



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC. NO.282 OF 2017
(FORMERLY ELC. NO.721 OF 2013 - MILIMANI ELC)

WANJIKU NJUGUNA GACHUI.....1ST PLAINTIFF/APPLICANT

WANGUI NJUGUNA GACHUI.....2ND PLAINTIFF/APPLICANT

**(Suing as the Administrators of the Estate
of the late JOSEPH NJUGUNA GACHUI)**

MULATA MUTHONI MWANGI.....3RD PLAINTIFF/APPLICANT

JOSEPH NDAIGA MUKUNDI.....4TH PLAINTIFF/APPLICANT

MARY WANGUI WAIGANJO.....5TH PLAINTIFF/APPLICANT

JOYCE GATHONI MUKUNDI.....6TH PLAINTIFF/APPLICANT

**(Suing as the Administrators of the Estate
of the late MUKUNDI NDAIGA NGOTHO)**

- VERSUS -

FRANK LOGISTICS.....1ST DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....2ND DEFENDANT/RESPONDENT

THE REGISTRAR LANDS, THIKA.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **26th September 2016**, brought by the Plaintiffs/Applicants herein seeking for injunction order against the Defendants/Respondents. The orders sought are:-

1) That this Honourable Court be pleased to temporarily restrain the 1st Defendant, by itself, its

agents, servants, employees and/or persons claiming under or in trust for it, from entering into, remaining upon, making or grading roads or tracks upon, selling, disposing, alienating, accumulating, building or other materials, constructing permanent or temporary structures upon, fencing off, digging a dam over, or otherwise committing acts of waste, equitable or otherwise, or in any manner howsoever interfering with the Plaintiff's quiet enjoyment and use of the access road to the Plaintiff's parcel of land known as Thika Municipality Block 6/1071 (formerly unsurveyed industrial plot A Thika Town) and Thika Municipality Block 6/7 (formerly unsurveyed industrial plot B Thika Town) both situated adjacently in Thika Town, Kiambu County or otherwise described, pending the hearing and determination of the suit herein.

2) That the costs of this application be provided for.

The application is premised on the grounds stated on the face of the

application and on the **Supporting Affidavit** of **Jackson Kamau Njuguna**. The grounds in support of the application are:-

i. That the Plaintiffs/Applicants are the legal and beneficial owners of all those parcels of land known as Thika Municipality Block 6/1071(formerly Unsurveyed Industrial Plot A Thika Town) and Thika Municipality Block 6/7 (Formerly Unsurveyed Industrial Plot B Thika town) both situated adjacently in Thika town, Kiambu County.

ii. That the land was allocated to the late Gen. Joseph Njuguna Gachui and the late Brig. Mukundi Ndaiga Ngotho, both veterans of the Mau Mau struggle for the liberation of this County from Colonial Rule way back in the year 1992 and they paid the necessary dues and have undertaken survey and are awaiting processing of the certificates of title by the 2nd and 3rd Defendants/Respondents.

iii. That their families, the Plaintiffs are now entitled to the said property and have been pursuing title thereto and were in fact assured by the officers of the 2nd Defendant that the land is theirs.

iv. That the Plaintiffs have enjoyed quiet use and possession of the land with the knowledge and in full sight of all persons including the Defendants.

v. That it has come to the knowledge of the Plaintiffs that the 2nd and 3rd Defendants have purported to issue title to the 1st Defendant and backdated the same to the year 2011.

vi. That such purported issuance of title to the 1st Defendant by the 2nd and 3rd Defendants is fraudulent, erroneous, illegal and unjust and the same deprives the Plaintiffs of their rights to the suit land.

vii. That the process by which the 1st Defendant was purportedly issued with title did not follow the laid down processes of law and is null and void for all purposes.

viii. That the 1st Defendant has also attempted to enter therein and to remove the Plaintiffs and to put itself into possession thereof and to commit acts of waste by purporting to make roads and other tracks within the property.

ix. That it is only fair that the injunction sought for be issued to protect the land pending the hearing and determination of the suit herein.

