



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**ELC CASE NO.180 OF 2016**

**PATRICK KIVAI NDUVA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**NOAH MONEIRA OLE KURRARRU.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**CO-OPERATIVE BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**R U L I N G**

The matter for consideration before me is the *Notice of Motion* dated **26<sup>th</sup> February 2016**, brought by the Plaintiff/Applicant herein **Patrick Kivai Nduva**, against the Defendant/Respondent. The said application is premised under Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

The Plaintiff/Applicant has sought for an order of injunction to issue against the Defendants by themselves, their servants, agents or persons acting from their instructions, from dealing with, transferring, alienating upon ***Kajiado/Kitengela 17105***, pending the hearing and determination of the suit or until further orders of this court. He also sought for costs of the application to be provided for.

The application is based on the ground that the Plaintiff/Applicant is the lawful owner of the property ***Kajiado/Kitengela/17105*** and is entitled to possession and all the rental proceeds. The same is also supported by the *affidavit* of **Patrick Kivai Nduva**.

The Plaintiff/Applicant's case is that he was the registered owner of ***Kajiado/Kitengela/17105***, in ***Kitengela Township*** which property has **35 two bedroomed apartments** for residential use developed on it. It was his further case that sometime in **2014**, one **James Maina Mburu** who was personally known to him introduced him to the 1<sup>st</sup> Defendant/Respondent, **Noah Moneria Ole Kurrarru**, who was selling several parcels of land in **Kajiado County**. He stated that he met with the 1<sup>st</sup> Defendant/Respondent in company of **James Maina Mburu**, and they agreed on sale and purchase of four parcels of land. The Plaintiff/Applicant was to pay for the purchase in both cash and kind. He was to **exchange** his property ***Kajiado/Kitengela/17105*** with ***Kajiado/Loodariak/140***, which was approximately **256 Hectares**. Plaintiff/Applicant was also to exchange the said plot, with his **Motor Vehicle Reg. No.KBE 480P, Toyota Prado** and some cash. It was his further case that he handed over his **original title**, ***Kajiado/Kitengela/17105***, to **Mr. James Maina Mburu** together with the other relevant documents for transfer with the understanding that 1<sup>st</sup> Defendant would also give him the original documents for

**Kajiado/Loodariak/140** ,and **Kekonyokie/Ilkisumet/98**. He also stated that the 1<sup>st</sup> Defendant/Respondent fraudulently transferred the property to himself on **27<sup>th</sup> November 2016**, and later **charged** it to the 2<sup>nd</sup> Defendant as **security** for a loan of **Kshs.50,000,000/=** which he has **defaulted** in payment. Further that the 1<sup>st</sup> Defendant has become evasive and has refused to transfer **Kajiado/Loodariak/140** ,to the Plaintiff/Applicant.

Further the 1<sup>st</sup> Defendant/Respondent pledged to re-transfer **Kajiado/Kitengela/17105** to the Plaintiff, but he has failed to do so and now the 2<sup>nd</sup> Defendant/Respondent intends to exercise its Statutory Power of Sale. Plaintiff/Applicant reiterated that the transfer of the suit property to the 1<sup>st</sup> Defendant was fraudulent as he forged several documents such as Spousal and Land Control Board Consents. He therefore urged the Court to restrain the 2<sup>nd</sup> Defendant from advertising for sale by public auction or have any further dealing with the suit property, **Kajiado/Kitengela/17105**, as doing so, the Plaintiff/Applicant risk losing his property. He urged the Court to allow his application.

The 1<sup>st</sup> Defendant/Respondent though **served** with the **Notice of Motion** application on **7<sup>th</sup> March 2016**, as is evident from the **Affidavit of Service** sworn by **Eddy Ahunga**, a **Court Process Server** ,failed to enter appearance nor file his **Replying Affidavit**. The 1<sup>st</sup> Defendant/Respondent therefore did not oppose the instance **Notice of Motion**.

