



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND DIVISION

ELC CIVIL NO. 1180 OF 2014

MUCHANGA INVESTMENTS LTD.....PLAINTIFF/APPLICANT

VERSUS

HABENGA HOLDINGS LTD.....1ST DEFENDANT/RESPONDENT

JINA ENTERPRISES LTD..... 2ND DEFENDANT/RESPONDENT

TELESOURCE COM LTD.....3RD DEFENDANT/RESPONDENT

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

DIRECTOR OF PHYSICAL PLANNING

MINISTRY OF LANDS & HOUSING.....5TH DEFENDANT/RESPONDENT

REGISTRAR OF TITLES.....6TH DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....7TH DEFENDANT/RESPONDENT

JOHN MUGO KAMAU.....8TH DEFENDANT/RESPONDENT

CATHERINE NGANGA FOR THE

ESTATE OF CARMELINA MBURU.....9TH DEFENDANT/RESPONDENT

BARCLAYS BANK OF KENYA LT...1ST INTERESTED PARTY/RESPONDENT

RULING

The application for consideration is Notice of Motion dated *1st September 2014*, brought by the Plaintiff under *Order 40 Rules 1, 3 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act*. The Plaintiff is seeking orders that;-

- i. *Pending the hearing and determination of this suit, the 1st, 2nd and 3rd defendants be restrained from entering, subdividing, alienating, disposing selling or in any way dealing with the property known as LR No. 3586/3 Karen, Nairobi (herein after referred to as the suit property).*

- ii. ***The plaintiff has also sought an order restraining the said defendants from presenting any subdivision, deed plans, or other instrument to the 4th - 7th defendants in relation to the suit property.***
- iii. ***Costs of the application be provided for.***

The application is supported by an affidavit sworn on 1st September 2014, by ***Horatius Da Gama Rose***, the plaintiff's director. The plaintiff's case is that it is the bonfide and legal owner of the suit property pursuant to a title issued to it on 11th February 1983. The plaintiff contended that the mother title for the suit property was a Grant registered as No. IR 94/1, portion no. 46 which was later subdivided into 10 subplots namely LR No. 94/3 - 94/12 which were transferred to different purchasers. According to the plaintiff, plot no. 94/3 which was transferred to Arnold Bradley on 27th February 1928 was later subdivided into LR Nos. 3586/1 and 3586/2 with the former plot being transferred to William Berilam on 27th January 1942 and the latter plot remaining in the name of Arnold Bradley.

The plaintiff further averred that 2nd March 1978, ***Barclays Bank International Ltd*** registered a probate of the will of ***Arnold Bradley*** against his title no. 3586/2 which was then subdivided into plot nos. 12243 and the suit property. It is the plaintiff's case that on 29th December 1982, Barclays Bank Ltd transferred the suit property to it for a sum of ***Kshs 1,250,000/-*** and that subsequently, a certificate of title was duly issued to it. The plaintiff also averred that it has been in actual physical possession of the suit property from the date it was issued with the certificate of title and further, that it had paid all land rent and rates in respect to the suit property.

While stating that it applied for and obtained approval and consent for subdivision and change of user in March 1985, the plaintiff averred that as a result of the subdivision scheme, it was issued with two titles in respect to LR No. 3586/3/2 and LR No. 3586/3/3 together with 199 deed plans for other subplots. It is the plaintiff's averment that it did not proceed with the proposed subdivision and that having applied for reversion of the suit property to its original status, it surrendered the 199 deed plans and the two certificates of titles for cancellation. The plaintiff averred that on 1st August 2013, the Director of Surveys wrote to it confirming the cancellation of the 199 deed plans.

The plaintiff stated that on 8th May 2014, an unknown person delivered documents allegedly relating to approved subdivision scheme of the suit property issued to the 3rd defendant in 1994. The plaintiff contended that a search at the land registry revealed that title to the suit property was purportedly issued to the 1st defendant on 16th February 1973 who purportedly transferred the same to the 2nd defendant on 26th April 1983 and that a subsequent purported transfer in favour of the 3rd defendant was registered on 17th March 1984.

The plaintiff averred that a perusal of the title purportedly issued to the 1st defendant together with the mother title and the 2nd and 3rd defendants' incorporation documents revealed that the certificate of title was illegal, null and void and that title was obtained fraudulently. Further, the plaintiff averred that the 3rd defendant had used the illegal certificate of title to illegally and fraudulently subdivide and obtain deed plans over the suit property and that the 3rd defendant was in the process of fraudulently alienating the suit property. It is the plaintiff's case that unless the reliefs sought are granted, the illegal and fraudulent alienation and transfer to third parties would render this suit nugatory.

Through a supplementary affidavit sworn on 30th October 2014, the plaintiff stated that Horatius Da Gama Rose had authority under its seal to swear all affidavits on its behalf. The plaintiff stated that the suit did not in any way offend the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules. While stating that it was the genuine, bonafide and legal owner of the suit property, the plaintiff averred that it purchased the same from Barclays Bank of Kenya in 1983 and therefore had a good root over the title. According to the plaintiff, Barclay Bank of Kenya having been appointed the executor and trustee of the will of Arnold Bradley had the legal capacity to deal with LR No. 3585/3 with effect from 2nd March 1978 when the grant of probate was registered against the title of the suit property.

According to the plaintiff, the transfer of the suit property from Barclays Bank to it was shown as entry no. 24 on the original mother title, thereby indicating that the plaintiff had a good root to the title. It is the plaintiff's contention that the purported transfer to **John Mugo Kamau** as alleged in the 6th and 7th defendants' Replying Affidavit was fraudulent and could not pass title to the suit property. The plaintiff stated that the Replying Affidavit did not disclose who allegedly transferred the suit property to **John Mugo Kamau** since there was no evidence that Barclays Bank transferred the same to the said **John Mugo Kamau** in their capacity as trustees of the will of Arnold Bradley.

The plaintiff stated that the transfer instruments transferring the property to John Kamau Mugo and subsequently to the 3rd defendant were not provided. It is the plaintiff's averment that the certificate of title issued to **John Mugo Kamau** being IR No. 31187 was issued on **2nd March 1978**, before the date of registration of the purported transfer which was on 24th August 1978. Further, the plaintiff contended that the purported date of issuance of the title to John Kamau Mugo on 2nd March 1978, was the same date the probate of Arnold Bradley was registered and therefore, that it was impossible for Barclays Bank of Kenya Ltd to have transferred the property to John Mugo Kamau.

While stating that there was no evidence of payment of land rent by either John Mugo Kamau or the 3rd defendant, the plaintiff contended that it had been in actual possession of the suit property from **11th February 1983**, which was guarded by armed security. The plaintiff stated that throughout its period of possession, no persons other than the plaintiff entered the property to carry out any survey or subdivision on behalf of the 3rd defendant or any other property. It is the plaintiff's contention that the only survey and subdivision carried out on the suit property was the one done by it in 1985, which was subsequently cancelled and that the alleged subdivision scheme contained in the 4th defendant's Replying Affidavit was identical to its proposed subdivision scheme of 1985 which was cancelled.

The plaintiff averred that it had previously been involved in litigation over ownership of the suit property which culminated in Civil Appeal No. 25 of 2002, where all parties including the 6th defendant acknowledged that it was the registered proprietor of the suit property. According to the plaintiff, **John Kamau Mugo** would have been a party to the proceedings had he been the proprietor of the suit property since 1978 as alleged.

