



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT & LAND COURT
ELC CASE NO.877 OF 2015

KIMURI HOUSING COMPANY LTD.....PLAINTIFF/APPLICANT

VERSUS

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

COUNTY GOVERNMENT OF KIAMBU...2ND DEFENDANT/RESPONDENT

LAND REGISTRAR THIKA.....3RD DEFENDANT/RESPONDENT

DIRECTOR OF SURVEY.....4TH DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the Notice of Motion application dated *15th September 2015*, brought under *Sections 1,1A, 1B,3 3A & 63 of the Civil Procedure Act Cap 21 Laws of Kenya ,Order 40 Rules 1(a) ,2,3,4,5 & 6 of the Civil Procedure Rules 2010 , Section 68 of the Land Registration Act* and all other enabling provisions of the Law.

The applicant *Kimuri Housing Co.Ltd* has sought for these Orders;-

- i. *Spent*
- ii. *Spent*
- iii. *Spent*

iv. *That the 5th defendant does confirm and /or verify the exact locality and/or description of the property known as Thika Municipality Block 12/286 in relation to LR No.4953/2342 Thika Municipality and subsequently file a report in Court and accordingly produce the relevant survey maps and/or Registry Index Maps.*

v. *That an order of inhibition to issue inhibiting any dealings with the suit property being LR No. 4953/2342 Thika Municipality and/or Thika Municipality Block 12/286 pending the hearing and determination of this suit .*

vi. *That an order of injunction does issue restraining the 1st Defendant whether acting by itself,*

its agents, officers, employees, servants, workmen or whatsoever from entering ,alienating ,selling, advertising sub-dividing construction, removing beacons dealing or otherwise interfering with the suit property being LR No.49531/2342 Thika Municipality and/or Thika Municipality Block 12/286 as the case may be and/or disturbing the Plaintiffs quiet possession thereof pending the hearing and determination of this suit.

vii. That Police Assistance be accorded to the Plaintiff through the OCPD Thika Police Division for the enforcement of the orders herein and to ensure that peace and order prevails.

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

The application is premised on the grounds stated on the face of the application and also on the supporting affidavit of **Margaret Wambui Ngugi**, the Director of the Plaintiffs Company. In the stated grounds, the Plaintiff averred;-

- a. That it is the legal owner of the parcel of land known as LR No. 4953/2342 Thika Municipality.*
- b. That the plaintiff has enjoyed quiet ownership and occupation of the said property until sometime in the year 2011, when one Julius Ngwirika Ruhiu T/A JR Investments Ltd purported to enter therein under the pretext of a lease over parcel of land known as Thika Municipality Blocks 12/286 which he purported was coterminous or similar on the grounds to parcel of land known as LR No. /4953/2342-Thika Municipality, owned by the Plaintiff aforesaid.*
- c. Further that the Court issued an injunction in ELC 216 of 2011 against any interference by the said Julius Ngwirika Ruhiu T/A JR Investments Ltd with the said property and the matter was eventually settled on 2014 with costs to the plaintiff.*
- d. That the Plaintiff has since enjoyed quiet possession of the said property until on or about September 2015 when some people entered into the said property and purported to remove the beacons placed by the Plaintiff hereon and to demarcate the said property.*
- e. Further that these persons held a certificate of lease to the property known as Thika Municipality Block 12/286 supposedly issued to the 1st Defendant (Frank Logistics ltd) in the year 2015 by the 3rd Defendant Thika Land Registrar) as lessee of the 2nd Defendant (County (Government of Kiambu).*
- f. Further that the Certificate of Lease held by the 1st Defendant who has invaded the suit property is for the same parcel of land as the one held by JR Investment Ltd who had previously invaded the suit property in the year 2011.*
- g. Further that the Plaintiff has subdivided the property and sold it to members of the public who stand to be adversely affected unless the Court issues the orders sought and that unless the orders sought are granted, the Plaintiff and the other bonafide purchases of the suit property stand to suffer immense prejudice, a grave travesty of justice and indeed irreparable harm. That is it fair and in the interest of justice that the orders sought herein should be granted.*

The application is only opposed by the 1st Defendant herein. The other Defendants though served with the pleadings as evidenced by the Affidavit of Service sworn by **Japheth Sangit** a process did not enter appearance, nor file any pleadings in response to this application.

