



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MACHAKOS**  
**CIVIL SUIT NO. 82 OF 2010**

**KEZIAH GATHONI SUPEYO.....PLAINTIFF/APPLICANT**

**VERSUS**

**MILLENNIUM DREAM HOMES LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**WONDERS VALLEY LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOSEPH GREGORY NYAMU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

*(Sued on behalf of Land Registrar, Ngong Land Registry & Chief Land Registrar)*

**RULING**

1. In the Notice of Motion dated 13<sup>th</sup> September, 2016, the Plaintiff is seeking for the following reliefs:

*a. That the 2<sup>nd</sup> Defendant/Respondent, their servants and/or agents be restrained by way of injunctions from trespassing, interfering, alienating, transferring and/or disposing or otherwise dealing with the suit property described as Land Parcel No. Kajiado/Olchoro-Onyore/5722, a land fraudulently sold to them by 1<sup>st</sup> Defendant/Respondent pending hearing and determination of this suit.*

*b. That this Honourable Court be pleased to grant leave to the Plaintiff/Applicant to further amend the filed Amended Plaintiff herein to include the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents and bring out their connection to this suit.*

*c. That this Honourable Court be pleased to grant leave to file a Further Amended Plaintiff and the same be deemed as properly filed.*

*d. That this Honourable Court do issue declaration that the 1<sup>st</sup> Defendant/Respondent first action of transferring the suit land to the 2<sup>nd</sup> Defendant was unlawful and fraudulent and that the 2<sup>nd</sup> Defendant/Respondent actions of trespassing, tampering with and interfering with peaceful enjoyment of the Plaintiffs/Applicants land is malicious and unjustifiable hence unlawful.*

***e. That this Honourable Court do issue an order directing the District Registrar of Land Ngong Land Registry to cancel the 2<sup>nd</sup> Defendant/Respondent's title and register it in the names of the Plaintiff/Applicant.***

***f. That an order be issued directing the O.C.S Ngong Police Station and/or the nearest police station to oversee the implementation and/or enforce the orders to be granted herein.***

***g. That the cost of this Application be provided for.***

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that subsequent to the filing of this suit, it transpired that the 1<sup>st</sup> Defendant had transferred parcel of land known as Kajiado/Olchoro-Onyore/5722 to the 2<sup>nd</sup> Defendant.

3. It is the Plaintiff's deposition that she was the registered proprietor of land known as Kajiado/Olchoro-Onyore/4912 until the year 2001 when she decided to sub-divide it into two (2) portions; that she instructed the 3<sup>rd</sup> Defendant to prepare the documentation in respect to the sub-division and issuance of Title Deeds in her name and that upon sub-division, she was only issued with one Title Deed in respect of parcel of land number Kajiado/Olchoro-Onyore/5721.

4. It is the Plaintiff's case that the 3<sup>rd</sup> Defendant retained the original Title Deed for parcel of land number Kajiado/Olchoro-Onyore/5722 (*the suit property*); that in the year 2008, she was shocked to find trespassers on the suit land and that on inquiry, she realised that the land had been transferred to the 1<sup>st</sup> Defendant without her knowledge.

5. The Plaintiff has deponed that she later learnt that the 3<sup>rd</sup> Defendant is a director in the 1<sup>st</sup> Defendant's company; that the 3<sup>rd</sup> Defendant was later on appointed a judge in the Court of Appeal and that she never heard from her then advocates after filing this suit until the year 2014 when some strangers went on the suit land.

6. On checking with the registry, the Plaintiff deponed that she realized that the suit property had been transferred from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and that is when she decided to change her advocates.

7. The Plaintiff has deponed that she is in possession of the land; that unless the suit property is preserved, she will suffer irreparably and that the Chief Land Registrar should cancel the Title Deed that was issued to the 2<sup>nd</sup> Defendant and have it registered in her favour.

8. In response, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed Grounds of Opposition in which they averred that the proposed amendments are being done in bad faith; that the amendments violate the provision of Constitution and that the 1<sup>st</sup> Defendant has no interest in the suit land.

9. According to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, the Applicant is time barred from raising any new cause of action fifteen (15) years after the first transfer and over three (3) years after the second transfer.