However, the 2<sup>nd</sup> Defendant/Respondent has vehemently **opposed** the application through the **Replying Affidavit** sworn by **Jacquelyne Khadambi**, a Recoveries Manager with the 2<sup>nd</sup> Defendant/Bank. She admitted that the Bank did **advance loan** facility of **Kshs.49,900,000/=** to the 1<sup>st</sup> Defendant who secured the same using **LR.No.Kajiado/Kitengela/17105**. It was her averments that before issuing the said loan facility, the 2<sup>nd</sup> Defendant carried all due diligence and noted that the suit property was **registered** in the name of the 1<sup>st</sup> Defendant as from **27<sup>th</sup> November 2014**, as evident from the copy of the title deed annexed as **JK1**. Further that the said **suit property** was **developed** and had **35 two-bedroomed apartments** for residential use and the 1<sup>st</sup> Respondent/Defendant was to repay the loan facility from among others, rental amount collected from the suit property. She also stated that the **1<sup>st</sup> Respondent defaulted** and was issued with a **demand letter** for the outstanding sum of **Kshs. 56,271,104/=**. The deponent further stated that **after lapse of 30 days**, the Bank opted to exercise its Power of Sale and issued a Statutory Notice over the suit property in accordance with the law on **18<sup>th</sup> February 2016**. It was her further contention that the 1<sup>st</sup> Defendant/Respondent continues to be in arrears in repayment of the loan facility as is evident from the statement of account **JK2**. It was also her contention that the Plaintiff/Applicant was also aware of the transfer of the suit property to the 1<sup>st</sup> Respondent on **27<sup>th</sup> November 2014**, and was also aware of the charge created by the 1<sup>st</sup> Defendant/Respondent on the suit property in favour of the 2<sup>nd</sup> Defendant in **February 2015**. Therefore the Bank has acted in accordance with the law while attempting to exercise its Statutory Power of Sale over the suit property. Further that the Bank only became aware of the allegations of fraudulent transfer of the suit property from Plaintiff/Applicant to the 1<sup>st</sup> Defendant/Respondent on **1<sup>st</sup> March 2016**. It was also her case that in the event that the suit against the 2<sup>nd</sup> Defendant/Respondent is successful, then damages would be adequate remedy and the Bank is capable of paying the same. She urged the Court to dismiss the instant **Notice of Motion** application.

The **Notice of Motion** was canvassed by way of **Written Submissions** and the **Law Firm** of **P. C. Onduso & Co. Advocates** for the Plaintiff/Applicant **filed** their **Written Submissions** dated **15<sup>th</sup> July 2016**, on even date and relied on several decided cases among them the case of **Giella.Vs.Cassman Brown & Co. Ltd 1973 EA 358**, which sets out the conditions for grant of injunction as:

- 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.*

Plaintiff/Applicant also relied on the case of *Elijah Makeri Nyangwara..Vs...Stephen Munagi Njuguna & Others, Eldoret ELC No.609 of 2012* where the Court held that: -

*“... It needs to be appreciated that Section 26(1)(b) of the Land Registration Act to be operative, it is not necessary that the title holder be a party to the vitiating facts noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme”. The heavy impact of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating facts. The purpose of Section 26(1)(a)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.*

The Plaintiff/Applicant also relied on Section 26(1) of the Land Registration Act which states as follows:

*“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-*

*(a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or*

*(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

On the part of the 2<sup>nd</sup> Defendant/Respondent, the *Law Firm of Ochieng Onyango, Kibet & Ohaga* Advocates filed their *Written Submissions* dated 16<sup>th</sup> September 2016 and also relied on various decided cases. Among them the case of *Kenya Commercial Finance & Co. Ltd...Vs Afraha Education Society (2005) 1EA 86*, where the Court held that:-

*“The sequence of steps to be followed in the inquiry into whether to grant an interlocutory injunction is:*

*i. Whether the Applicant has laid out a prima facie case with probability of success.*

*ii. Whether the Applicant might suffer irreparable injury if the injunction is not granted.*

*iii. If there is doubt, whether the balance of convenience favours the Applicant”*

The 2<sup>nd</sup> Defendant/Respondent also relied on the case of *Nguruman Ltd..Vs..Jan Bonde Nielsen & 2 Others ,Civil Application No. 77 of 2012 where the Court held that:-*

*“an injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy”.*

The 2<sup>nd</sup> Defendant/Respondent also quoted the case of *Andrew M. Wanjohi ..Vs..Equity Building Society & Another (2006) eKLR* where the Court held that:-

*“By offering the suit property as security, the chargor was equating it to a commodity which the chargee may dispose of so as to recover his loan together with the interest thereon”.*

It was also submitted that Section 99(4) of the Land Act was clear on the issue of damages which

provides as follows”-

**“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.**

It was further submitted that the balance of convenience tilts in favour of the 2<sup>nd</sup> Defendant/Respondent who is entitled to exercise its Statutory Power of Sale over the suit property upon breach of the 1<sup>st</sup> Defendant/Respondent. For this, reliance was placed in the case of **Milimani Motors (K) Ltd..Vs..Kenya Commercial Bank Ltd 2014 eKLR** where the Court held that”-