The plaintiff filed a further supplementary affidavit sworn on 29th January 2015 in response to the interested party's Replying Affidavit where it stated that only Barclays Bank of Kenya Ltd had the capacity to transfer the suit property after the death of Arnold Bradley. The plaintiff averred that the interested party had confirmed that the process of transferring the suit property was completed in 1983, the same year it acquired the suit property. The plaintiff averred that the interested party had confirmed that it had dealings over LR 3586/3 with **Da Gama Rose Investments Ltd** between 1983 and 1989.

According to the plaintiff, it could not have been legally possible for it and the interested party to have registered instruments against title to the suit property if the property belonged to **John Mugo Kamau**, as alleged. The plaintiff contended that the alleged transfer of the suit property from Arnold Bradley to John Mugo Kamau annexed to the 3rd defendant's affidavit as "JK3" was fraudulent as it was purported to have been executed on 23rd August 1978, after the death of Arnold Bradley on 22nd October 1973 and issuance of the grant of probate on 24th July 1974. The plaintiff also averred that the aforesaid instrument of transfer was fraudulent as it purported to have been drawn by **F. Hopley** Solicitor on 23rd August 1978, yet a gazette notice dated 30th August 1960 which was annexed showed that **Fredrick Hopley** died on 27th July 1960. The plaintiff maintained that the transfer of the suit property from John Mugo Kamau on 23rd August 1978, was fraudulent, illegal and void and that therefore, that **John Mugo Kamau** had no title to pass to the 3rd defendant,

The application was opposed. The 2nd defendant filed grounds of objection dated **17th September 2014**, as well as a replying affidavit sworn by its director, **Patrick Osero** on **13th October 2014**, where it was contended that the verifying affidavit in support of the plaintiff was not sworn by an officer of the

company under seal. The 2nd defendant stated that it was incorporated on **5th October 1995**, and that it never had dealings with the 1st defendant who was the title holder as at **2nd March 1978**. According to the 2nd defendant, entry no. 2 for a transfer in its favor on **26th April 1983** was falsified as it was not in existence as at the said date. The 2nd defendant averred that the transfer to the 3rd defendant on **17th March 1994** was also fictitious since it was only incorporated on 5th October 1995.

The 2nd defendant stated that it had never owned or been the registered owner of the suit property and was never in occupation of the same to warrant the prayers sought by the plaintiff against it which were in vain. The 2nd defendant contended that the application was only calculated to prejudice, scandalize and embarrass it and further, that the suit against it was hollow, misdirected, frivolous, misconceived and disclosed no cause of action against it.

The 3rd defendant filed grounds of objection dated **17th September 2014** as well as a Replying Affidavit sworn on **10th November 2014**, by its Director, **Josphert Konzolo**. In the grounds of opposition, the 3rd defendant averred that the plaintiff had not met the requirement for grant of interlocutory remedies sought in the application. The 3rd defendant stated that it was a stranger to the allegations contained in the plaintiff's supporting affidavit and further, that the application was premised on presumption and non disclosure of material facts. It was also contended that the verifying affidavit supporting the plaint was fatally defective for offending the provisions of Order 4 Rule 1(4). According to the 3rd defendant, the application did not comply with mandatory rules of procedure and that the same was misguided, bad in law, frivolous, vexatious and an abuse of the court process liable for dismissal with costs.

Through its Replying Affidavit, the 3rd Defendant averred that before purchasing the property, it conducted due diligence and confirmed from the relevant offices that the documents of title were authentic and legally recognized. The 3rd defendant adopted the Replying Affidavits of the 4th, 6th and 7th defendants in opposition of the application and stated that the plaintiff had no interest in the suit property and would therefore suffer no loss if the orders sought were not granted.

In response to the interested party's Replying Affidavit, the 3rd defendant filed a supplementary affidavit sworn on **18th December 2014** where it stated that until the allegations of fraud against it were proved, it was the **absolute** and **indefeasible** owner of the suit property. According to the 3rd defendant, the suit property was on 27th January 1942 subdivided into LR No. 3586/1 and 3586/2 and that 3586/1 measuring 20.2 acres was transferred to William Bertram and a separate title duly issued to him. The 3rd defendant averred that a charge and discharge in favour of Barclays Bank was registered against the title to LR No. 3586/2. Further, that on 2nd March 1978, LR No. 3586/2 was subdivided into LR No. 3586/2/1 and LR 3586/2/2 and that a third subdivision known as LR No. 3586/2/3 was also registered against the title and sold to **John Mugo Kamau**.

While stating that the bank only got instructions to execute the will of the deceased Arnold Bradley, in the year 2000, the 3rd defendant contended that the property had at that time been subdivided and that the will was therefore incapable of enforcement and transferring any interest in the land. The 3rd defendant further contended that the bank was only privy to the portions known as 3586/2/1 and 3586/2/2. According to the 3rd defendant, LR No. 3586/2/3 was never vested to Barclays Bank of Kenya Ltd and therefore, that the bank had no mandate or legal right to sell the same to the plaintiff. It is the 3rd defendant's averment that the property known as LR No. 3586/2/3 currently known as L.R No.3586/3, was transferred to John Mugo Kamau on **24th August 1978** vide a certificate of title IR 31187 and that the title was issued on 2nd March 1978.

Further, the 3rd defendant stated that John Mugo was the first registered and indefeasible owner of the suit property and that his title which was legitimately acquired for value at a consideration of Kshs 32,000,000/- was indefeasible and protected under the law. The 3rd defendant contended that it purchased

the suit property measuring **54.39 Ha**, from John Mugo on 21st October 2005, and that it had since been in occupation and control of the property with a valid title.

The 6th and 7th defendants opposed the application through a Replying Affidavit sworn on **8th October 2014**, by **Geoffrey Swanya Birundu**, the **Deputy Chief Land Registrar**, who stated that their offices had no records of the title held by the plaintiff being **LR No. 3586/3** registered as **LR No. 37285**. The 6th and 7th defendants stated that according to their records, the suit property was registered in the name of the 3rd defendant and that the same was a transfer emanating from a title registered in the name of **John Mugo Kamau** whose transfer emanated from the original title registered as IR 94, LR 3586 registered as entry no. IR No. 94/24 vide IR 31187. The 6th and 7th defendants contended that the 3rd defendant was therefore the registered proprietor of the suit property and that the LR 3586/3 IR 37285 which the plaintiff claimed was a different parcel from the one registered in the 3rd defendant's name. They stated that from their records, LR 3586 was registered as IR 31187/1 and not IR 37285/1.

While stating that LR No. 3586/3 IR No. 37285 had been subsequently subdivided upon transfer to the 3rd defendant, the 6th and 7th defendants stated that titles on 189 subplots had subsequently been issued. According to the 6th and 7th defendants, the rights accorded in the Constitution do not extend to illegally acquired property and further, that injunctive orders cannot issue where damages as an alternative remedy would suffice.

The interested party through a Replying Affidavit sworn on 9th December 2014 by Waweru Mathenge, the Senior Legal Counsel, Head of Legal and Secretarial Services stated that based on the documents in their possession, by a will dated 15th August 1969, Mr. Bradley appointed Barclays Bank DCO to be the executor and trustee of his will. It was contended that in the Will, Mr. Bradley bequeathed to his daughter **Annette Therese Benson** approximately four acres of the land known as LR No. 3586 and that the residue of the estate was bequeathed to **Edith Dorothy Brounger**. That upon the death of Mr. Bradley on 22nd October 1973, his last Will dated **15th August 1969**, was registered in court on **24th July 1974**, in High Court Probate and Administration cause no. 50 of 1974.