10. In his Replying Affidavit, the 3<sup>rd</sup> Defendant deponed that the initial sale was between the Plaintiff and a limited liability company; that the Plaintiff has maliciously dragged his name in the suit and that the 1<sup>st</sup> Defendant has no interest in the land since the year 2013.

11. The 3<sup>rd</sup> Defendant deponed that the sale of the suit land cannot be impeached under the law because the 2<sup>nd</sup> Defendant is a purchaser for value without notice and that the Registrar of Titles removed the Applicant's caution because it was bad in law and was not legally registrable.

12. It is the 3<sup>rd</sup> Defendant's case that the Applicant was aware of the sale of the suit property to the 1<sup>st</sup>

Defendant and that neither the 1<sup>st</sup> Defendant nor himself were involved in the sub-division, transfer or issuance of the title.

13. The 3<sup>rd</sup> Defendant deponed that the Plaintiff acknowledged payment of Kshs. 2 million in consideration of the Transfer and that a further Kenya shillings 1.5 million was paid for her children's tuition fees in Minnesota.

14. The 2<sup>nd</sup> Defendant's manager deponed that the 2<sup>nd</sup> Defendant acquired the suit property on 9<sup>th</sup> June, 2011 for a sum of Kshs. 50,000,000 from the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup> Defendant was issued with a Title Deed on 26<sup>th</sup> April, 2013.

15. It is the 2<sup>nd</sup> Defendant's case that the Plaintiff attempted to fraudulently sub-divide the suit property; that the Plaintiff has not demonstrated fraud on the part of the 2<sup>nd</sup> Defendant and that the Plaintiff's remedy, if any, lies in damages.

16. The 3<sup>rd</sup> Defendant, who is a director in the 1<sup>st</sup> Defendant's company, swore a Further Affidavit in which he deponed that the Plaintiff has failed to demonstrate any fraud in view of the statement of the Assistant Land Registrar, Kajiado.

17. The 3<sup>rd</sup> Defendant deponed that it is the Plaintiff who lodged the mutation forms and transfer documents; that the Plaintiff voluntarily signed the transfer documents and that the property was transferred to the 1<sup>st</sup> Defendant for a consideration of Kshs. 2,000,000.

18. The Plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their respective submissions and authorities which I have considered.

19. The Plaintiff sued the 1<sup>st</sup> Defendant alone vide her Plaint dated 28<sup>th</sup> April, 2010.

20. In the Plaint, the Plaintiff averred that the Defendant fraudulently and by misrepresentation registered itself as the proprietor of the suit land. The Plaintiff sought for a declaration that the Title Deed that was issued to the Defendant in respect to the suit land is invalid, ineffectual, null and void.

21. The record shows that on 24<sup>th</sup> May, 2013, the Plaintiff filed an Application dated 20<sup>th</sup> May, 2013 seeking to amend the Plaint. I have perused the record and it would appear that the Application dated 20<sup>th</sup> May, 2013 was never heard and determined.

22. It would appear that in the meantime, and while the suit was pending, the 1<sup>st</sup> Defendant transferred the suit property to the 2<sup>nd</sup> Defendant. That is the reason why the Plaintiff is seeking for leave to amend the Plaint and enjoin the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in this suit.

23. In its Replying Affidavit, the 2<sup>nd</sup> Defendant has admitted that it purchased the suit property from the 1<sup>st</sup> Defendant vide a sale agreement dated 9<sup>th</sup> June, 2011. The 2<sup>nd</sup> Defendant has annexed a copy of the Title Deed in respect to the suit property that was issued in its favour on 26<sup>th</sup> April, 2013.

24. The Plaintiff has sought to enjoin the 3<sup>rd</sup> Defendant in the suit by virtue of the fact that he is a director in the 1<sup>st</sup> Defendant's Company.

25. According to the Affidavit of the Plaintiff, it is the 3<sup>rd</sup> Defendant who took possession of the Title Deed in respect of parcel of land known as Kajiado/Olchoro-Onyore/4912 for the purpose of having it sub-divided into two (2) parcels of land.

26. The Plaintiff's case is that after sub-division of the said land, the 3<sup>rd</sup> Defendant retained the Title

Deed in respect of the suit property and had it fraudulently transferred to the 1<sup>st</sup> Defendant.

