



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT DIVISION

ELC NO. 614 OF 2015

GEOFFREY K KAMAU.....1ST PLAINTIFF/APPLICANT

BISHOP DELEVINE K MARIAKA.....2ND PLAINTIFF/APPLICANT

GRACE MUMBI.....3RD PLAINTIFF/APPLICANT

(Suing as the Chairman, Secretary, Treasurer &

Members of KWA MAJI SELF-HELP GROUP

=VERSUS=

BARFAN SUMBULE.....1ST DEFENDANT/RESPONDENT

EVERLYNE GATUNE SUMBULE.....2ND DEFENDANT/RESPONDENT

WILSON GITHIORA MBURU.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion dated *1st July 2015* , brought by the Plaintiffs/Applicants herein under *Order 40 Rules 1 ,2 & 3 of the Civil Procedure Rules & Sections 63(e) & 1A ,1B and 3A of the Civil Procedure Act*. The applicants have sought for these Orders against the Defendant/ Respondent.

1. Spent

2. Spent

3. That Injunction do issue against the Defendants/Respondents by themselves, their servants and/or agents or otherwise however, restraining them from selling, transferring, transacting, trespassing upon, developing, erecting structures, dealing and/or interfering with plot No.Nairobi Block 126/365/13 or any other plot within Plot No.Nairobi Block 126/365 pending the hearing and determination of this suit or further orders of this Honourable Court.

4. That cost of this application be borne by the Respondents.

The application is based on the grounds stated on the face of the application and on the supporting affidavit of **Geoffrey K Kamau** . The grounds in support are:-

- 1. That the plaintiffs/applicants are the officials and members of Kwa Maji Plot 365 Self Help Group the proprietor of the whole of that parcel of land known as Plot No. Nairobi Block 126/365.**
- 2. That the Defendants/Respondents are unlawfully trespassing on plot No. Nairobi Block 126/365 purporting to sell, transfer, putting up illegal structures, and developing on Plot No. Nairobi Block 126/365/13.**
- 3. That the Respondents/Defendants are generally interfering and/or intermeddling with the management and operation of Kwa Maji Plot 365 Self Help Group, with the intent to take over some plots without adhering to the laid down procedures in acquiring plots within Plot No. Nairobi Block 126/365/13.**
- 4. That the respondents have no right in attempting to trespass, take over and develop plot No. Nairobi Block 126/365.**

In his supporting Affidavit, the Deponent **Geoffrey K Kamau** alleged that he is one of the Plaintiffs/applicants herein and the Chairman of **Kwa Maji plot 365 Self-Help Group** . Further that some time on **10th April 1997**, he entered into a sale agreement for plots **Nos.38/37/36/35** being subdivisions of **L R No.126/365** with **Miharati Development Company** at a cost of **25,000/=** per plot measuring approximately **80ft x 40ft** as per annexure **“GK-1”**.He also alleged that other people also bought plots on LR No.126/365 from **Miharati Development Company Limited** and they took possession and occupation of the plots. He further averred that unfortunately before the said plots could be transferred to him and the other purchasers, the Director of **Miharati Development Company Limited** passed away which led to the disintegration of the company.

That being in a predicament the purchasers came together and agreed that they would follow up on the transfer of the land to themselves. Therefore all the purchasers were called and after conducting due diligence they learnt that **LR No.126/365** originally belonged to one **Rev.Harriton S Manyasa** who had entrusted the land to **Miharati Development Company Limited** to sub-divide the land and sell it on his behalf then remit the proceeds to him.

It was his further disposition that on **22nd July 2008**, the purchasers made an application for registration of a Community Based Organization in the name of **Kwa Maji Plot 365 Self Help Group** with the intent of redeeming **plot No.Nairobi/Block 126/365** to themselves as evident from annexure **“GK-4”** and the same was registered on **24th July 2008**, as per annexure **GK5**.He also deposed that the registered members of **Kwa Maji Plot 365 Self Help Group** started making contributions towards clearing the balance to **Rev. Munyasya** and payment of transfer fees towards the plot among other expenses and requisite fees. Again that on **31st July 2008**, the registered group proceeded to **Ngundu Farmers’ Co-Operative Society** where they paid transfer fee of **LR No.126/365** as per annexure **“ GK-8”**.

He further alleged that upon payment of the transfer fee, they were issued with documents from **Ngundu Farmers’ Co-Operative Society** indicating that the land was in the process of being transferred as the matter was still pending before the Ministry of Lands as evident from annexure **“GK-9”**. . Further that besides the balance of the purchase price, transfer fee and other requisite fees the group has incurred huge expenses in terms of rates paid to redeem the parcel of land from being repossessed and/or by the Council as per annexure **“GK-13”**.