In his **Supporting Affidavit**, **Jackson Kamau Njuguna** averred that his **father, the late Joseph Njuguna Gachui** and **late Brig. Mukundi Ndanga Ngotho** were **veterans of Mau Mau** struggle and in recognition of the said veterans, the two were allocated unsurveyed industrial **plots No.A and B, Thika Municipality**

measuring approximately **3.7 Hectares** and **4.0 Hectares** respectively and were issued with letters of allotment marked **JKN3**. He further averred that his father also owned motor vehicle **KAB 690X** which was driven by **James Nyira Karanja**, but the said motor vehicle was at one time stolen but later recovered, with all his documents missing. He also alleged that in **1994**, **James Nyira Karanja**, with others filed a Civil Suit in **Nakuru High Court**, being **HCCC No.183 of 1994**, wherein they claimed the **two Thika Municipality plots** were held in trust for Mau Mau veterans. It was also averred that the said case was finally decided on **24th May 1996**, and a **Decree** issued on **10th May 1996**. The said case had delayed the full following of registration of the two plots to the names of his father and **Mukundi Ndaiga Ngotho**. However, the two veterans later died in the **year 2002 and 2003 respectively** and the Plaintiffs have been following up the registration of the suit properties. They paid the Stand Premium of **Kshs.447,640/=** in the **year 2007 and 2011** as is evident from **JKN3** and **JKN6(a) & (b)**. It was his contention that they wrote numerous letters to the Commissioner of Lands seeking for registration of the two plots. Further that on **31st January 2011**, the Commissioner of Lands wrote to them and confirmed that the land had been restored back to them as evident from **JKN8**. That a surveyor visited the area and prepared Registry Index Map in respect of both **plots A&B**. It was his further contention that they have been waiting for issuance of certificates of title since then.

However, their frustrations continue as their effort to obtain titles have been frustrated with several strangers turning up to try and grab the land. He alleged that on **14th September 2016**, some people went to the two plots and started to grade roads and tracks to enable the two plots to be subdivided and sold. It was then that they learnt that **Thika Municipality Block 6/1071** measuring **3.7 Hectares** was registered in favour of **1st Defendant** by **3rd Defendant** on **2nd October 2015**. It was his allegation that this is a conceited effort to grab their said plots and he sought for protection of this Court. He also alleged that the title documents held by the **1st Defendant** and issued by the **2nd and 3rd Defendants** were illegal and direct violation of their constitutional rights to property. He further contended that it is right and fair for this Court to intervene by issuing the temporary injunctive orders sought. The application is contested by the **1st Defendant** only. The **2nd and 3rd Defendants** did not file any response to this application.

Francis Nyaga Njeru, a Director of the **1st Defendant** swore a Replying Affidavit in opposition to the instant Notice of Motion. He averred that the Plaintiffs have not tendered any credible evidence to show that they have an interest in the suit property. It was his contention that the suit land **Thika Municipality Block 6/1071** measuring **3.7 Hectares** was legally registered in favour of the **1st Defendant** on **2nd October 2015**. Therefore the said Certificate of Lease vests the **1st Defendant** with interest over the said parcel of land. He also claimed that the Plaintiffs have based their claim on letters of allotment which are inferior to the **1st Defendant's** registered interest. He also contended that **1st Defendant** has no claim **over Thika Municipality Block 6/7-plot B** measuring approximately **4.0 Hectares**. It was his further contention that the said letters of allotment do not confer or vest any proprietary interest in a parcel of land to the beneficiaries of such a letter. The deponent further deposed that the beneficiaries of the letters of allotment did not meet the conditions therein and therefore the **1st Defendant** was procedurally allotted **Thika Municipality Block 6/1071**, measuring **3.7 Hectares** on **1st September 2011**, and later issued with Certificate of Lease on **2nd October 2015**, having complied with all the relevant requirements, terms, conditions and obligations. It was his contention that the Plaintiffs are trespassers on the **1st Defendant's** parcel of land and they should be restrained from such interferences. He further deposed that the **1st Defendant** was lawfully allocated the suit land by the **1st and 2nd Defendants** and was subsequently issued with proper title upon meeting the requisite terms and conditions. However, the Plaintiffs are hell-bend on procuring the **1st Defendant's** exclusive property by any means even by circumventing the law. He contended that the Plaintiffs have not met the threshold for issuance of injunctions and he urged the Court to dismiss the instant application.

Jackson Kamau Njuguna filed a further affidavit on **27th March 2017**, and averred that the **1st Defendant** got itself fraudulently registered as the owner of the suit property and that does not vitiate the Plaintiffs right and title over the suit property and therefore the **1st Defendant** does not have indefeasible title. He alleged that even if their letters of allotment were nullified or rescinded, they were not notified of the

same and the procedure required was never followed. He urged the Court to disregard the 1st Defendant opposition and grant the injunctive relief.

