



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

**ELC CASE NO. 197 OF 2017**

**(Formerly Nairobi ELC No. 926 of 2016)**

**SAMSON TEELA AKUTE.....PLAINTIFF**

**VERSUS**

**KENNETH J. KAMAU NGIGI.....1<sup>ST</sup> DEFENDANT**

**TWYFORD CERAMICS COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL (for and on behalf of and agent for the**

**Government of the Republic of Kenya/Ministry of Lands Housing and**

**Urban Planning/The National Land Commission) .....3<sup>RD</sup> DEFENDANT**

**RULING**

The application before this court is a notice of motion application dated the 25th July, 2016 brought pursuant to Order 40 Rules (1) (a) (b) and (3) Order 51 Rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, and all and enabling provisions of the Law. The Plaintiff /Applicant seeks the following prayers:

1. Spent

2. Spent

3. That this Honourable Court be and is hereby pleased to grant a temporary order of injunction restraining the Defendants and or Respondents each one of them jointly and severally, whether by themselves, their servants, employees and or anybody acting on their behalf or claiming under them from trespassing into, constructing on, selling, transferring and or registering in their names, mortgaging, charging, developing or in any manner dealing with all that the parcels of land known as Title Number: KAJIADO/DALEKUTUK/1320, pending the hearing and determination of this Application.

4. That this Honourable Court be and is hereby pleased to grant a temporary order of injunction restraining the Defendants and or Respondents each one of them jointly and severally, whether by themselves, their servants, employees and or anybody acting on their behalf or claiming under them from trespassing into, constructing on, selling, transferring and or registering in their names, mortgaging, charging, developing or in any manner dealing with all that the parcels of land known

as Title Number: KAJIADO/DALEKUTUK/1320, pending the hearing and determination of this suit.

5. That this Honourable Court be pleased to grant an order of mandatory injunction directing the 1st and 2nd Defendants and or Respondents, their servants, agents, and or any other persons claiming under them to remove from the said piece of land Title Number KAJIADO/DALALEKUTUK/1320 forthwith, and in any event within fourteen(14) days from the date of making this order, any building, structures and construction materials, machinery, motor vehicle and any other tools of trade that they may have deposited on the suit land Title Number KAJIADO/DALALEKUTUK/1320; and in default to do so and or to comply with this order the Plaintiff be and is hereby at liberty to remove the Defendants and or Respondents, and their belongings if need be forcefully: costs and or expenses of such removal to be met by the Defendants and or Respondents jointly and severally.

6. That the Plaintiff be and is herein at liberty to invoke the services of the Kajiado County Police Commander and his officers to ensure compliance for removal from the suit land and or compliance by the Defendants and or Respondents with the Order of Mandatory injunction.

7. That the orders to be served upon the Advocates on record for the Defendants and or Respondents, the District Land Registrar, Kajiado Land Registry.

8. That the costs of this application be provided for.

The application is based on the following grounds, which in summary are that the Defendants especially the 1st Defendant has alienated the suit land Title number KAJIADO /DALALEKUTUK /1320 measuring approximately 24.3 hectares, to the disadvantage of the Plaintiff/Applicant. That by an agreement of Sale dated 23rd December, 2015, the 1st Defendant purportedly sold the suit land to the 2nd Defendant for a price of Kshs. 235,295,000/= knowing fully well, he does not have a good title to the suit land. Title deed dated 29th May, 1996 was fraudulently obtained and given to the 1st Defendant by the Land Registrar, Kajiado. The Plaintiff does not recognize that the 1st Defendant is the true owner of the suit land but states that he is the true rightful equitable legal owner of the suit land, by virtue of a title deed issued on 14th August, 1997 by the Land Registrar, Kajiado after purchase for valuable consideration. There is a serious conflict of interest of who is the rightful, equitable, legal and true owner of the suit land. Both titles of the Plaintiff and the 1st Defendant are still being investigated by the Directorate of Criminal Investigations and the National Land Commission. The Plaintiff seeks to stop the intended completion of the transaction of sale and purchase of the suit land by the 1st Defendant to the 2nd Defendant to protect his rights and interests.