The 1st Defendant filed grounds of opposition and stated that;-

- i. The application is incompetent, without merits, frivolous and vexatious.*
- ii. That the application is misconceived and legally unattainable and an abuse of the court*

process.

- iii. *That the application has failed to satisfy the test for grant of injunctive order as laid in the case of Giella Vs Cassma Brown .*
- iv. *That the Plaintiff/Applicant is guilty of material non-disclosure and concealment of relevant material facts.*
- v. *That the application and Plaint ought to be struck out or dismissed with costs to the 1st Defendant /Respondent .*

Francis Nyaga Njeru , a Director of Frank Logistics Ltd swore a Replying Affidavit and averred that he is a stranger to the ownership of parcel of land registered as LR No. 4953 /2342 as claimed by the Plaintiff. He further averred that the 1st Defendant is the absolute, bonafide, and legal owner of land parcel registered as **Thika Municipality Block 12/286**, as per the Certificate of Lease held by the 1st Defendant. He also averred that **Frank Logistics Ltd** ,was issued with the letter of allotment dated 4th **June 2011**, by the Government for the land parcel registered as **Thika Municipality Block 12/286** .

It was his contention that subsequent to the issuance of the allotment letter to **Frank Logistics Ltd** by the Government for land parcel registered as **Thika Municipality Block 12/286** , the 1st Defendant complied with the requisites of registration of the said land parcel.

Further that the 1st Defendant was issued with Registered Index Map for the whole parcel of land **Thika Municipality Block 12** and the said Index map does not capture the parcel of **Land LR No. 4953/2342 Thika Municipality**. It was his contention that upon his search at the Company Registry at Sheria House, he noted that **Kimuri Housing Co.ltd** , the Plaintiff herein was incorporated in the year 1995, whereas the **land LR No. 4953 /2342**, was granted by the government in the year 1967 and therefore the plaintiff has no *locus standi* to claim any ownership of **LR No. 4953/2342** as the Plaintiff was not in existence in the year 1967.

Further that since the Plaintiff has no *Locus Standi* , the suit and the application herein should be dismissed with costs for being an abuse of the Court *process, frivolous* and *vexatious*. The Deponent further averred that the land parcel **No. Thika Municipality Block 12/268** is not similar to land parcel **No. 4953 /2342. Thika Municipality** and did put the Plaintiff to strict proof. He denied that the Plaintiff has been in quiet enjoyment and possession of **LR No. Thika Municipality 12/286** since the 1st Defendant and its servants or agents has been constantly on the site since allotment. He contended that the 1st Defendant sought approval and was granted the same to construct a boundary wall in the **LR No.Thika Municipality 12/286**, and the said approval and permit was granted by the County Government of Kiambu.He further deposed that the 1st Defendant is the *absolute ,bonafide and legal owner* of land parcel **LR No. Thika Municipality Block 12/286** , and proper procedure was followed to obtain and register the said land parcel into the 1st Defendants name and that the said property has not been subdivided and no survey plan has been tendered for registration . Further that **LR No. 4953/2342 Thika Municipality** does not exist and so there is no sub division as alleged by the Plaintiff and no member of the public has gone to claim any subdivided portion of **LR No. Thika Municipality 12/286** ,as claimed by the Plaintiff. He further deposed that since its allotment of the said land by the Government in the year 2011, the 1st Defendant has been in possession of **LR. No. Thika Municipality Block 12/286**, with no any interference or complaint or even a criminal case against the 1st Defendant by any member of the public. Further that the plaintiff has no title documents to show ownership of **Thika Municipality Block 12/286**, and therefore has no moral or legal authority to seek for inhibition orders. The deponent therefore stated that in the interest of justice and fairness, the orders sought herein should be dismissed with costs to the 1st defendant.

The 1st Defendant /Respondent filed a further affidavit on 13th **November 2015**, and averred that he searched the Company Registry and noted that there was no trade name going by the name of **Julius**

Ngwirika Ruhiu T/A JR Investments Ltd. He further stated that he noted in **ELC No. 216 of 2011** , the Plaintiff had alleged that it bought **LR No. 4953/2342 Thika Municipality** from one **Douglas Kariuki Mundia** , whereas in this suit , it claims that the suit land was allocated to it by the Government . He urged the court to dismiss the Plaintiff's Notice of Motion.