**“.....I think the Respondent stands to suffer likely prejudice if the amounts owing reach a point where the offered securities cannot cover. This is a possible scenario as the amount is obviously increasing. The Respondent stands exposed to potentially substantial irrecoverable loss. This persuades me that the balance of convenience lies in favour of the Respondent”.**

This Court has now carefully considered the instant **Notice of Motion** and the **Written Submissions** of each of the respective party. The Court has also considered the **cited authorities** and the relevant provisions of law and the Court renders itself as follows;

The Plaintiff/Applicant has sought for equitable relief which is granted at the Court’s discretion. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others..Vs..Gatheru & Others 1(1990) KLR 554**, where the Court held that:-

**“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be based on common sense and legal principles”.**

In determining whether to grant or not to grant the orders sought, the Court will be guided by the well settled principles laid down in the case of **Giella..Vs... Cassman Brown & Co. Ltd (supra)**. The Court will also rely on the description of the **prima-facie** case as was held in the case of **Mrao Ltd..Vs..First American Bank of Kenya Ltd & 70 Others (2003) KLR 125** :

**“A case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

As the court also embarks on determining whether the Plaintiff/Applicant has made a **prima-facie** case with probability of success, the Court will take into account that **prima-facie** case means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the Plaintiff/Applicant’s case at the trial. In the case of **Habib Bank, Attorney General Zurich..Vs..Eugene Marion Yakub, Civil Application No.43 of (1982) LLR 44977**, the Court held that:-

**“Probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.**

Also at this stage, the Court will warn itself that it is not supposed to make definite findings of facts and law based on affidavit evidence. See the case of **Agip (K) Ltd ..Vs.. Maheshchandra Himatlal Vora & 2 Others, Civil Appeal no.213 of 1999 2 EA 285** where the Court held that:-

**“In an application for injunction, the Court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence”.**

Bearing in mind the above positions held by various courts, I will then comb through the available evidence to determine whether the Plaintiff/Applicant is deserving of the orders sought.

There is no doubt that the Plaintiff/Applicant herein **Kivai Patrick Nduva ID No.10434174**, was the registered owner of **Kajiado/Kitengela/17105**, which he got registered on **1<sup>st</sup> September 2010**. There is

no doubt that on the said property there are developed **35 two bedroomed apartments** for residential use. There is no doubt that the Plaintiff/Applicant got into an agreement with the 1<sup>st</sup> Defendant for sale and purchase of various parcels of land by 1<sup>st</sup> Defendant to the Plaintiff. **LR.No.Kajiado/Loodariak/140** , was one of such parcels of land. Since the **1<sup>st</sup> Defendant did not file a Replying Affidavit** to controvert the Plaintiff/Applicant's averments in his affidavit, the Court also finds that there is no doubt that the Plaintiff/Applicant exchanged his parcel of land **Kajiado/Kitengela/17105**, with one of the 1<sup>st</sup> Defendant/Respondent's parcel of land **Kajiado/Loodariak/140**, which was approximately **256 Hectares**.

The Plaintiff/Applicant averred that he handed over his original documents to **James Maina Mburu**, who was **a go between** the Plaintiff/Applicant and 1<sup>st</sup> Defendant for the suit land. In exchange, the 1<sup>st</sup> Defendant was to give the Applicant the original documents for **Kajiado/Loodariak/140**. However, the Plaintiff alleges that this did not happen but the 1<sup>st</sup> Defendant quickly registered the suit property in his name and took a loan of about **50 million** from the 2<sup>nd</sup> Defendant/Respondent and **offered the title** to the suit land **as security**. The 1<sup>st</sup> Defendant is **now in default** and the 2<sup>nd</sup> Defendant is attempting to exercise its Statutory Power of Sale. If that happens the Plaintiff/Applicant will have lost the suit land and there is no guarantee that 1<sup>st</sup> Defendant would transfer **Kajiado/Loodariak/140**, to the Plaintiff/Applicant. Plaintiff/Applicant had also averred that in a meeting with 1<sup>st</sup> Defendant, he had agreed to re-transfer the suit land to the Plaintiff/Applicant which he had not done by the time of filing the suit. In its **Replying Affidavit**, the **Bank** was amenable to the change of security over the loan advanced to the 1<sup>st</sup> Defendant/Respondent.

Since the allegations made by the Plaintiff/Applicant have not been controverted, by the 1<sup>st</sup> Defendant, the Court finds that the 1<sup>st</sup> Defendant reneged on the agreement that he had entered with the Plaintiff/Applicant herein. The 1<sup>st</sup> Defendant/Respondent transferred the suit land into his name and even took a loan over the said title as security. However, he has kept the money and the other land **Kajiado/Loodariak/140**, which he was to sell to the Plaintiff. If the above scenario is allowed to remain as it is, then for sure the Plaintiff/Applicant will have lost all his investments. That would be before the suit is heard and determined.