The interested party contended that upon the death of **Edith Dorothy Brounger** on **29th January 1974**, his personal representative namely Thomas Owen Crundwell disclaimed all interest in the residue of Mr. Bradley's estate and that his children **Charles Robert Bradley** and **Annette Therese Benson** became entitled to the estate in equal shares absolutely. It is contended that by a deed of family arrangement dated 20th August 1976, the parties agreed to have one half of the estate distributed to **Annette Therese Benson** while **Charles Robert Bradley** and his daughter **Imogen Lindsay Poppleton** each acquired one quarter of the estate.

According to the interested party, a further deed of family arrangement dated February 1979 saw Charles Robert Bradley assign his interest in the residue of his Kenyan estate to **Imogen Lindsay Poppleton absolutely** and that the estate was equally distributed to **Imogen Lindsay Poppleton** and **Annette Therese Benson**. The interested party averred that the process of transferring LR No. 3586/3 and payment of legal fees had been completed as at 31st January 1983. It was further contended that LR NO. 3586/3 was recorded on the bank's securities journal on 21st September 1983 and 10th October 1998 and that the name of the customer was indicated as **Da Gama Rose(Investments)Ltd**.

The interested party made reference to correspondences dated 7th October 1988, 19th December 1988, 20th January 1989, 16th January 1989, 23rd January 1989, 14th March 1989 and 6th April 1989 and stated that there were transactions in relation to LR No. 3586/3 with Da Gama Rose(Investments)Ltd. It is the interested party's contention that it had no knowledge of the current state, proprietorship or the ownership of the suit property. According to the interested party, the information in its possession would have been availed without its involvement as a party to the suit and that having supplied the same, it reserved the right to be struck out as a party to these proceedings.

The application was canvassed by way of written submissions. The plaintiff filed submissions dated 1st December 2014, stated that it was not in breach of Order 4 Rule 1 (4) of the Civil Procedure Rules. Counsel stated that the aforesaid rule did not require the authority to swear affidavits to be exhibited. The plaintiff argued that form CR 12 from the Registrar of Companies clearly identified the deponent as its director and further, an authority under seal dated 29th August 2014 before the institution of this suit which was annexed to the supplementary affidavit sworn on 30th October 2014 indicates that the deponent had the requisite authority to swear all affidavits.

Reference was made to Article 159(2)(d) and Article 2 of the Constitution and it was submitted that even if there was requirement to exhibit the authority to swear the verifying affidavit, the same would amount to a procedural technicality which the court would be required to overlook under Article 159. Counsel referred to the case of **Giella vs. Cassman Brown Ltd(1973)EA 358** and submitted that the plaintiff had a prima facie case with probability of success since from the mother title, the plaintiff's title could be investigated and traced back to the original grant, thereby showing a good root of the title. The plaintiff argued that it had provided evidence of the transaction between it and Barclays Bank of Kenya Ltd evidencing the sale of the suit property and further, that it had tendered evidence to show that it had been paying land rent and rates from 1983 to 2014. Counsel contended that the plaintiff had deposed that it had been in physical possession of the suit property since 11th February 1983 and that the plaintiff's possession which had not been denied by any of the respondents was therefore uncontroverted.

Counsel stated that the plaintiff had exhibited a judgment in previous litigation where the 6th defendant was a party, conforming that the plaintiff was the registered owner of the suit property. The plaintiff averred that the 6th defendant's assertion that it had no records relating to its ownership was untrue since in ***Civil Appeal No. 25 of 2002***, the 6th defendant had registered a caveat against title to the suit property.

Counsel submitted that the Court of Appeal had in its judgment found that the suit property was registered in the name of the plaintiff and that the 6th defendant who was party to that suit did not challenge the court's finding and claim that the land belonged to John Mugo Kamau as was the case herein. It was further submitted that a subdivision scheme over the suit property undertaken in 1985 had been cancelled with the full participation of the 4th - 7th defendants and that it was therefore untrue for the 6th defendant to claim they had no records relating to the plaintiff's ownership of the suit property.

Counsel made reference to correspondences from the Ministry of Lands, the Nairobi City Commission, the Commissioner of Lands and the National Land Commission and submitted that it was clear that the plaintiff was the registered proprietor of the suit property and that the 4th - 7th defendants had transacted with the plaintiff and had records of the same.

In further submission, the plaintiff contended that the purported certificate of title no. 32276 was fraudulent and could not confer ownership of the suit property to the 1st, 2nd and 3rd defendants. Counsel reiterated the facts as pleaded in the plaintiff's affidavits and argued that the plaintiff's averment that the said title was fraudulent had not been controverted by the defendants. It was also submitted that the plaintiff's contention that the purported approval plans issued to the 3rd defendant were illegal and fraudulent was not countered by any of the defendants. Counsel stated that ***John Mugo Kamau***, the 8th defendant herein had not filed an affidavit to show how he acquired the suit property.

In respect to the 3rd defendant's response, the plaintiff stated that the replying affidavit was vague and evasive and did not affect its claim of ownership of the suit property. Counsel submitted that the 3rd defendant had not adduced evidence to demonstrate how it allegedly acquired the suit property from ***John Mugo Kamau*** in the form of a sale agreement, duly executed transfer, payment of stamp duty as well as relevant consents from the Commissioner of Lands and Nairobi City Council.

It was the plaintiff's submission that the 3rd defendant had not indicated whether it was in possession

of the suit property or when such possession was acquired or parted with. Counsel argued that the 3rd defendant had also not provided any evidence of sub division as alleged by the 4th - 7th defendants in the form of an application for subdivision, copies of approvals by Nairobi City Council with accompanying conditions, payment receipts for the application and approval fees, approval letters from relevant departments as well as the Commissioner of Lands, letter from licensed surveyor forwarding the plans to the Director of Surveys, copy of authentication slip from the Director of Surveys as well as a copy of the payment receipt for checking fees.

The plaintiff further submitted that the 3rd defendant had not adduced any evidence as to whether or not it had sold or parted with possession of any of the alleged subdivided plots. Counsel submitted that no person or entity had come forward claiming ownership of any of the alleged subdivided plots despite the wide publication of this suit in the print and electronic media. The plaintiff contended that no financial institution had come forward claiming to hold a legal charge or other security over any of the subdivided plots leading to a conclusion that the alleged sub division scheme over the suit property was fraudulent and aimed at illegally dispossessing it of its land.

Counsel made reference to section 26 of the Land Registration Act as well as the decisions in **Elijah Makeri Nyangw'ra vs. Stephen Mungai Njuguna & another Eldoret ELC No. 609(b) of 2012** and **Olympic Company Trading Ltd vs. Said Mohamed Nairobi ELC No. 259 of 2012** and it was submitted that the law was extremely protective of title and only provided two instances when a title could be challenged and even cancelled. The plaintiff stated that it had provided sufficient evidence to show that the purported certificate of title No. IR 31187 over the suit property issued to **John Mugo Kamau** and subsequently transferred to the 3rd Defendant, was acquired illegally, unprocedurally and through a corrupt scheme. It is the plaintiff's submission that the certificate of title IR No. 31187 is liable for impeachment under section 26(1)(b) of the Land Registration Act and that a prima facie case had thus been established.

