



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.NO.133 OF 2017

JOHNSON KIHATU THIONGO.....PLAINTIFF/APPLICANT

MAHIRA HOUSING COMPANY LTD.....PLAINTIFF/APPLICANT

-VERSUS-

JOSEPH GATHURU.....DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the *Notice of Motion* application dated **8th March 2016**, wherein the Plaintiffs/Applicants have sought for the following orders:-

1) Spent.

2) Spent.

3) That the Defendant, his servants and/or agents be restrained by way of an injunction from trespassing and/or continuing to trespass, from entering, from constructing, from alienating, from transferring, from leasing, excavating, from fencing, from charging and/or erecting any structures or building therein, committing acts of waste on LR. Ruiru Kiu Block 10/(Mahiira)/675 and/or from interfering with the 1st Plaintiff's title and interest to the said property and/or from dealing with the said property in any way whatsoever pending the hearing and determination of this suit.

4) That the OCPD Kasarani Police Station and OCS Ruiru Police Station do supervise the enforcement of the order and ensure that peace prevails on the suit property.

5) That 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 Johnson Kihatu Thiongo**. These grounds are:-

a) That the 1st Plaintiff is the bonafide registered owner of the suit property known as plot number 520 in LR.10901/37 at Kahawa South Ruiru Town.

b) That the 1st Plaintiff's right of enjoyment of the suit property is in real danger of being negated by the Defendant.

c) *That the Defendant is a trespasser to private property and has no right or claim over the property.*

d) *That the Defendant has threatened to trespass and/or continue to trespass in to the suit property and interfere with the 1st Plaintiff's use and enjoyment of the suit property. The Defendant's conduct is an act/or thing adversely affecting the 1st Plaintiff's title to and interests in the suit property.*

e) *That unless the Defendant is restrained as prayed, the 1st Plaintiff shall suffer irreparable harm and injury which cannot be compensated for in damages.*

f) *That it will be in the best interest of justice that the Defendant be restrained from his unlawful actions.*

The deponent **Johnson Kihatu Thiongo**, swore his **Supporting Affidavit** on **8th March 2016**, and reiterated the contents of the grounds in support of the application. He further averred that he bought the suit property at **Kahawa South, Ruiru Town** from **Martin Njuguna Kahura** who was a member of the 2nd Plaintiff company for a consideration of **Kshs.155,000/=** which he allegedly paid in full and the transfer was effected as evidenced by annexure **JKT1**. He also averred that the transfer was captured by the 2nd Plaintiff, who issued him a plot certificate as a new proprietor as is evident from annexure **JKT2**. It was his contention that he went ahead and processed a title deed to the land which was issued **on 11th November 2013**, in his name as can be seen from **JKT3**. Further that he did conduct a search at the lands registry and he confirmed that the plot was still registered in his name as evidenced by annexure **JKT4**. It was his allegation that the Defendant is not in possession or occupation of the suit property but has recently, unlawfully trespassed into the suit land and has deposited building materials, with the intention of erecting a building therein to the detriment of the 1st Plaintiff. Therefore it was his contention that the suit property is in real danger of being wasted, damaged or alienated by the Defendant, his servants and/or agents and thus this application. He urged the Court to allow his application.

The application is contested and **Evans Gathuru**, the Defendant/Respondent swore a **Replying Affidavit** on **28th June 2016**, in opposition to the instant **Notice of Motion**. He averred that the suit property belonged to the late **Macharia Gathuru**, who was his grandfather, having been issued with a certificate of ownership by the 2nd Plaintiff/Applicant herein on **27th July 1987**, as is evident from **EG1**. Further that upon ownership of the said property, the suit property vested to the family members of the late **Macharia Gathuru**, and more particularly himself since prior to the demise of his grandfather, he had ordered so and the deponent was in occupation of the suit property. He annexed **EG2** which were minutes of the family meeting. He alleged that on or about the year **2013**, he undertook improvements on the suit property wherein he built a house which is currently occupied by his brother, **Elijah Kome** as evident from **EG3**, photos of the house. He also alleged that in the year **2013**, he approached the 2nd Plaintiff in an attempt to be issued with a transfer document to no avail, and he thereafter reported the said matter to the police. That the 2nd Applicant unlawfully and in collusion with 1st Applicant transferred the suit property to the 1st Applicant. Further that the 2nd Applicant had even approached him in the year **2014**, with a proposal to issue him with another property so that he can give vacant possession to the 1st Applicant. He contended that he has been in occupation since **1987** and it is for the interest of justice that this application be disallowed.

The 1st Plaintiff/Applicant filed a supplementary affidavit and reiterated the contents of his supporting affidavit and further stated that he has the title and ownership documents to the suit property and that he is the actual occupier of the suit property herein.