The application is supported by the affidavit of SAMSON TEELA AKUTE who is the Plaintiff/Applicant herein. He deposes that he is the only legal and true owner of the suit land and that his records have been tampered with at the Kajiado Land Registry so much so, that his name and ownership of the suit land are nowhere in the registry; and his place has been replaced with KENNETH J. KAMAU NGIGI who is now purported to claim absolute ownership of the suit land, having been given his title deed on 29th May, 1996. He states that the 2nd and 3rd Defendants are in physical possession and occupation of the whole of the suit land, and that the 1st Defendant purportedly leased and or sold the suit land to the 2nd Defendant. He states that he resides in Trans Nzoia County and it took him sometime to learn that there were intruders on his land. Further that he learnt of the intrusion sometime in June 2016 through GIDEON OLE NKAI NOAH, JOHNSON KAPESI OLE MPOKI and his lawyers. He further deposes that he went to the suit land and witnessed the intrusion, after which he reported the matter to the Kajiado District Criminal Investigation Office and through his lawyers he learnt there was a law firm of COULSON HARNEY Advocates who were involved in the transaction of the sale and or lease of the suit land. Further, that he instructed his lawyers to enter a caveat and on 4th June, 2016 a notice of 'Caveat Emptor' over the suit land was placed in the Standard Newspaper. He avers that there is no way the 1st Defendant purchased the suit land from NOAH MELITA OLE NKAI who is now deceased if due diligence was adhered to, as he had the genuine title deed issued on 14th August, 1997 after one SAMMY KIBET KITUR who shortly owned the suit land sold and transferred the said land to him. Further that the 2nd

and 3rd Defendants have used the fake title to apply for change of user from freehold title to leasehold and he stands to suffer irreparable loss of and damage if the orders sought are not granted.

The 1st, 2nd and 3rd Defendants opposed the application and filed their respective affidavits. The 1st Defendant filed a replying affidavit sworn by KENNETH J. KAMAU NGIGI where he deposed that the instant application is frivolous, misconceived and an abuse of the Court process. He stated that he is the absolute proprietor of the suit parcel which he had bought from NOAH MELITA OLE NKAI (deceased) on 29th May, 1996 for Kshs. 1,480,000 and since then no third party has laid any claim to it, until 2016 when the Plaintiff misrepresented to the authorities that he is the owner of the said land and filed a caution on it. He avers that his title to the suit property is genuine and indefeasible and that if the deceased indeed sold the land later to a third party, he did not have the capacity to do so as he was already a bona fide purchaser. He states that by a Sale Agreement dated 23rd December, 2015 he intended to transfer the suit property to the 2nd Defendant but the Plaintiff has frustrated the process by registering a caution against the title knowing fully well he is the registered owner. Further that he does not know SAMMY KIBET KITUR as there is no indication in the registry that at one time he was the owner of the suit land, and the alleged transfer of the suit property to him is suspicious and smacks of fraud, non disclosure of material facts and misrepresentation on the part of the Plaintiff. He deposes that he does not know the Plaintiff, has never dealt with him and failure by the Plaintiff to disclose the source of information regarding the alleged criminal activity at the Kajiado Land Registry to fraudulently create a title in the 1st Defendant's favour masks with falsehoods as he has never worked with anyone at the said Registry to commit a criminal offence. He further avers that since the 2nd Defendant was a foreign owned company, they could not hold a freehold title and he applied for change of user from freehold to leasehold which application was advertised in the local press on 25th February, 2016; the Plaintiff's claim is frustrating his contract of Sale and he stands to suffer irreparably if the subsisting inhibition persists as he will not be able to complete the sale.

The 2nd Defendant filed a replying affidavit sworn by one RUIQIN LI who is its Managing Director where he avers that it is an innocent party to the allegations of fraud being made by the Plaintiff and notes that there is no indication of the role played by the Company in the alleged fraud relating to title over the suit property. He deposes that the 1st and 2nd Defendant entered into a Sale Agreement dated 23rd December, 2015 in respect of the suit property and upon signing the said agreement, a Deed of Variation was executed with the 1st Defendant providing several guarantees to the 2nd Defendant as a true and lawful owner of the suit property. Further that the 2nd Defendant undertook due diligence including conducting official searches at the Kajiado Land Registry and all of them indicated the 1st Defendant as the registered owner of the suit property, and at no point did the Plaintiff's name appear. He avers that the transaction was fully transparent with the Company also registering a caution to preserve the purchaser's interest. It was thereafter that they realized there was a third party claiming ownership to the suit parcel, yet the due diligence conducted did not reveal Plaintiff's ownership. He further avers that he was informed by the Kajiado Land Registry staff that the matter was reported to the Criminal Investigation Department and the investigations are still ongoing, and the Plaintiff need not be apprehensive as there is no intention to purchase, transfer, register, nor charge the suit land until this case is completed and ownership dispute resolved. He states that the 2nd Defendant has invested approximately Kshs. 2 billion at present in developing the suit parcel pursuant to reliance upon the searches at the Kajiado Land Registry as well as the license granted to it by the 1st Defendant, and the Plaintiff's wish to have injunctions issued against construction and occupation of the suit land must be weighed in light of the massive investment put in, as this would jeopardize the company.