This application was canvassed by way of written submissions. The **Law Firm of P. Kamau Njuguna & Co. Advocates** for the Plaintiffs/Applicants filed their written submissions on **27th March 2017**, and submitted that they have met the threshold for grant of injunctive orders. They urged the Court to allow their application.

The **Law Firm of Osundwa & Co. Advocates** for the 1st Defendant/Respondent filed their written submissions on **20th July 2017**, and submitted that the Applicants have failed to meet the threshold for grant of injunctive orders sought. It was submitted that the Plaintiffs application should be dismissed with costs to the 1st Defendant/Respondent

This Court has now carefully considered the instant **Notice of Motion** and the annexures thereto. The Court has also considered the rival submissions, cited authorities and the relevant provisions of law and makes the following findings;-

The Applicants herein have come to Court seeking for Orders of injunction which are equitable reliefs granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others..Vs..Gatheru & Others (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 judicially exercised. It must be based on common sense and legal principles.”

The Court too at this stage will warn itself that it is not supposed to make conclusive findings of facts and law based on affidavit evidence which might prejudice the parties at the main trial. See the case of **Nahendra Chaganlal Solanki...Vs...Neepu Auto Spares Ltd, Kisumu HCCC No.90 of 2003**, where the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise cautionary steps”.

Taking into account of the above position, the Court finds that the principles that will guide this Court in deciding whether to grant the orders sought are the ones elucidated in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358** and these principles 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.***

Firstly, the Applicants must establish that they have a *prima-facie* case with probability of success at the trial. *Prima-facie* case was described in the case of **Mrao....Vs...First American Bank of Kenya Ltd & Another(2003) KLR**, to mean:-

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”.

And what is probability of success?

In the case of **Habib Bank Attorney General Zurich...Vs...Eugene Marion Yakub, Civil Application No.43 of 192 (1982) LLR 4977 (CAK)**, 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”.

The Plaintiffs have alleged in their pleadings that they are the beneficiaries of the estate of **Joseph Njuguna Gachui** and **Mukundi Ndaiga Ngotho**, who had been allotted the suit properties herein **Thika Municipality Block 6/1071** and **Block 6/7** vide their Letters of Allotment dated **30th July 1992** and **August 1992** respectively and marked **JKN3**.

The Applicants further averred that vide **Nakuru HCCC No.183 of 1994**, the Court found that the two plots had been allotted to the two deceased herein. It was their allegation that they paid the Stand Premium of **Kshs.447,640/=** in the **year 2007** and **2011** but their attempt to have the suit properties registered in their names has been fruitless. However, the **1st** Defendant was registered as a proprietor of the suit properties in the **year 2015** and they alleged that the said registration was fraudulent. Further that the **1st** Defendant has invaded the suit properties with the aim of grading roads and tracks for purpose of subdivisions of plots and disposal of the same. They have come to Court to seek restraining orders to forestall the above stated subdivisions until the suit is heard and determined.

The **1st** Defendant has contended that it is the registered proprietor having been registered so on **2nd October 2015**, and so it has a superior title to that of the Plaintiffs who only claim interest through letters of allotment. It further contended that Letters of allotment are not prove of ownership of any property and therefore the Plaintiffs’ application should be dismissed.

It is not in doubt that the **1st** Defendant herein is the registered proprietor of the suit property, **Thika Municipality Block 6/1071 (formerly unsurveyed industrial plot A Thika Town)**. As provided by Section 26(1) of the Land Registration Act, 2012 the **1st** Defendant is the absolute and indefeasible proprietor of the said property. The said Section provides 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.***

The Plaintiffs/Applicants have alleged that they were the first to be allotted the suit property and their letters of allotment were never revoked. Therefore if the **1st** Defendant was registered as a proprietor in the **year 2015**, then the said registration was done fraudulently. Though Section 26(1) of the Land Registration Act provides that a Certificate of Lease is a *prima-facie* conclusive prove of ownership of land, and the registered proprietor is deemed to be an absolute and indefeasible owner, the provisions of 26(1)(a) & (b) are to the effect that the said certificate can be challenged on various grounds such as **fraud, misrepresentation** or if the certificate was acquired **illegally** or **through corrupt scheme**. The said exceptions are as follows:-

“.....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.