The Notice of Motion was canvassed by way of Written Submissions. The Law Firm of **H .Kago & Co. Advocates** for the Plaintiff filed their submissions on **11th November 2015**. Whereas the Law Firm of **Anyango Opiyo & Co. Advocates**, for the 1st Defendant filed their submissions on **16th November 2015**. This Court has now carefully considered the pleadings in general, the annexures thereto, the relevant laws and the written submissions and makes the following findings;-

There is no doubt that the Plaintiff and the 1st Defendant have documents of ownership of different parcels of land as evident from the Registration documents. However, Plaintiff claims that though the suit land has different registration documents it is the same land physically. The Plaintiff is in possession of **Grant No.LR 82855** issued on **28th May 1999**, in respect of **LR No. 4953/2342 Thika Municipality** for **99 years** from **1st December 1967**. The Grant is issued to **Kimuri Housing Co. Ltd** and the locality for the same is **Thika Municipality** as per the **Deed Plan** attached thereto. It is also evident that the 1st Defendant Frank Logistics Ltd is in possession of Certificate of Lease for **Thika Municipality Block 12/286** , issued to it **on 6th August 2015** . From the documents annexed to the pleadings, the Plaintiff and 1st Defendant each owns separate parcels of land in Thika Municipality.

However, the Plaintiff has alleged that the documents held by the 1st Defendant refers to the parcel of land owned by the Plaintiff physically. The Plaintiff alleged that the 1st Defendant has invaded the suit property and constructed a boundary wall. The 1st Defendant has indeed confirmed that it has constructed boundary wall on its parcels of land. The 1st Defendant has not admitted that the parcel of land that it is claiming is physically the same parcel of land that the plaintiff is claiming .There are therefore two conflicting positions on whether the Plaintiffs parcel of land is physically the same parcel of land being claimed by the 1st Defendant. That can be ascertained by a site visit by the Trial Court during the hearing of the main suit. The Plaintiff's registration documents were issued in 1999 whereas the Defendants documents of registration were issued in the year 2015 . What is also not in doubt is that the Plaintiff had filed **ELC No. 216 of 2011**, against one **Julius Ngwirika Ruhiu** seeking a declaration that **LR No. 4953/2342. Thika Municipality** is owned by the Plaintiff. It is therefore evident that the Plaintiff has been claiming ownership of this suit land since the year 2011. I have also seen the letter of Allotment held by the 1st Defendant dated 4th June 2011. It refers to **UNS Industrial Thika Municipality**. It does not refer to **Thika Municipality 12/286** . However, for this court to find out whether the letter of allotment dated **4th June 2011**, refers to **LR No. Thika Municipality 12/286**, evidence has to be called and that can only be done by the trial court in the hearing of the main suit. The above being the salient features in this suit, the issues now for determination is whether the Plaintiff herein deserves the orders sought.

The applicant has sought for various prayers. The 1st one is that the 5th Defendant who is the Director of Survey, should confirm and/or verify the exact locality and/or designation of the said property known as **Thika Municipality Block 12/286**, in relation to **LR No. 4953/2342 Thika Municipality** and file a report in court and produce the relevant Survey Maps and Registry Index Maps.

It is evident that the Plaintiff herein has produced a **Grant** and a **Deed Plan**, attached to the said Grant. It is also evident that the 1st Defendant has produced a letter of allotment and a Certificate of Lease for its alleged parcel of land. The 1st Defendant also stated that it obtained Registry Index Map for the whole of **Thika Municipality Block 12/286** and the Plaintiff's parcel of land was not captured in it. However, as I stated earlier, Plaintiff has been claiming this parcel of land since the year 2011 as evidenced by **ELC No.216 of 2011**. The Plaintiff has alleged that what the 1st Defendant is alleging to be its parcel of land, though with different registration details is the same parcel of land that the Plaintiff is claiming. That the physically two parcels of land refer to the same parcel of land. The Court is in agreement with the Plaintiff that this confusion or state of affairs can only be brought to light if the 5th Defendant who is a

custodian of the records is directed to confirm and verify the exact locality and designation of the said property known as **Thika Municipality Block 12/286** in relation to **LR No.4953/2342 Thika Municipality**. The Court consequently finds that the Plaintiff's /applicants prayers No. 4 is merited and the same is allowed.