Though Section 26(1) of the Land Registration Act provides that a **person issued** with a **certificate of title** is presumed to be the **absolute and indefeasible owner**, such title can **be challenged** if the same was **acquired fraudulently, through misrepresentation or illegally**. From the evidence tendered by the Plaintiff/Applicant herein, then the **certificate issued** to the 1<sup>st</sup> Defendant was **acquired through misrepresentation and illegally** as he had not accomplished his part of the bargain. The **1<sup>st</sup> Defendant's action** amounted to **cheating** the Plaintiff/Applicant out of his investment.

As the parties await to avail evidence so that the Court would determine whether the actions of 1<sup>st</sup> Defendant amounted to fraud or not, the suit property needs to be protected. The 2<sup>nd</sup> Defendant intends to exercise its Statutory Power of Sale. If the said exercise is accomplished, the Plaintiff/Applicant will lose his investment. The Court of Appeal had occasion to deal with a similar situation in the case of **Arthur Highway Developer Ltd..Vs..West End Butchery Ltd & 6 Others, Civil Appeal no.246 of 2013** where the Court held that:-

***“It would mean that all a person needs to do is fraudulently acquire title then proceed to charge it and because of that charge, his fraudulent transactions will be sanitized. The fraudster would end up being unjustly enriched for he will have money in return for the charge which money he will obviously have no incentive to pay and the Bank will still be able to recover its money by a sale of the property. The loser will of course be the proper title holder”.***

Though the Court is not at this stage supposed to make definitive findings of facts and law, the Court finds that as the parties prepare to call evidence to determine whether there was fraud on the part of the 1<sup>st</sup> Defendant or not, then the suit property needs to be preserved. It is trite that the purpose of injunction is

to preserve the *status quo* and the *status quo* to be preserved is the one that existed before the wrongful act. See the case of **Agnes Adhiambo Ojwang..Vs..Wycliffe Ojijo, Kisumu High Court, Civil Case no.205 of 2000.**

Equally in this case, the Court finds that the suit property **Kajiado/Kitengela 17105**, needs to be preserved by preserving the *status quo* that existed before the 2<sup>nd</sup> Defendant intended to exercise its Statutory Power of Sale. Consequently, the Court finds that the Plaintiff/Applicant has established that he has a *prima facie* case with probability of success at the trial.

On the 2<sup>nd</sup> limb of irreparable loss, the Court finds that if the suit property is sold through public auction by the 2<sup>nd</sup> Defendant, then the Plaintiff/Applicant herein will lose all his investments in the suit property and it is not possible to recover the same parcel of land even if the 2<sup>nd</sup> Defendant/Respondent would compensate him by an award of damages. The Court finds that the subject of this matter is land which is an emotive issue and it is not always true that damages would be adequate to compensate an Applicant once he/she loses the land in issue. See the case of Olympic **Sports House Ltd..Vs..School Equipment Centre Ltd (2012) eKLR** where the court held that:-

***“Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.***

On the third limb, the Court finds that it is not in doubt and even if the Court was to decide on balance of convenience, the same would tilt in favour of preserving the suit property and this can only be done by allowing the orders sought by the Plaintiff/Applicant herein.

Having now carefully considered the available evidence, and the **Written Submissions** herein the Court finds that the Plaintiff/Applicant’s **Notice of Motion** application dated **26<sup>th</sup> February 2016**, is **merited** and the same is **allowed entirely** in terms of **prayer no.4** pending the hearing and determination of the suit or until further orders of this Court. The cost of the application shall be in the cause.

Further, the Court has noted that the suit land falls under the jurisdiction of **Kajiado Environment and Land Court**. The Court therefore **directs** that this **file** be transferred forthwith to **Kajiado, Environment and Land Court** for final hearing and determination of the main suit.

It is so ordered.

Dated, signed and delivered at Nairobi this 4<sup>th</sup> day of August 2017.

**L. GACHERU**

**JUDGE**

**4/8/2017**

In the presence of

No appearance for Plaintiff/Applicant though served

No appearance for 1<sup>st</sup> Defendant/Respondent

M/S Mwika for 2<sup>nd</sup> Defendant/Respondent

Philis - Court clerk

**L. GACHERU**

**JUDGE**

**4/8/2017**

**Court** – Ruling read in open court in the presence of M/S Mwika for 2<sup>nd</sup> Respondent and absence of Plaintiff's advocate though served.

**L. GACHERU**

**JUDGE**

**4/8/2017**