</sup> April 2016. The same is accordingly dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

**Delivered and Signed at Nairobi this 31<sup>st</sup> day of March, 2017**

**S. OKONG'O**

**JUDGE**

**In the presence of**

|            |                                   |
|------------|-----------------------------------|
| Mr. Oigara | for the Plaintiff                 |
| Mr. Mokuu  | for the 1 <sup>st</sup> Defendant |
| N/A        | for the 2 <sup>nd</sup> Defendant |
| Mrs. Ndago | for the 3 <sup>rd</sup> Defendant |
| Kajuju     | Court Assistant                   |