While stating that the 2nd defendant had filed a replying affidavit sworn by **Patrick Osero** on 13th October 2014 denying ever owning the suit property, Counsel submitted that the replying affidavit had confirmed that the certificate of title No. IR 32276 over the suit property was illegal and fraudulent. The court was urged to disregard the replying affidavit by the 4th and 5th defendants showing approved subdivisions of the suit property and Counsel averred that the approvals and subdivision were illegal as they were based on a certificate of title which was fraudulent, illegal, and void.

The plaintiff stated that the 9th defendant had failed to file any response to its application despite the court's directions requiring the said defendant to do so. Counsel contended that the Notice of Motion dated 27th October 2014 filed by the 9th defendant did not establish a prima facie case of ownership of the suit property and that the 9th defendant's claim should therefore be dismissed.

In respect to irreparable harm which cannot be compensated by damages, the plaintiff stated that unknown persons to it had encroached on the property between 4th - 10th October 2014 wherein they began digging trenches, constructing roads, erecting structures and excavating the suit property. Counsel argued that unless the injunction was granted, the suit property would be alienated or damaged to an extent that the plaintiff would be unable to recover the land were it to eventually succeed at the main trial. The plaintiff averred that none of the defendants has disputed the invasion of the suit property. It was further submitted that the suit property was a prime property situated in Karen and measuring approximately 134.4 acres(54 hectares) and that since land in Karen is valued at Kshs 50 million an acre, the suit property would be valued at approximately 7 billion shillings. Counsel submitted that were the suit property to be lost, the plaintiff would be unable to recover the said amount as damages from any of the parties.

Lastly, it was submitted that since several parties had laid ownership claims to the suit property which was undeveloped and of very high economic value, the balance of convenience lay in favour of an injunction to protect the substratum of the suit to avoid the same being an exercise in vain.

The 2nd defendant filed submissions dated 6th November 2014 where reference was made to the case of **Giella vs. Cassman Brown & Company Ltd (1973) EA 358** and Counsel argued that the plaintiff had not established a prima facie case with a probability of success against the 2nd defendant. It was submitted that the 2nd defendant was incapable of causing irreparable harm to the plaintiff in respect to the suit property and further, that there was no cause of action between the plaintiff and the 2nd defendant to give rise to any balance of convenience for securing a right to the suit property. Counsel submitted that joinder of the 2nd defendant to this suit was unnecessary and malicious and the court was urged to strike out the 2nd defendant as an unnecessary party to these proceedings.

The 3rd defendant in submissions dated 9th December 2014 referred the court to sections 24, 25 and 26 of the Land Registration Act and submitted that its title had been authenticated by the relevant government registries which had the mandate of processing registrations and issuing titles to property. Counsel argued that since the 3rd defendant was the party entitled to protection from the court, restraining the 3rd defendant from accessing and using its own property would be arbitrary, an abuse of the court process and a travesty of justice.

The 3rd defendant submitted that the court's discretion in issuing injunctions should not be exercised in breach of the law. Counsel contended that being the ***absolute*** and ***indefeasible*** owner of the property, the 3rd defendant's rights to the property were incapable of being curtailed under sections 24 and 25 of the Land Registration Act. Reference was also made to the case of **Giella vs. Cassman Brown & Company Ltd (1973) EA 358** for the proposition that that the court's discretion must be exercised sparing in the most deserving cases.

It is the 3rd defendant's submission that having raised questions of fraud against the plaintiff, the court would require the benefit of full evidence to determine whether there was fraud if any and the culpable party. Counsel argued that the 3rd defendant had placed before the court authenticated copies of title which prima facie confirmed that the 3rd defendant was the legal owner of the property. The 3rd defendant submitted that under section 26 of the Land Registration Act, its rights to the property could only be challenged after fraud was proved and a determination made and therefore, the court could not interfere with its rights to the property at this stage of the proceedings.

In further submission, Counsel contended that the court was being asked to hold the rights of the 3rd defendant in abeyance while the plaintiff was on a fishing expedition for non-existent legal rights. It was submitted that the plaintiff's rights were unknown to law whereas the 3rd defendant had clearly demonstrated its legal rights to the property and had drawn the history of the property since its initial disposition under the Crown Land Ordinance.

Counsel submitted that the plaintiff had no legal rights which would require a rebuttal by the 3rd defendant. It was submitted that having adduced true records of the property which had been authenticated by government officials, the application before the court ought to fail since the 3rd defendant had conclusively demonstrated its ownership and proved that the plaintiff's claim was non-existent. The court was referred to the case of **Mrao Ltd vs. First American Bank Ltd & 2 others (2003)eKLR** for the submission that in order for a court to find that there is a prima facie case, the court must consider whether there is a right which has been infringed by the opposite party as to call for a rebuttal by the opposite party.

The court was urged to find that the plaintiff's assertions had no chance of success having failed to prove ownership. Counsel averred that no investigation and evidence had been presented before the court to substantiate the allegation that the 3rd defendant's title was a forgery and further, that the allegations of fraud had been countered by the 3rd and 4th - 7th defendants with proof of actual records of the transaction. It is the 3rd defendant's submission that the plaintiff had not made out a prima facie case with a chance of success to entitle it to protection by the court by way of an injunction.

In respect to irreparable loss, it was submitted that the question was not whether the plaintiff would suffer irreparably but rather, what other remedies were available to the plaintiff for the wrongful/ fictitious/ fraudulent issuance of a title in its name. Counsel submitted that the plaintiff's remedies lay in pursuing the relevant persons, entities and bodies for the recovery of money following a fraudulent sale. It is the 3rd defendant's submission that damages was the only appropriate remedy available to the plaintiff since it had no legal rights recognized under the law.

The 3rd defendant further argued that it stood to suffer in its ownership, control and use of the property was curtailed by the court. Counsel submitted that the court should not cause an injustice to one party to appease another. It was submitted that the court's only duty was to make a determination as to who was the true owner of the property and that any further orders at this stage would cause an injury incapable of remedy by way of damages to the 3rd defendant.

The 3rd defendant submitted that the balance of convenience was in its favour. Counsel argued that the property known as LR No. 3586/3 was none existent having been subdivided into 197 subplots with individual titles. Lastly, it was submitted that the orders sought would only be theoretical and none effective and further, that the orders would prejudice third parties who had acquired the sub-divisions for valuable consideration and deserved the protection of the court.

The 4th - 7th defendants in submissions dated 9th December 2014 stated that the plaintiff had not satisfied the conditions set out in **Giella vs. Cassman Brown & Company Ltd (1973) EA 358**. Counsel stated that the plaintiff had not established a prima facie case with a probability of success since the suit property was registered in the name of the 3rd defendant and there was no evidence of any allocation or transfer in favour of the plaintiff. Counsel referred to the case of **Isaac Gathungu Wanjohi & another vs. The Attorney General & 6 others(2012)eKLR** and submitted that the documents relied on by the plaintiff to show the alleged transfer of the suit property from Barclays Bank of Kenya were disputed as being irregular and had not been authenticated by the bank.

It was further submitted that the plaintiff had failed to demonstrate that it would suffer irreparable harm if the orders sought were denied. Counsel contended that the plaintiff had not demonstrated that it was in actual possession of the suit property and that safe for stating that the value of the land was Kshs 7 billion, there was no valuation report or evidence from an expert. The 4th - 7th defendants submitted that the plaintiff would not suffer irreparable harm which could not adequately be compensated by damages and reliance was placed on the case of **Isaac Gathungu Wanjohi & another vs. The Attorney General & 6 others (2012) eKLR** for the proposition that the state would be able to satisfy the claim for damages were the court to find that the property was not illegally acquired.