The deponent further contended that all along the defendants have never made any follow up on **LR No. Nairobi Block 126/365** nor made any contributions towards redeeming the parcel of land neither are they registered members of **Kwa Maji Plot 365 Self Help Group**. It was his further contention that to date the defendants have never surrendered any documents to prove ownership within **plot No. Nairobi Block 126/365** neither have they made any contributions to the group and/or complied with the rules and

regulations of the group for them to be admitted as members of ***Kwa Maji Plot 365 Self Help Group***. He also contended that since the **year 2009**, the defendants had never made any claim on the plots only for them to emerge in the month of **May 2015** and the 3rd defendants had commenced developments on **plot No.LR No. Nairobi Block 126/365 /13** purporting to have purchased the plot from the 1st and 2nd defendants who were not registered owners of the plot as evident from annexure **GK15**. It was his further contention that the defendants will wrongfully and illegally proceed with their unlawful illegal actions of trespassing and putting up of illegal structures on **Plot No. Nairobi Block 126/365** thereby depriving ***Kwa Maji Plot 365 Self Help Group*** their rightful ownership of the property by dubious means unless they are restrained from doing so by an order of this Honourable Court.

Therefore the Plaintiffs and ***Kwa Maji Plot 365 Self Help Group*** as a whole stand to greatly suffer and continue to suffer irreparable loss and damage as a result of the defendant's illegal and wrongful actions unless the orders sought herein are granted. He argued the court to allow the instant application.

The 1st and 3rd Defendants filed their Replying Affidavit in opposition to the Instant Notice of Motion.

Everlyne Gatune the 2nd Defendant filed a Replying Affidavit on **11th November 2015**, and averred that the Defendant is her former husband whom they divorced. Further that the defendant is her second land buyer residing to the plot **No.13 Kwa Maji plot 365 Self Help Group** at **Kamulu**. She alleged that on **10th July 1997** the 2nd Defendant entered into a sale agreement for 5 plots numbers **10,11,12,13, & 14** and at **30,000/=** each and on **8th August 1999** bought plots **5,6,7,8, and 9** of **40,000/=** each. Plot measuring approximately **80ftx40ft** and took possession and occupied since **October 1997**. It was her allegation that **No.26** her former husband was a treasurer of the group since their divorce in **2008**, their nephew had been living there and she has been visiting the group secretary every year for the update.

She contended that nobody had approached her to stop selling the plots and by the time the suit was filed, she had sold all the plots. She urged the court to dismiss the application.

Wilson Githiora Mburu also filed his Replying Affidavit and averred that on **6th day of June 2015**, he purchased and bought **plot no. Nairobi Block 126/365 /13** from **M/s Evelyn Gatune Mwiadi** and signed a sales agreement before **Gachau Kariuki-Advocates** and paid for the plot through a **Cheque no.020786** worth **Kshs.450,000**. He further averred that before the purchase of the plot he consulted the 1st Plaintiff **Geoffrey Kariuki Kamau** who confirmed to him that **Ms Everlyne** was the genuine owner of the **Plot Nairobi Block 126/365 /13**. That he was introduced to **Mr Geoffrey Kariuki Kamau** who was the vice chairman of ***Kwa Maji Plot 365 Self Help Group*** who later introduced him to **M/s Everlyne Gatune** to buy the plot. It was his contention that immediately after buying the plot, he started developing the same. He also contended that on **16th June 2015**, the area chief ordered all members and officials of ***Kwa Maji Plot 365 Self Help Group*** block **126/365** to meet on **20th June 2015**, to solve the issues raised over the suit land. Further that, the 1st and the 2nd Plaintiff did not attend the chiefs meeting which other members did attend and instead they filed a case in court and alleged that the matter was already in court so there was no way they could attend the meeting.

He therefore argued the court to suspend the orders issued against him restraining him from developing his **plot No.Block 126/365/13** and that the Plaintiff be ordered to stop interfering with his occupation of the suit property because of their differences with the 2nd Defendant.

Further that they should be ordered to give him the share certificate which will enable him obtain title deed for his **Plot no.126/365/13**. The plaintiff filed a further affidavit on **15th December 2015**, sworn by **Geoffrey K Kamau**.

The application was canvassed by way of written submissions **Mr Julius Nyakiangana,Advocates** for the Plaintiffs/Applicants filed the written submissions on **16th February 2016**, on behalf of the Plaintiffs. The 3rd Defendant herein ***Wilson Githiora Mburu***, who is acting in person, filed his written submissions on

21st March 2016. The 2nd Defendant though represented by **Maina Muchiri Advocates** failed to file her written submissions.