This application was canvassed by way of written submissions. The Plaintiffs/Applicants through the **Law Firm of Arusei & Co. Advocates**, filed their written submissions on **23rd November 2016**, and submitted that the Plaintiff have established the principles set out in **Giella..Vs...Cassman Brown 1973 EA 358**. They further relied on various decided cases and

various provisions of law. In particular, they relied on the case of *Dr. Joseph Arap Ngok... Vs...Justice Ole Keiwa & 5 Others, Civil Appeal NO.60 of 1997*, where the Court held that:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject of challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy..”

The *Law firm of Mwenda Njagi & Co Advocates* for the Defendant filed their written submissions on **13th March 2017**, and alleged that the Applicants have not met the threshold for grant of interlocutory injunction as enunciated in the case of *Giella...Vs...Cassman Brown & CO. Ltd (Supra)*. The Defendant submitted that the suit land belongs to the Defendant as it is evident that he was the first in possession and occupation since **1987** under the name of his grandfather, who was issued with the certificate of ownership of the suit property by the 2nd Plaintiff. He relied on the *maxim of equities* which states that ***‘when two equities are equal, the first in time prevails’***. It was his further submissions that the Defendant was the first to be allocated the suit property and his certificate of ownership should therefore prevail. Further that ***equity follows the law***. It was submitted that the allocation of this suit property to the 1st Plaintiff by 2nd Plaintiff is shrouded in fraud and therefore the Defendant’s ownership of the suit property should prevail. Therefore the Defendant urged the Court to dismiss the Plaintiff’s application dated **8th March 2016**, entirely with costs to himself.

This Court has now carefully considered the available evidence and the annexures thereto. The Court has also carefully considered the written submissions, the cited authorities and the relevant provisions of law and the Court make the following findings:-

The Applicants have sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of *Giella..Vs..Cassman Brown & Company Ltd 1973 E.A 358* where the court held that:

“The granting of an Interim Injunction is an exercise of Judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Since the Applicant has come to seek for injunctive reliefs, the Court will take into account that at this state, it will not deal with the disputed issues definitively especially relying on affidavits evidence. However, the Court is only called upon to decide on whether the Applicants are deserving of the injunctive relief based on the usual criteria. See the case of *Edwin Kamau Muriu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002*, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The principles to be considered herein are the ones set out in the case of *Giella...Vs...Cassman Brown & Co. Ltd (supra)*. 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.***

Have the Applicants satisfied the above threshold?

On the first principle of whether the Applicants have a *prima-facie* case with probability of success, the Court finds that indeed the 1st Plaintiff herein is in possession of title deed in his name which was issued to him on **11th November 2013**. The 1st Plaintiff became the owner of the suit property after the same was allegedly transferred to him by one **Martin Njuguna Kahura** on **22nd January 2009**, as can be discerned from **JKT1**. The 1st Plaintiff allegedly paid **Kshs.10,000/=** to the 2nd Defendant as transfer fees and consequently he was issued with plot certificate for **Plot no.520** on the same day **22nd January 2009**. Subsequent thereto, he obtained certificate of title on **11th November 2013**, which is for a parcel of land hived from **Ruiru Kiu Block 10(Mahiira)**. Therefore *prima-facially* as provided by Section 26(1) of the Land Registration Act, the 1st Plaintiff is the **absolute** and **indefeasible** owner of the suit property and his title cannot

be challenged except on the conditions given in Section 26(1)(a) & (b).

However, the Defendant has alleged that the suit property was not available to be allocated to the 1st Plaintiff as the said plot was allegedly issued to **Macharia Gathuru**, his late grandfather on **27th July 1987**, as can be discerned from **EG1**. Indeed the said annexure is a plot certificate from **Mahiira Housing Co. Ltd**. The Defendant alleged that his grandfather took possession and was in occupation of the suit property since **1987**. However upon the demise of his grandfather **Macharia Gathuru**, the family members agreed to allocate the said suit property to Defendant as per the wishes of their grandfather. It was the allegation of the Defendant that the 2nd Plaintiff took advantage of the demise of his grandfather to fraudulently allocate this plot to the 1st Plaintiff and that the 2nd Plaintiff blatantly refused to issue the Defendant with the certificate of ownership in the year **2013** when he applied for the same.

The 2nd Plaintiff/Applicant did not swear any affidavit to either dispute or confirm the allegations made by the Defendant herein. Taking into account that this Court is not dealing with this matter definitively or conclusively and that evidence need to be called, the Court finds that the affidavit of the 2nd Plaintiff would have been very crucial in establishing whether the 1st Plaintiff acquired the suit property lawfully or unlawfully. The Defendant has alleged fraud. Fraud is a serious allegation which cannot be established through affidavit evidence but by calling of evidence. See the case of **Samuel Samita Namuny...Vs...Philmon Machina Ndiwa & 3 Others (2014) eKLR**, where the Court held that:

“Fraud is a very serious allegation and one that warrants and attracts serious consequences under the law. It is trite that for fraud to lie, the alleging party should prove the existence of that fraud not on a balance of probabilities but a much higher standard of proof albeit below beyond reasonable doubt.”