Counsel submitted that the balance of convenience was in favour of the 3rd defendant who had a good title which had already been transferred to many other members of the public. It was submitted that the 3rd defendant's title had been subdivided and titles had been issued to 189 subplots. The cases of **Symon Gatutu Kimamo and 587 others vs. East Africa Portland Cement Ltd(2011)eKLR** and **Kenya Hotel properties vs. Willesden Investments Ltd (2013)eKLR** were cited and it was argued that the number of persons who had acquired the sub-plots and the public interest at large stood to be prejudiced if the injunctive orders were extended.

The 9th defendant filed submissions dated 17th March 2015 wherein she contended that she held the ***power of attorney*** in respect to all properties belonging to ***Carmelina Ngami Mburu***, the surviving widow of the late ***John Godhard Ichahuria Mburu***, who was the bonafide registered owner of 54.39 hectares of LR No. 3586/3(originally 3582/2) in Grant IR No. 37285. Counsel submitted that the aforesaid grant had been tampered with by either the plaintiff or the defendants to deprive the estate of the late John Mburu its proprietorship.

While submitting that the late John Mburu was registered as the owner of the property on ***7th March 1978***, the 9th defendant contended that under section 25(1) of the Land Registration Act, the late John

Mburu acquired the proprietary right to the property and that pursuant to section 26(1), he should be found to be the bonafide owner of the property. According to the 9th defendant, the late John Mburu entrusted his lawyers with documents relating to the suit property and that upon his demise, the suit property was amongst properties which were not included in the deceased's lists of assets for purposes of taking out letters of administration.

While submitting that the office of the Public Trustee was not certain of all John Mburu's properties, Counsel averred that ***Carmelina Mburu*** might not have known all the deceased properties which were left in the hands of his lawyers who might have taken advantage of his demise to illegally transfer the property. It was submitted that the association of the late ***John Mburu*** and the Law Firm of ***Da Gama Rose & Company*** Advocates' in respect to the suit property had been brought out by various correspondences. Counsel submitted that the late John Mburu dealt with the aforesaid Law Firm as its client in 1978 when the property was registered in his name.

The 9th defendant further submitted that the firm of Shapley Barret Company Advocate and Francis ***Da Gama Rose & Company*** where the name ***Da Gama Rose*** features acted for the late John Mburu and must have had access to the deceased's original title documents to LR No. 3586/3 Lang'ata amongst other land documents belonging to the deceased. While submitting that the purported registrations of the plaintiff's proprietorship as well as the 1st - 3rd defendant were done after the death of John Mburu in 1982, counsel argued that if the probate of the Will of Arnold Bradley was registered on 2nd March 1978, there was no reason for the plaintiff to have waited until 1983 to be registered as the proprietor of the suit property.

According to the 9th defendant, entry no. 20 on annexure "HDR-3" could not come before entry no. 21 since the caveat ought to have been removed prior to effecting subdivision. Counsel submitted that entries no. 21, 22, 22 and 23 were hurriedly done as part of a scheme to defraud the estate of the 9th defendant. The 9th defendant argued that the 6th defendant had through a memo dated ***27th September 2012***, raised serious queries in respect to registration of ***LR No. 3586/2*** and ***3586/3*** and therefore, the purported registration of the plaintiff as the registered proprietor of ***LR No. 3586/3*** could only be attributed to fraud.

The 9th defendant submitted that Messrs Francis Da Gama Rose in whose care the late John Mburu left his details altered documentation for purposes of divesting the Public Trustee of his lawfully acquired responsibility with the intention of disposing the property for his own benefit. Counsel averred that the fiduciary duty of care owed by Messrs. Francis Da Gama Rose & Company advocates was breached in as far as the suit property and its registered proprietor John Mburu were concerned. It was further submitted that the 1st - 3rd defendants' documents in respect to the suit property were suspect and the 9th Defendant averred that while she opposed the Plaintiff's claim that it was the rightful owner of the suit property, she was not opposed to conservation of the suit property pending the conclusion of this suit.

This court has now carefully considered the instant Notice of Motion, the annexures thereto, the replies by the Respondents, the relevant laws and the written submissions and the court makes the following findings:-

There is no doubt that the Plaintiff/Applicant herein has sought for injunctive orders which are equitable remedies granted at the discretion of the Court. The Court in **Hasmukh Khetshi Shah Vs Tinga Traders ltd, Civil Appeal No.326 of 2002** held that:-

“ It must be stated at the outset 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“

Further in the case of **CMC Motors Group Ltd and another Vs Evans Kageche Boro Civil Appeal No.295 of 2001**, the Court held that:-

“In granting the injunctory reliefs, the Superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judiciously and in accordance with the principles enunciated in Giella’s case.”

From the above findings, it is evident that the discretion of the court must be exercised judicially.

Since the applicant has come to court to seek for equitable remedy of injunction, it had a duty to satisfy the Court that it deserves the Orders so sought. The principles for grant of injunctive reliefs are well laid down in the case of **Giella Vs Cassman Brown & Co. Ltd** and which have further been repeated in many other judicial pronouncements. In the case of **Kibutiri Vs Kenya Shell, Nairobi, High Court, Civil Case No. 3398/1980 (1981) LR 390**, the court held that:-

“The conditions for granting of a temporary injunction in East Africa are well known and these are; first an applicant must show prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (See also E A Industries Vs Trufoods (1972) EA 420).

The applicant /Plaintiff herein therefore had a duty to fulfil the above conditions. The question now is whether the applicant herein is deserving of the orders sought, or whether the applicant has fulfilled any of the conditions enumerated above.

Firstly, the applicant needed to satisfy this Court that it has ***a prima facie case*** with probability of success at the trial. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125**, prima facie case was described 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.”

It is evident from the above description 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 applicant’s case at the trial.

Has the applicant herein established that it has a prima facie case with probability of success at the trial?. Is the available evidence pointing to any infringement of the applicant’s right?

As I consider the available evidence, I must warn myself of the gravity or danger of making conclusive findings that may prejudice the interest of the parties at the main hearing. The above position was held by the Court in the case of **Narendra Chaganlal Solanki Vs Neepu Auto Spaces Ltd, Kisumu High Court Civil Case No. 90 of 2003** where the Court stated that;

“In an interlocutory application for injunction, the Court must warn itself of the gravity or 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 some cautionary steps”.

Further in the case of **Edwin Kamau Muniu vs. Barclays Bank of Kenya, Nairobi (Milimani) High Court, Civil Case NO. 118 of 2002**, 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 that the court is entitled to at that stage is whether the applicant is entitled to an injunction sought on the usual criteria”.

At this juncture, it is obvious that the court is dealing with an interlocutory application wherein it is not required to make any conclusive or definitive findings of fact or law and most certainly not on the basis of contradicting affidavits filed by the parties and the disputed annexures thereto and different prepositions of law , advanced by the parties herein.

The application herein is brought under Order 40 Rule 1 which provides that;-

“ *where in any suit it is proved by Affidavit or otherwise*

- a. *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit.....*

The court may order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders:-

The application is also predicated upon Sections 1A and 1B of the Civil Procedure Act which deals with the overriding objective of the Act which is to facilitate the **just, expeditious proportionate and affordable** resolution of the civil disputes governed by the Act and that the Court has a duty to further the said overriding objective . The Court has also been donated power by Section 3A of the said Act to make such orders as may be necessary for ends of justice and to prevent abuse of the process of court.