27. In view of the allegations that have been raised in the Plaintiff's Affidavit and in the proposed Amended Plaint against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the said Defendants ought to be joined in this suit by way of having the Plaint amended as shown in the draft "Further" Amended Plaint. The proposed amendments will not prejudice the Defendants.

28. I say so because most of the proposed amendments have arisen because the 1<sup>st</sup> Defendant sold the suit property to the 3<sup>rd</sup> Defendant during the pendency of this suit.

29. It is trite that the power granted to the court to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case. The power to amend pleadings may be exercised at any stage of the proceedings (*See Bullen Leak and Jacobs Precedents of Pleadings, 12<sup>th</sup> Edition page 127*).

30. As was held in the case of *Institute for Social Accountability & Another vs. Parliament of Kenya & 3 others (2014) eKLR*, the power of amendments makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.

31. In *Eastern Bakery vs. Castelino (1958) EA 461, Sir Kenneth O'Conner* held as follows:

***"It will be sufficient to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs."***

32. The amendments that have been proposed by the Plaintiff will not cause any injustice to the Defendants. Indeed, the proposed amendments will enable the trial court to effectually and completely adjudicate upon and settle all questions involved in the suit.

33. The next issue that I am supposed to deal with is whether the Plaintiff is entitled to an injunction pending the hearing of the suit.

34. The Plaintiff has alleged in her Affidavit that she entrusted the 3<sup>rd</sup> Defendant with the Title Deed for the suit property; that the 3<sup>rd</sup> Defendant fraudulently transferred the suit property to the 1<sup>st</sup> Defendant, a company in which he is a director and that while this suit was pending, the 1<sup>st</sup> Defendant transferred the land to the 2<sup>nd</sup> Defendant.

35. The main issue that the trial court will deal with is whether indeed the Plaintiff signed the sale agreement and the transfer documents transferring the suit property to the 1<sup>st</sup> Defendant. The trial court will also determine if the required consents were ever obtained and if the purchase price was paid to the Plaintiff.

36. In the event that the court finds in favour of the Plaintiff, it follows that the transfer of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant will be declared a nullity.

37. It is common knowledge that the purpose of an order for injunction is to preserve the suit property. However, such an order can only be granted if the Plaintiff shows that he has a *prima facie* case with chances of success. An injunction will not normally be granted unless the Applicant might suffer irreparable injury and when the court is in doubt, it will decide the Application on the balance of convenience (*See Giella vs. Cassman Brown & Co. Ltd [1973] E.A 358*).

38. As I have stated above, the issue as to whether the suit property was fraudulently transferred to the 1<sup>st</sup> Defendant can only be determined at trial. However, considering that the alleged sale agreement between

the 1<sup>st</sup> Defendant and the Plaintiff has not been exhibited by the Defendants, and in the absence of a copy of the consent of the Land Control Board for the transfer of the suit property to the 1<sup>st</sup> Defendant, I find and hold that the Plaintiff has a *prima facie* case with chances of success.

39. Considering that the 1<sup>st</sup> Defendant transferred the suit property during the pendency of this suit, the suit property may be further removed from the reach of the Plaintiff if the 2<sup>nd</sup> Defendant sub-divides it and sells it to third parties. Such a transaction will definitely cause the Plaintiff to suffer irreparable injury.

40. In the circumstances, I shall grant to the Plaintiff the orders of injunction pending the hearing of the suit.

41. The other prayers in the Application can only be granted after full trial, and not at an interlocutory stage.

42. For those reasons, I allow the Notice of Motion dated 13<sup>th</sup> September, 2016 in the following terms;

*a. That the 2<sup>nd</sup> Defendant/Respondent, its servants and/or agents be and is hereby restrained by way of injunction from trespassing, interfering, alienating, transferring and/or disposing or otherwise dealing with the suit property described as Land Parcel No. Kajiado/Olchoro-Onyore/5722 pending the hearing and determination of this suit.*

*b. That leave be and is hereby granted to the Plaintiff/Applicant to amend the Plaint herein to include the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents and bring out their connection to this suit.*

*c. That leave be and is hereby granted to the Plaintiff to file and serve an Amended Plaint within fourteen (14) days from the date hereof.*

*d. That the costs of this Application to be in the cause.*

**DATED AND DELIVERED AT MACHAKOS THIS 31<sup>ST</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**