Secondly, the applicant has on prayer 5 sought for Order of Inhibition to inhibit any dealings with the suit property being **LR No. 4953 /2342 , Thika Municipality and/or Thika Municipality Block 12/286** pending the hearing and determination of the suit.

Section 68(1) of the Land Registration Act donates to this court power to inhibit registered dealings. It reads as follows:-

“ The Court may make an order (herein after referred to as inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land ,lease or change”.

The provisions of Section 68(1) above stated shows that the Court has discretion to issue the orders referred to. From the pleadings, herein it is evident that both the Plaintiff and the 1st Defendant have documents of ownership of some parcels of land referred to in their documents of ownership. However, there is a conflict on whether the two separate documents of ownership refers to the same parcel of land. That confusion will be unraveled after evidence has been called and tested through cross- examination. The report from the 5th Defendant would also aid the Court in arriving at a just conclusion. However, the court finds that since both the Plaintiff and 1st Defendant are claiming ownership of the same land physically, and since the Plaintiff has alleged that it has subdivided the land and sold to different third parties, then it is prudent to inhibit any other dealings on the parcel of land until the trial court arrives at a finding as to which registration refer to the land referred to by both the Plaintiff and the 1st Defendant. The Court also finds that to allow the parties herein to deal with the land as they please or wish would compound and confuse the issues further. Since there is a dispute over the suit property, the Court finds it necessary to preserve the substratum of the suit and also prevents the ends of justice from being defeated. This Court further finds that none of the party herein will suffer any prejudice if the order of inhibition is granted as the said order will indeed serve the best interest of both parties herein. Though the 1st Defendant submitted that the Plaintiff has no legal basis to seek for **order of inhibition** , the court finds that since the Plaintiff is alleging that its suit property is the one being held by the 1st Defendant , then the Plaintiff has an arguable case and the best option herein is to inhibit the suit property . See the case of **Japhet Kaimenyi M'ndatto Vs M'ndatto M'mbwiria (2012) eKLR** where Makau J outlined the conditions for grant of inhibition orders.

From the foregoing, the Court finds that the applicant has demonstrated that an order of inhibition is necessary herein and thus this Court allows the applicants prayer No. 5.

Thirdly, the applicant had to demonstrate that it is deserving of the injunctive orders herein. The applicant therefore needed to establish that it has established the laid down principles for grant of injunctive order as per the classical case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358.**

These conditions are:-

- a. ***The applicant must establish that it 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.***

The applicant first needed to establish that it has a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125,** the Court

described prima facie case as;-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

Has the applicant herein established that it has a prima facie case with probability of success?.

As the Court analysis the available evidence, it will be cautious not to deal with the issues that will be canvassed at the main trial with finality. See the case of **Edwin Kamau Muniu vs. Barclays Bank of Kenya Ltd, Nairobi (Milimani) High Court, Civil Case 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”.

The applicant alleges that it owns suit property **LR No. 4953/2342 Thika Municipality**. It has attached a Grant issued to it in the year 1999. Applicant has alleged that the suit property has been encroached by the 1st Defendant who has erected a boundary wall. The 1st Defendant /Respondent has not denied erecting of the said boundary wall but has alleged the suit property belongs to it and its Registration No. is **LR Thika Municipality Block 21/286**. The 1st Defendant has attached a Certificate of Lease to its pleadings. It is however evident that the Plaintiff have had a claim on **LR NO 4953/2342 Thika Municipality** as evident from ELC No. 216 of 2011. There is a dispute as to whether the said parcel of land that the Plaintiff is referring to is the same parcel of land that the 1st Defendant also claims to own though with different registration number being **Thika Municipality Block 12/286**. The issues of whether the two Titles refer to the same land physically will only be canvassed and finally decided after the main trial by the trial court.