Taking into account the above provisions of the law, the Court will now analyze the evidence and facts as presented by the parties herein in order to determine whether the applicant has established a prima facie case with probability of success at the trial.

There is no doubt that the parcel of land in dispute is **LR No. 3586/3**, situated in Karen which measures approximately **54.39 Hectares** or **134.4 acres**. There is also no doubt that this suit land is being claimed by three persons herein, that is the Plaintiff /Applicant, Muchanga Investments Ltd claims ownership of this parcel of land and it has attached documents of ownership being Certificate of title **HDR2** , issued on 11th February 1983 . The 3rd Defendant, **Telesource.Com Ltd** also claims ownership of the same parcel of land and has attached certificate of title dated 16th July 2014, JK2 for LR No.3586/297 original number 3586/3/97 with an allegation that it purchased the same from one **John Mugo Kamau** , who is alleged to have been registered as the proprietor of the suit land on **2nd March 1978** ,as per annexure **JK1**. Further the 9th Defendant herein **Catherine Njeri Nganga** holder of Power of Attorney in respect of **Carmelina Ngami Mburu**, claimed that the suit land LR No. 3586/3 belongs and forms part of the estate of the late **John Godhard Ichahura Mburu** , who died on 27th October 1981. Though the 9th Defendant did not attach a Certificate of title in respect of **John Godhard Mburu**, she attached the Original Grant **CNN2** which showed in entry No. 22 that the suit land was transferred to **John Godhard Mburu – (54 .39 Ha)** on 7th March 1978.

What is also not in dispute herein is that the suit property herein was initially registered in the name of **Arnold Bradley** on 27th February 1928 , who allegedly died in the year 1973 and left a **Will** appointing Barclays Bank as the Executors of his will. It is also evident that the three claimants of the suit land herein have all attached copies of the mother title of the suit land herein which copies show the history of the land in question. The land herein was initially registered as titled No. 94 on 1st July 1919 for a term of 999 years which was to run up to 2918. This title No. 94 was vested to one **Grathan Biddalp Norman**, by the Colonial government then. The above history is common in all the three copies of the mother title attached to the pleadings by the Plaintiff, 3rd Defendant, 9th Defendants and also 6th and 7th Defendants. However, the entries that are common in all the copies attached herein are upto entry No.16. Thereafter each copy of the mother title has a different narration. On the copy attached to the 3rd Defendant Supplementary Affidavit, the suit land was allegedly transferred to **John Mugo** on 24th August 1978. Further on **CNN2** the suit land was allegedly transferred to **John Mburu** on 7th March 1978, and on the

HDR3, copy attached to the Notice of Motion herein, the suit land was transferred to Muchanga Investment on 11th February 1983 . The Court has also noted that the 6th and 7th Respondents also attached a copy of the mother title which bore similar entries to the copies produced by Plaintiff and 9th Defendant but only differed on entry No. 24, which shows the transfer was to **John Kamau Mugo**. It is evident that we have three copies of the mother title availed in Court by Plaintiff/ Applicant, 3rd Defendant, 6th - ,7th Defendants and 9th Defendant and the said copies have conflicting entries on who was the ultimate transferee of the suit land.

Among the copies produced herein, there must be one which is the genuine one. However, that is an issue to be canvassed and determined at the main trial after evidence is called and tested through cross—examination. The genuineness of the copies of the mother title cannot be determined at this juncture but after the full hearing. The Court is aware that at this stage it should not venture into making definitive findings of fact or law based on affidavit evidence.

Though the 9th Defendant alleged that the suit land was transferred to **John Godhard Mburu** on 7th March 1978, there was no certificate of title issued in the name of the said **John Mburu**. However, the Plaintiff herein and the 3rd Defendant have certificate of title issued in their respective names. The said titles were issued under Registration of Titles Act Cap 281 (now repealed) and Section 23(1) of the said Act provided that:-

“ the certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all court as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof subject toand the title to that proprietor shall not be subject to challenge except on the ground of fraud, or misrepresentation to which he is proved to be a party”.

The above position has now been replicated under Section 26 of the **Land Registration Act 2012**. However, the Land Registration Act further provides in Section 26(1) (a) ,(b) that the said Certificate of title of a registered 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***
- b. ***Where the certificate of title has been acquired illegally , unprocedurally or through a corrupt scheme.***

It is evident that both the plaintiff and the 3rd Defendant have Certificates of title which according to Section 23 (1) of Cap 281 (now repealed) and Section 26 (1) of the Land Registration Act show that the said Certificates of title are conclusive evidence of proprietorship and that as holders of such Certificates of title, they are the **absolute** and **indefeasible** owners of the subject land. However, in this case, there are two certificates of titles over the same parcel of land. It is trite law that no parcel of land can be held by two separate persons each with his/her own distinct Certificate of title. Each parcel of land has a single certificate of title held either **singly, jointly** or in **common**, but not separate titles held by different parties (persons) over the same parcel of land.

In the Instant suit, we have separate Certificates of title for the same parcel of land, held by different individuals. There must be one that is registered **procedurally** or **regularly**. Though the 6th and 7th Defendants alleged that the Certificate of title held by the 3rd Defendant is the genuine one, that is not an issue to be decided at this juncture as the said allegation has been disputed by the Plaintiff and 9th Defendant and the said allegation needs to be tested by calling of evidence and testing the same through cross-examination. The Court is also aware that the question of the rightful owner of this parcel of land and how each got registered and whether the titles were obtained procedurally or through fraud are serious issues to be tried on the suit and cannot be answered through this interlocutory application.

Again, the court finds that at this stage, the court cannot delve into the issues on which certificate of title is legally held or which is not genuine as those are the issues to be decided with finality at the hearing

of the main suit. It is also evident that though Plaintiff and 3rd Defendant have certificates of title which make them the **absolute** and **indefeasible** owners, the said Certificates of title can be challenged on grounds of **fraud, misrepresentation**, or if the same were acquired **illegally, unprocedurally** or through **corrupt schemes**.

However, the court can only arrive at a finding of how the titles were acquired through calling of evidence. Though there are allegations of fraud, and misrepresentation, made by the parties herein, this court cannot make a finding on those allegations at this stage through affidavit evidence. The said allegations have to be strictly proved through calling of evidence.

Having said that the allegations of **fraud, misrepresentation** and the issue of how the titles were acquired can only be determined after evidence has been called, the Court finds that it cannot at this stage find and hold on which of the titles held by the parties herein is **genuine, legal** or **procedurally** acquired. The court is not required at this stage to determine which of the Certificates of title was acquired, **fraudulently**, or not as this is a determination that can only be made at the trial upon taking of evidence and testing the same.

However, the court is only called upon to determine whether the plaintiff herein who is the applicant has established a **prima facie case** with probability of success or whether it has shown that its right has been infringed.