The 3rd Defendant/Respondent did not file any replying affidavit. All the parties filed written submissions which were highlighted on 12th April, 2017. All the parties reiterated the facts of the case as highlighted above. Both the Plaintiff and 1st Defendant's Counsels staked claim on the suit land. The 1st, 2nd and 3rd Defendant's counsel opposed the application for injunction stating that the Plaintiff did not have a valid claim as there were no records at the Kajiado Land Registry to confirm this. The Plaintiff's Counsel on the other hand submitted that his client was a victim of forgery and he was indeed the true owner of the suit parcel.

## **Issues and determination**

Upon perusal of the application together with the supporting affidavit, the replying affidavits and the parties' submissions, at this juncture the only issue for determination is whether the interim and mandatory injunctions sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

In line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, it is the Plaintiff's contention that he is the proprietor of the suit land KAJIADO/DALALEKUTUK/1320 and the 1st Defendant fraudulently colluded with the Kajiado Land Registry and obtained title to the suit land, and sold the said land to the 2nd Defendant. The 1st Defendant stated that he bought the suit parcel from one NOAH MELITA OLE NKAI for a valuable consideration and obtained title in May 1996 before the Plaintiff got his in August 1997. The 2nd Defendant submitted that he is an innocent purchaser for value, as he conducted due diligence at the Kajiado Land Registry which revealed that it is the 1st Defendant who was owner of the suit parcel, and hence bought the same from the 1st Defendant and commenced investing on it.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. Although several issues are curious about how the Plaintiff and the 1st Defendant both came to have title to the suit parcel. The Plaintiff avers that he bought the suit land from one SAMMY KIBET KITUR who they had a special arrangement with, and who later on transferred the suit land to him. The 2nd Defendant on the other hand undertook due diligence and innocently entered into a Sale Agreement with the 1st Defendant and commenced investing on the suit land. However, these are issues best heard and determined at a full trial.

On the second principle as to whether the Applicant suffers irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 1st Defendant claim ownership of the suit land and admit that the 2nd Defendant has invested on it. There are also allegations of fraud by both parties who admit that the issue of the two titles is still pending investigations by the CID. I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22** 'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'. In the instant case I find that it would be pertinent if both the Plaintiff and the 1st Defendant are granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, ' **a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

The mandatory injunction sought by the applicant for removal of structures on the suit land can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. Even though both the Plaintiff and 1st Defendant are staking a claim to the suit land, and has each annexed a copy of their respective title deeds to prove ownership, the Court notes that the title presented by the 1st Defendant is dated May 1996 while the one for the Plaintiff is dated in the August 1997. Both the Plaintiff, 1st Defendant and 2nd Defendant confirm that the issue of the two titles in relation to the suit land is a matter which is still being investigated. The Court has taken judicial notice that the 2nd Defendant after undertaking due diligence and purchased the suit property commenced construction thereon and is currently operating a company. The 2nd Defendant claims to have invested over Kshs. 1 billion shillings on the suit land, a fact which has not been rebutted by the Plaintiff. It is in these circumstances that I decline to grant the mandatory injunction sought for the removal of structures, pending the hearing and determination of the suit.

Since both the Plaintiff and the 1st Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the 2nd Defendant who was an innocent purchaser having invested heavily on the suit land, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/DALALEKUTUK/1320 measuring approximately 24.3 hectares, of any dealings, lease or charge pending the hearing and determination of the suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajiado this 18<sup>th</sup> day of July, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION.**

Munikah for the Plaintiff/Applicant

Lithuma holding brief for Musyoka for the 1<sup>st</sup> Defendant

M/s Akal for the 2<sup>nd</sup> Defendant

Court Clerk - Mpoye