The allegation of fraud as contended by the Defendant can only be conclusively decided by calling of evidence in the main trial. Though the 1st Plaintiff has alleged that he is the registered owner of the suit property, Section 26(1)(a) & (b) gives exceptions on when such certificates can be challenged.

- 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.***

Therefore, the 1st Plaintiff's certificate of title is subject to the above

exceptions which can only be established after calling evidence in the main trial. The Defendant has alleged that he has been in possession of the suit property and he even put temporary structures on the suit property in the **year 2013**. The Court has seen some photographs which show that there is a house on the suit property. The issue of when the same was allegedly put up by the Defendant can only be determined

in the main trial. There was no evidence on whether the 1st Plaintiff has been in occupation of the suit property. As was held in the case of **Films Rovern International...Vs...Canon Films Notes 1986 (3All ER 772 page 780:-**

“A fundamental principle is that the Court should take which cause appears to carry the lower risk of injustice if it should turn out to have been wrong...”

It is alleged that the Defendant has been in possession and occupation. It is evident that the 1st Plaintiff obtained registration of title in the year **2013**. The 2nd Plaintiff did not file an affidavit to confirm whether the 1st Plaintiff obtained the said registration lawfully or through fraud as alleged by the Defendant. Since the issue of fraud has to be decided in the main trial, the Court finds that the 1st Plaintiff has not established that he has a prima-facie case with probability of success.

On the second limb of whether the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages, it was alleged by the Defendant that he was always in possession and occupation since the year **1987**. It is evident that the 1st Plaintiff purchased the suit property in the year **2009** from **Martin Njuguna Kahura**. The said **Martin Kahura** should adduce evidence on what state he handed over the suit property to the 1st Plaintiff. There are photographs showing existence of some houses on the suit property. The Defendant has alleged that the said houses were put up by him. If the 1st Plaintiff has not been in possession, then he will not suffer any loss which cannot be compensated by an award of damages. In the case of **Mwangi & Another ...Vs...Mwangi 1986 decided**, where the Court of Appeal held that the rights of persons in occupation of a property are binding to the law. It provides:-

“ the rights of a person in possession or occupation of land are equitable right which are binding.

If the Defendant was in occupation, then the matter should await full trial to establish whether his occupation is lawful or not. If the matter is decided in favor of the Plaintiffs, then the loss that they will have suffered would be adequately compensated by an award of damages.

On the third limb of if the Court is in doubt, to decide the matter on balance of convenience, the Court finds and holds that it is indeed in doubt. Having found that the Court is in doubt, then the balance of convenience would tilt in favour of maintaining the *status quo*. And what is the status quo herein?. The Defendant has alleged that he has put up some structures on the suit property which are being occupied by his brother **Elijah Kome**. The Plaintiffs did not avail any evidence to dispute that allegation. The Court finds that the status quo to be maintained is the one that would carry the lower risk of injustice if it should turn out to have been wrong (***See the Films Rovern Case***). **Black Law Dictionary 9th Edition at page 155** defines *status quo* as “ ‘state in which’ that is ‘***the situation that currently exists***’ ”. Further in the case of **R..Vs.National Environment Tribunal & Another 2013) eKLR**, the Court held that:-

“Therefore when a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained”.

In the instance case, the Court finds that the Defendant is in possession and has put up some houses on the suit property. That should be the *status quo* to be maintained but the Defendant should not construct any more structures thereon, transfer, subdivide, charge and/or alienate the suit property in any other manner apart from possession and occupation until the suit is heard and determined.

Consequently, after careful analysis of the instant ***Notice of Motion*** dated **8th March 2016**, the Court finds ***it not merited*** and the said application is hereby ***dismissed entirely with costs being in the cause***.

i) Further, the Court directs that the ***status quo be maintained*** to the effect that the ***Defendant remains in possession and occupation but*** he is ***restrained from further construction or transferring, subdividing,***

charging and/or alienating the suit property until the suit is heard and determined.

ii) Parties to comply with Order 11 within a period of 30 days and thereafter set the matter down for pre-trial before the Deputy Registrar of this court.

It is so ordered.

Dated, Signed and Delivered at Thika this **13th** day of **October, 2017**.

L. GACHERU

JUDGE

In the presence of

Mr. Karanja for the 1st and 2nd Plaintiffs/Applicants

M/S Mwangi holding brief for Mwenda Njagi for Defendant/Respondent

Timothy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

13/10/2017