As I said from the onset, it is evident that the Plaintiff herein holds a certificate of title which was issued to it on 11th February 1983. Though the 9th Defendant alleged that the suit land had by this time been transferred to **John Mburu** as per **CNN2**, and that the said **John Mburu** died on 27th October 1981, and that the Plaintiff herein might have been registered as a proprietor of the suit land fraudulently, the court finds that the procedure or the process of how the plaintiff was registered as a proprietor is a matter to be determined at the main trial. The Court cannot find and hold that at the Plaintiff herein was fraudulently registered as the proprietor of the suit land at the expense of the estate of the late **John Mburu** as alleged by 9th Defendant. The Plaintiff herein alleged that it purchased the suit land from Barclays Bank who were the Executors of the Will of **Arnold Bradley**, who was the registered owner of the suit land by the time of his demise in 1973. This position was also confirmed by **Waweru Mathenge**, the head of legal Services at Barclays Bank through his Affidavit filed in Court.

There is also no doubt that the last Will of **Mr Bradley** appointed Barclays Bank DCO on 15th August 1969, as the Executors and trustee of his Will. It is also evident that the copy of the mother title produced by 6th and 7th Defendants and Plaintiff/Applicant at entry No.22 showed that "probate of the will of **Arnold Bradley** to Barclays Bank International Ltd' was registered.

The Plaintiff further attached **HDR4** a "**Transfer**" from Barclays Bank International Ltd to Muchanga Investment Ltd in consideration of **Kshs.1250,000/=**. The said **Transfer** is dated 29th December 1982, and the transfer was executed by Barclays Bank of Kenya. Though the 3rd Defendants alleged that this property had been transferred to **John Mugo Kamau** on **24th August 1978**, there was no **transfer** document attached to the said Defendant's pleadings. All that the 3rd, 4th – 7th Defendants have shown is the entry on the mother title dated 24th August 1978, and the certificates of title. A keen look at the Certificate of title for **John Mugo Kamau** shows that it is dated **2nd March 1978** and the entry on the mother title **GSB1** is dated **24th August 1978**.

Further the Certificate of title for **John Mugo Kamau** is in reference to LR No. 3586/3 delineated on **IR.100122**, whereas the certificate of title in respect of **Telesource Com. Ltd** is in respect of **LR No. 3586/279** delineated from land survey plan **No.364874 for 0.1800 ha** and the transfer to **John Mugo Kamau** is in respect of **54.39 ha** which is the same size of land in certificate of title held by the Plaintiff/Applicant herein that is 54.39 ha.

The 9th Defendant also alleged that this suit property was transferred to John Mburu on 7th March

1978, but the 9th Defendant did not attach any instruments of transfer executed by the said **John Godhard Mburu**. Though the 6th – 7th Defendants alleged that according to their records, the office does not have any records of the title held by the applicant herein being LR.No. 3586/3 registered as IR/37285 , it is evident that the applicant has been paying land rent and it has a Rent Clearance Certificate issued by the Ministry of lands in respect of LR No.3586/3, showing that land Rent had been paid upto and including 31st December 2014 . There is also a letter from the Commissioner of Lands dated 15th December 1988 demanding payment of land rent of Kshs.266.60. The applicant also attached receipts showing that it has been paying land rates to Nairobi City Council from 1983 upto 2014 in respect of LR No. 3568/3 .

The applicant having attached evidence of payment of all statutory taxes over the suit property **LR.No.3586/3** then the 6th – 7th Defendants cannot allege that they have no records in their office to show that the applicant is the owner of the suit property. The Plaintiff/Applicant has also alleged that it has been in physical possession of the suit land since 1983. This is evident by the payment of all statutory taxes and by the fact that the applicant herein was alluded to have been the owner of the suit land in Civil Appeal No.25 of 2002, which was a case involving **Muchanga Investments Ltd Vs Safari Unlimited and Registrar of Titles** . From the above Civil Appeal No. 25 of 2002, it is evident that Safari Unlimited had registered a caveat against the title of the suit land **LR No. 3586/3** and the said caveat was registered by the Registrar of titles. Therefore the 6th and 7th Respondents cannot claim that they have no records relating to the applicant's ownership of the suit property. The above mentioned suit herein was filed in the year 2002 and neither the said **John Mugo Kamau** nor the 9th Defendant were parties to that suit and that fact *prima facie* shows that the Plaintiff herein was in possession of the suit land .

Having found that the applicant herein has shown evidence of payment of the statutory taxes, this Court also finds that there is no evidence herein to show that the 3rd Defendant, 9th Defendant, and one **John Mugo Kamau** paid any of the statutory taxes over this suit property. Further, there are no documents or evidence attached to the pleadings of 9th Defendant to show that she was in physical possession of this suit property. The allegations of *fraud* by the Plaintiff/Applicant as alleged by 9th Defendant can only be determined after calling of evidence in the full hearing .Most of the documents that she has attached to her Affidavit talk of different parcels of land.

The applicant also attached subdivision scheme over the suit property LR No. 3586/3 in 1985, but which was later cancelled after the applicant requested for the said cancellation. This approval of subdivision is evident from **HDR 6**, which is a letter from the Ministry of Lands giving approval for subdivision scheme and **HDR10** which is a letter from the applicant to the Commissioner of Lands to cancel the subdivision scheme. Further by a letter Exhibit **HDR 11**, the National Land Commission confirmed to the applicant that it had cancelled the subdivision scheme and requested for the surrender of the respective titles from that scheme. The National Land Commission also confirmed that the land had reverted to its original state.

Taking into account the above chronology of events, then it is evident that the 4th – 7th Defendants were aware that the Plaintiff/ Applicant was registered as a proprietor of the suit land. If indeed that 3rd and 9th Defendants were also registered as the owners of this suit land, then the 4th – 7th Defendant would have brought that fact to the attention of the Plaintiff/Applicant as it applied for sub-division scheme and later cancellation of the same.

Though the Plaintiff/Applicant submitted that the Certificate of title held by the 3rd Defendant is fraudulent and was illegally acquired and cannot confer ownership of the suit property LR No. 3586/3 , the Court has already held that the issue of *fraud* and the process of acquisition of the Certificates of title will only be dealt with at the main trial. The 3rd Defendant did submit that the title to suit land LR No.3586/3 is no longer in existence as the suit land has been subdivided and distributed to various third parties. However the Court notes that though various registrations have been exhibited on GSB2, the individual Certificates of titles were not attached to the said pleadings of the 3rd Defendant and 4th – 7th Defendants. The said various purchasers or third parties have not joined the suit herein. Furthermore, it is evident that Certificate of title can be challenged and/or impeached if it is found that the same was

acquired illegally or unprocedurally. The court will have to determine at the main trial whether indeed the said alleged registrations to various third parties were legal or procedural. At this stage, all that the applicant needed to show is a ***prima facie case***, with probability of success and not ***success itself***. It is evident that a certificate of titles registered under an Act can be cancelled or revoked if it is proved that it was obtained by fraud.

Having considered the available evidence and the annexures to the pleadings, the court finds that the applicant has been able to ***prima-faciely*** establish that it has been in ownership of the suit property since 1983 as it has demonstrated payment of various statutory taxes and charging of the said suit land to Barclays Bank of Kenya.

Order 40 Rule 1 provides that where the suit is in danger of ***wasting or alienation***, then the court can issue injunctive Order. The applicant has alleged that the 3rd Defendant and/or his agents have invaded or encroached on the suit land and carried out subdivisions. The applicant alleged that as the owner of the suit land who has not sold or parted with the same, then its rights have been infringed. The 3rd Defendant on its part did not deny such encroachment. However, the 3rd Defendant alleged that it has already subdivided the suit land and sold it to various third parties or purchasers who have now taken possession of their specific parcels of land. If that is the case, then the said subdivisions and alienation would definitely change the substratum of the suit land. The Plaintiff has not sold the land or allowed such subdivisions and alienations. The Court has found that *prima facie* the Plaintiff/Applicant has established that it is the registered owner of the suit land.