The Plaintiffs have alleged that the 1st Defendant was registered as a proprietor of the suit property herein fraudulently or through corrupt scheme. Though the issue of whether the said registration was fraudulently done or not cannot be determined at this stage, the Court finds that the 1st Defendant's title has been challenged and the Plaintiffs should be given an opportunity to advance their challenge or claim. Therefore whether the 1st Defendant's title is absolute and indefeasible is an issue to be determined after calling of evidence at the main trial.

The 1st Defendant also alleged that the letters of allotment held by the Plaintiffs did not confer any interest in them as they never met the terms and conditions of the said Letters of allotment. Further that the 2nd and 3rd Defendants had power to rescind the said Letters of allotment. However, the 2nd and 3rd Defendants have not filed their Replying Affidavit on whether they rescinded the Letters of allotment or not. The Court has seen the letter dated **31st January 2011**, from the Commissioner of Lands assuring the Plaintiffs that the Government has agreed to reinstate the offers in respect of the two parcels of land once all formalities are finalized. The Court needs to take evidence of how the suit properties were later allotted to 1st Defendant even with the said assurance.

As the Court noted earlier, it cannot make conclusive and definitive findings of facts or law based on affidavits evidence. The Court needs to await the calling of evidence in the main trial and testing the same through cross-examination. Especially in this matter, the Court needs to hear whether the Letters of allotment were rescinded or nullified by the 2nd and 3rd Defendants, and the procedure that was used to rescind the same, if indeed they were rescinded and allocate the suit property to the 1st Defendant. This is because once land has been allocated, it is not available for re-allocation unless the first allocation is validly cancelled. Such was the case of **Rukaya Ali Mohammed...Vs...David Gikonyo Nambacha & Another, Kisumu HCCA No.9 of 2004**, where the Court held that:-

“Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled”.

As the Court has earlier observed, at this juncture, the Court cannot find and holds with certainty that the Plaintiffs herein failed to meet the conditions set out in the said Letters of allotment. That can only be determined after calling of evidence in the main trial.

It is evident that the late **Joseph Njuguna Gachui** and **Mukundi Ndaiga Ngotho**, were the first allottees of the suit properties which later vested to the Plaintiffs after their deaths. However, the suit property especially **Thika Municipality Block 6/1071 (formerly unsurveyed industrial plot A, Thika Town)** is now registered in favour of the 1st Defendant. The 1st Defendant has admitted having engaged in the process of putting a perimeter wall over the suit property. That is before the issue of whether 1st Defendant's title was obtained legally or through fraud has been resolved.

It is trite that the purpose of injunction is to protect the rights of the Plaintiff from violation or threatened violation. There is an allegation that the transfer or registration of this suit land was done through fraud. That is an issue that needs to be determined first and therefore the ***Court finds that the Plaintiffs have established*** that they have a ***prima-facie*** case ***with probability of success at the trial.***

On the second limb of whether the Applicants will suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that indeed the 1st Defendant has admitted to be putting up a perimeter wall around the suit property. The Applicants have alleged that the 1st Defendant also intends

to subdivide the land and then sell it to third parties. If that happens, then the substratum of the suit land would change and then it would be difficult to take it back to the state that it is in the event the Plaintiffs succeeds in the main trial. The suit property is owned by the beneficiaries of the estate of the two deceased persons. If the 1st Defendant is allowed to subdivide the suit property and sell it, then the said estates will indeed suffer irreparable loss which cannot be compensated by an award of damages.

On the balance of convenience, the Court finds that it is not in doubt. However, if the Court is to decide on the balance of convenience, the Court finds that the same would tilt in favour of **preserving** the *status quo*. The *status quo* herein is that the **1st Defendant** should **stop any further construction or grading of roads or tracks or any dealing** with the **suit property until the matter is heard and determined**. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Having now carefully considered the **Notice of Motion** dated **24th September 2016**, the **Court finds it merited** and **is allowed in terms of prayer no. 4 with costs being in the cause**.

Further the Court finds that the **parties herein should preserve the suit property by maintaining the status quo** and the *status quo* herein means that **none of the parties herein should construct, alienate, dispose off and/or deal or interfere with the suit properties** in whatsoever manner **until the suit is heard and determined**.

The parties are directed to **comply with Order 11** within the next **45 days** from the date hereof and thereafter **take a date for Pre-trial Conference** before the Deputy Registrar of this Court.

It is so ordered.

Dated, Signed and Delivered at Thika this **27TH** day of **October 2017**.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs/Applicants

Mr.Makori holding brief for Mr. Osundwa for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE