



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC. CASE NO. 300 OF 2004**

**NEWTON WANJALA & 12 OTHERS..... PLAINTIFFS**

**VERSUS**

**JOSEPH ZIRO MUSIOMA .....1<sup>ST</sup> DEFENDANT**

**CRESENT CONSTRUCTION CO. LTD. .... 2<sup>ND</sup> DEFENDANT**

**KAIRU ENTERPRISES LIMITED .....3<sup>RD</sup> DEFENDANT**

**PAN AFRICAN BANK LIMITED**

**(IN LIQUIDATION) .....4<sup>TH</sup> DEFENDANT**

**COMMISSIONER OF LANDS .....5<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Chamber Summons dated 15<sup>th</sup> December 2010 in which the 3<sup>rd</sup> Defendant/Applicant seeks for orders that this suit be dismissed and the amended plaint filed herein be struck out and that all consequential orders issued in this suit in favour of the Plaintiffs be discharged. The Applicant also seeks for the Plaintiffs to be condemned to pay the costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Patrick Maina Munene, one of the Directors of the 3<sup>rd</sup> Defendant, sworn on 15<sup>th</sup> December 2010 in which he averred that the 3<sup>rd</sup> Defendant was the registered proprietor of the parcel of land identified as Nairobi/Block 82/1761 which it charged to the 4<sup>th</sup> Defendant on 23<sup>rd</sup> May 1991 for a loan of Kshs. 24 million. He further averred that subsequently, that parcel of land was subdivided into two parcels namely Nairobi/Block 82/2710 and 2711 and that the loan from the 4<sup>th</sup> Defendant was transferred to parcel Nairobi/Block 82/2711 thereby discharging parcel Nairobi/Block 82/2710. He further stated that further subdivision was done to parcel Nairobi/Block 82/2711 to yield various sub-leases some of which are claimed by the Plaintiffs. He disputed the validity of the claims by the Plaintiffs to those subleases pointing out that it was illegal to transfer land which is subject to a charge without the previous consent in writing from the holder of the charge. He claimed that the titles held by the Plaintiffs are worthless pieces of paper because the 3<sup>rd</sup> Defendant holds title to those parcels of land and the 4<sup>th</sup> Defendant held the titles as security that are yet to be discharged.

The Application is contested. The 1<sup>st</sup> Plaintiff, Newton Wanjala, filed his Replying Affidavit sworn on 2<sup>nd</sup> February 2011 in which he averred that the matters deponed in the Application had already been brought before to this court through earlier Affidavits sworn on behalf of the 3<sup>rd</sup> Defendant in reply to the Plaintiff's initial Application dated 29<sup>th</sup> March 2004. He further averred that Justice Nyamu (as he then was) ordered that the suit be heard on its merits in view of the conflicting claims over the same property. He added that most of the averments made in the Application are issues of fact which are disputed by the Plaintiffs and it is therefore necessary that they be subjected to the rigours of a full trial and cross-examination.

The Application was further contested by the 11<sup>th</sup> Plaintiff, Charles Mbugua Gathuru, who filed his Replying Affidavit sworn on 28<sup>th</sup> February 2011 in which he averred that it is true that the 3<sup>rd</sup> Defendant was the registered proprietor of Nairobi/Block 82/1761 which was surrendered to the Government of Kenya and new leases being Nairobi/Block 82/2710 and 2711 were issued. He also confirmed that it is true that the charge to the 4<sup>th</sup> Defendant was transferred to parcel Nairobi/Block 82/2711 on 23<sup>rd</sup> May 1991. He also averred that the 3<sup>rd</sup> Defendant further surrendered parcel Nairobi/Block 82/2711 to the Government on 8<sup>th</sup> February 1992 upon complying with **section 63 of the Registered Land Act (now repealed)**, upon which the 3<sup>rd</sup> Defendant was issued with subleases for part of former Nairobi/Block 82/2711 being Block 82/2774-2790, 2815-2817, 2889-3987, 3103-3115, 3118-3142 and 5974 (hereinafter referred to as the "subleases"). He further averred that the charge to the 4<sup>th</sup> Defendant was transferred to the subleases. He further stated that apart from the subleases, the remaining plots emanating out of the former Nairobi/Block 82/2711 became unalienated land which were later allocated to the Plaintiffs as former members of the Jesus Disciples Centre and issued with certificates of lease. He added that the Plaintiffs have legal titles to the suit premises which were issued and signed by the registrar of lands pursuant to **section 37(1) and (2) of the Registered Land Act (repealed)**.

The 3<sup>rd</sup> Defendant filed its written submission. In its submissions it relied on section 26 of the Land Registration Act that title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner except where the title has been acquired illegally, unprocedurally or through a corrupt scheme. It submitted that the plaintiffs illegally acquired title and held forged certificates of title therefore the court should order for the cancellation and or revocation of the titles. It further stated that a Land Registrar one S.L Were swore an affidavit where he denied issuing the Plaintiffs the certificates of searches and that the ones produced by the Plaintiffs in their affidavits were forged. It concluded that the Plaintiffs have no reasonable cause of action since they have admitted that the parcel which is the subject matter of this suit was part of the subdivision of parcel Nairobi/Block 82/1761 which was registered in the name of the 3<sup>rd</sup> Defendant and if this suit subsists it will amount to an abuse of the court process and should be struck out with costs.

The 5<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Plaintiffs filed their written submissions on 1<sup>st</sup> March 2011. They submitted that they are the registered owners of the plots that gave rise to this suit upon allocation and taking control and/or physical possession until the 1<sup>st</sup> Defendant without any right or legitimate claim to ownership trespassed upon the Plaintiffs' parcels of land interfering with their quiet possession over the same. They stated that there is a confusion on surrender, transfer and allocation of the suit plots from the former Nairobi/Block 82/2711. They further submitted that their titles as issued by the Registrar of Lands have to be proved to be genuine. They also submitted that the person who signed the allotment letters should be called to confirm whether the said letters of allotment were genuine.

I have considered the Application, the affidavits and the written submissions together with the authorities relied upon. The issue the court has been called upon to make a determination is whether the amended plaint dated 10<sup>th</sup> December 2009 raises any triable issue or is a sham and should be struck out. This Application has been brought through **Order VI Rule 13 of the repealed Civil Procedure Rules** which is the precursor to the present **Order 2 Rule 15 of the Civil Procedure Rules, 2010**. The said Rule 15 provides that,

***“(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on***

***the ground that:-***

a.

**DAY OF JANUARY 2016.**

**MARY M. GITUMBI**

**JUDGE**