Therefore if the 3rd Defendant and the alleged third parties are allowed to continue with the subdivisions and /or alienations of the suit land, then indeed the applicant's rights to ownership of this suit land would have been infringed. The right of ownership of property is cardinal and is protected by Article 40 of the Constitution 2010. Its trite law that injunction is issued to protect an immediate threatened or contravened right which if no injunction is granted, the applicant will suffer harm. Further the purpose of seeking injunction is to protect the rights of the applicant from violation or threatened violation (See the case of **Stephen Juma & Another Vs Executive Committee of Kenya Sugar Growers Association in Kisumu High Court Civil Case No. 5 of 2004.**

The applicant herein has shown that there is a threatened violation of its right to ownership of the suit property herein. From the foregoing analysis, the court finds that the applicant has been able to establish that it has a *prima facie* case with probability of success.

The applicant also had a duty to establish that it will suffer irreparable loss which cannot be compensated by an award of damages. It is trite that where damages are adequate to compensate the applicant, then injunction would not apply. See the case of **Wairimu Mureithi Vs City Council of Nairobi Civil Appeal No.5 of 1979,** where the Court held that;-

“However strong the Plaintiff ‘s case appear to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them”. See also **American Cynamid Company Vs Ethicon ltd 1975 E.A 396.**

The applicant has been able to establish that the suitland herein is in danger of being encroached by other third parties who are not parties to this suit. The 3rd Defendant has confirmed that it has already subdivided the land and sold to third parties who are now ready to take possession. The applicant has alleged that the suit land is valued at Kshs.7 Billion (7,000,000,000/=). Though this land has been given a value, it is evident that encroachment of the suit land is by parties who are not sued in this

suit. If this property is allowed to be subdivided and alienated to different individuals or third parties, it is evident that these third parties may not be in a position to pay the damages in tune of **Kshs.7 Billion** as quoted by the applicant herein.

This is also a matter involving land and the court finds that each land is unique in its own way and it is not always right that damages are sufficient to compensate the amount of loss or harm that an applicant would incur if he/she loses the parcel of land or suit property. The Court finds that the applicant has demonstrated that it will suffer irreparable loss which cannot be compensated by an award of damages.

On the balance of convenience, this court finds that it is not in doubt. However, the court finds that even if it was in doubt, then the balance of convenience would tilt in favor of the Plaintiff/Applicant who has demonstrated that it had been in possession of this suit land since 1983 by paying statutory taxes and even attempting to register subdivision scheme which it later cancelled and the suit land reverted to its original state.

The Court finds that the balance of convenience herein therefore would favor the confirmation of the interim orders that were granted herein on **3rd September, 2014**.

However, the Court also notes that the ownership of this suit land herein is hotly contested. Though the court allows the applicant's Notice of Motion dated 1st September 2014, in terms of prayers No.4 and 5, the Court further finds that Section 3A and 63(e) of the Civil Procedure Act allows the court to make such orders that would ensure that end of justice is met.

Further the purpose of injunction in most cases is to keep things in **Status Quo** pending the trials and the Status Quo to be preserved is the one that existed before the wrongful act. See the case of **Esso(K) ltd Vs Mark Makwata Okiya Civil Appeal No.69 of 1991.**

Section 63(e) of the Civil Procedure Act provides that:-

“In order to prevent the ends of justice from being defeated the court may if it so prescribed make such other interlocutory orders as may appear to the court to be just and convenient”.

Taking into account the above provisions of Law and the fact that the Court has confirmed the interim orders herein, the Court further directs that it is important to **protect** and **preserve** the suit property herein until the final determination of the suit, since the issue of ownership is yet to be conclusively decided.

For that reason, the court finds that though the Plaintiff is found to be the one in possession and **prima facie** the owner of the suit land, the court directs that the plaintiff/applicant should not **charge, alienate, sell, dispose** of or **subdivide** the suit land **LR No.3586/3** until the issue of ownership is wholly determined.

Further the parties are directed to comply with Order 11 expeditiously and ensure that the suit herein is set down for hearing the soonest, so that the contested issues herein can be resolved with finality.

Having now carefully considered the Notice of Motion dated **1st September 2014**, and the annexures thereto together with the written submissions, the court finds it merited and it is allowed wholly in terms of prayers No.4 and 5 with costs to the applicant to be borne by the 3rd, 4th- 7th Defendants.

However, the Plaintiff/Applicant is also restrained from charging, alienating, disposing, and/or subdividing the suit property LR No.3586/3 in order to protect and preserve it pending the final determination of the suit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **24th** day of **March, 2016**

L.GACHERU

JUDGE

In the presence of

L . Gacheru : Judge

Court Clerk: Hilda

Mr Wena for the Plaintiff/Applicant

None attendance for the interested party

Mr Gikera for 3rd Defendant/Respondent

Mr Kamau for 4th-7th Defendants/Respondents

None attendance for the 1st Defendant/Respondent

None attendance for the 2nd Defendant/Respondent

None attendance for the 9th Defendant/Respondent

L GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above named advocates.

L GACHERU

JUDGE

Mr Gikera: Given that the injunction has been confirmed, we can mention the matter after 30 days to ensure that there is compliance with Order II.

L. GACHERU

JUDGE

Wena: I find that 30 days is sufficient to comply with Order II.

L.GACHERU

JUDGE

Mr Kamau Njoroge: We will also comply within 30 days.

Court: Given that the Court has directed the parties to expeditiously comply with Order II. The Court further directs the parties to do so within the next 30 days as requested by them. Further mention on **6th June 2016** to confirm compliance with order II.

The applicant's counsel to serve these directives to the Advocates for the interested party, 2nd and 9th Defendants who are absent.

L.GACHERU

JUDGE

Further Courts Directions:

Further on 12th October 2015 , Mr. Miller for the applicant complained to court that the Daily Nation Newspaper had been reporting the proceedings of this matter but with totally distorted evidence. That the said reporting has been addressing issues and evidence that were never brought out in court. In particular, he pointed out the report on 3rd October 2015, which read “ ***Mbaru sucked in Karen land Saga***”.

Mr Miller submitted that ***Mr Mbaru*** has never given evidence in this case and further quoted one ***Ken Wambungu*** allegedly an employee of Barclays Bank of Kenya but the said ***Ken Wambungu*** is not an employee of Barclays Bank and that the information being put out there was wrong and false. He urged the court to summon the writer of the said article and explain the source of the said information .Though the other advocates admitted that there was indeed misreporting , they urged the court not to summon the said writer but to direct Mr Miller to report the said complaint to the Media Council.

The Court thereafter directed that the reporters who were in Court to ensure that they report fairly, accurately and responsibly without any distortion or additional facts or evidence which were not brought out in court.

The Court finds no reason to summon the writer of the said article but reiterates that the reporters and writers of article over this matter should ensure that whatever they report is accurate and without any distortion or additional evidence which has not been adduced in court like the issue of “ ***Mbaru sucked in Karen land***”.

Indeed it is evident that ***Mr Mbaru*** has never given evidence in court and it was really distortion of facts for the writer to have indicated so in the said article of ***3rd October 2015***. The reporters herein are further directed to report the correct facts accurately and without distortion.

L.GACHERU

JUDGE

24/3/2016