The Court at this stage cannot finds and holds that the suit land belongs to the Plaintiff and that the Plaintiff has therefore has established a prima facie case with probability is success. This Court finds that the Plaintiff has not established a prima facie case.

On whether the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages, the court finds that the Plaintiff has alleged that it has subdivided the land and sold it to different individuals. It is evident that the Plaintiff got registered as the proprietor of the suit land in 1999 and in the year 2011 filed a case **ELC No. 216 of 2011** against one **Julius Ngwirika Ruhiu** . However, there is no evidence that this parcel of land had been occupied by anyone and no evidence of subdivision. If it had been subdivided as alleged by the Plaintiff, then the 1st Defendant would have noted beacons or evidence of subdivision before it put up its boundary wall. The court finds that the applicant has not established that it will suffer irreparable loss which cannot be compensated by an award of damages.

The Court is also mandated to decide this application on a balance of convenience, if it's in doubt. It is not in doubt that both the Plaintiff and 1st Defendant have in their possession documents of ownership of a parcel of land in **Thika Municipality**. The Plaintiff acquired its documents in the year 1999 and the 1st Defendant in the year 2015. The two Registration documents refer to different parcel of land but the Plaintiff alleges that the physical location is the same and that is why the 1st Defendant has occupied the Plaintiffs suit property which has a different registration number as to that of the 1st Defendant. The Court is therefore in doubt whether the two registration documents herein refer to the same parcel of land on the ground. That doubt will only be resolved after evidence has been called or after the 5th Defendant has confirmed the physical location or locality of the two parcels of land. The Court will therefore decide this application on the balance of convenience. The Court after considering the circumstances herein finds that the balance of convenience tilts in favour of preserving the **Status Quo** . The Court will be persuaded in this findings by holding in the case of **Eunice Kyallo Muthembwa Vs Cosmas K Muthembwa (2014) eKLR** , where the court on granting injunction order held that the court should look at the whole case and also be guided by the principles of law that “ **the Court should take whichever course appears to**

carry the lower risk of injustice if it should turn out to have been wrong”.

Taking into account the circumstances of the case and the whole case in general, the Court finds that the lower risk of injustice herein would be to maintain the **Status Quo** and the **Status Quo** herein would be restraining any further dealings or developments and/or alienation of the suit property until the final determination of the suit. The 1st Defendant cannot allege that he has been allowed to carry out a car parking business by the County Government of Kiambu as he acquired the said permission or approval during the subsistence of this case. The said approval was sought onOctober 2015 and granted onOctober 2015. The **Status Quo** should be what was there before the suit was filed. In making this order the Court is guided by Section 63 of the Civil Procedure Act which allows the Court to issue interlocutory Orders that may be convenient to prevent the ends of justice from being defeated.

For the above reasons, the Court enters an order of **Status Quo** pending the hearing and determination of the suit and the effect therefore is to restrain any further dealings, developments and/or alienation of the parcel of land in dispute herein .

On prayer No. 7 , the Court finds that the Police assistance is necessary to enforce the orders granted herein and on prayer No.8, the costs shall be in the cause.

In a nutshell, the Court finds that after careful consideration of the instant Notice of Motion, it has allowed the applicant **prayers No. 4,5,7** and costs in the cause.

The Court has also entered an order of **Status Quo** pending the hearing and determination of the suit and the effect of the order shall to restrain any of the parties herein from any further dealings, developments, and/or alienation of the suit property **LR No. 4953/2342 Thika Municipality** and/or **Thika Municipality Block 12/286**. Parties are further encouraged to prepare the suit for hearing expeditiously by complying with Order 11 and then set the matter for hearing so that the underlying issues can be resolved once and for all.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd day of February, 2016

L. GACHERU

JUDGE

In the presence of :-

L .Gacheru Judge

Court Clerk : Hilda

Mr Mark Ronald holding brief Mr Kago for the Plaintiff/Applicant

M/s Opiyo for 1st Defendant/Respondent

None attendance for the 2nd Defendant/Respondent

None attendance for the 3rd Defendant/Respondent

None attendance for the 4th Defendant/Respondent

None attendance for the 5th Defendant/Respondent

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above Counsels and absence of 2nd – 5th Defendants/Respondents.

L. GACHERU

JUDGE