The Court has now considered the instant Notice of Motion and the annexures thereto. The Court has also considered the relevant provisions of law, the pleadings in general and the written submissions and it renders itself as follows:-

The Plaintiffs have filed this suit against the Defendants and among the prayers sought are an order for Permanent Mandatory Injunction against the Defendants to restrain from dealing with **plot No. Nairobi Block 126/365** and a declaration that **Kwa Maji Plot 365 Self Help Group** is the owner of the suit plot **Nairobi block 126/365** and all the sub plots thereon. Simultaneous to the Plaintiffs' application, the applicants filed the instant Notice of Motion seeking for temporary injunction against the Defendants to be restrained from dealing with the suit property at all until the suit is heard and determined. The Plaintiffs herein are allegedly the **Chairman, Secretary, Treasurer** and a **Member** of **Kwa Maji Plot 365 Self Help Group**.

From the available evidence, there is no doubt that various persons had bought plots from **Miharati Development Co.Ltd on LR No. 126/365**. From the Plaintiff's evidence, the **plot No.Nairobi/Block 126/365** relating to **LR No.11593** comprising of about **1.058 ha** was initially owned by one **Harriton Shisa Munyasa** whose subdivision scheme had been approved by the Ministry of Lands vide a letter dated **18th December 1992** . It is also evident that the plot, **Block 126/365** had its rates records showing that the property was still registered in the name of **Ngundu Farmers' Co-operative** as is evident from **GK 13 Rates Demand Note**.

The deponent to the Plaintiffs application one **Geoffrey K Kamau** , the 1st Plaintiff had alleged that he had entered into a sale agreement for plots **No. 38/37/361/35** which were subdivisions of **LR No. 126/365** with **Miharati Development Company** at a cost of **25,000/=** per plot and each plot was about **80ft x40ft**. It is also evident that the 2nd Defendant herein also had entered into a sale agreement with the same **Miharati Development Co.Ltd** for purchase of plots **no. 10,11,12,13,& 14** by the 2nd Defendant from the said **Miharati Development Co.Ltd** . The 2nd Defendant attached various receipts to show that between the year **1996 – 1997**, she paid for plots **no. 10,11,12,13 & 14** to **Miharati Development Co,Ltd** . There is also no doubt that the 2nd Defendant sold her plots to various persons and vide a sale agreement dated **6th June 2015**, the 2nd Defendant sold plot **no. 13 LR No. 126/365** to **Mburu Wilson Githora** , the 3rd Defendant/Respondent herein.

It is also evident that **Kwa Maji Plot no 365 Self-Help Group** was registered on **24th July 2008** as evident from **GK 5**. It is also not in doubt that the transfer of lease in respect of **Plot no. Nairobi/Block 126/365** was signed on **18th August 2008**, and the applicants have averred that the pending finalization at the Ministry of lands is almost complete to secure the title in the name of **Kwa Maji Plot 365 Self Help Group**. The 3rd Defendant has alleged that after the purchase of his plot from the 2nd Defendant, he started to build a structure on it with the knowledge of the 1st Plaintiff. That by the time the plaintiffs came to Court, he had already built his structures on the suit property.

That being the position of this matter the issue now for determination is whether the Plaintiffs are entitled to the injunctive orders sought.

The applicants have sought for Injunctive orders which are equitable remedies granted at the discretion of the court. However, the said discretion must be exercised judiciously. As was held in the case of **Isaac Awuondo and 4 others Vs Mount Kulal Ltd , Civil Appeal No. 191 of 1997** by the Court of Appeal that ;-

“Grant of injunction being discretionary will only be interfered with if it is shown that the Judge acted on wrong principles or failed to take into account a relevant factor or took into account an irrelevant factor on short of this, that the discretion is plainly wrong”

In deciding whether to grant the orders sought or not the court will be guided by the laid down principles in the case of **Giella Vs Cassman Brown 1973 EA 358** and later repeated in other judicial pronouncements. In the case of **Kibutiri Vs Kenya Shell, Nairobi High Court Civil Case no. 3398 of 1980 (1981)KLR**, the court held that: -

“The conditions for granting a temporary injunction in East Africa are well known and these are;-First, an applicant must show a 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.”

The applications herein need to fulfil any of the above conditions before the court can grant the Orders sought herein.

The first condition is that the applicants must show that they have a prima facie case with probability of success as was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125 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.”

Have the applicants herein established that they have a prima facie case?. Before the Court delves into the substance of the available to confirm whether the applicants have established a prima facie case, the court will take into account that at this stage. It is not required to make final conclusions on the disputed issues .The case of **Agip Kenya Ltd v. Maheshchandra Himatlal Vora & Ano. Civil Appeal No. 213 of 1999**, where it was held that;-

“ In an application for injunction ,the court should not delve in substantive issues and make finally concluded views of dispute before hearing oral evidence”.

The applicants have alleged that after registering ***Kwa Maji Plot 365*** Self-Help Group, the said group received a transfer of plot no ***Block 126/365*** to itself and the members of the said Self-Help Group have paid substantial amount of money to secure the suit property. However they alleged that the defendants have refused and/or neglected to pay any amount of money and they are not members of the Self Help Group and thus should not utilize the plots in question. However, from the available evidence, it is evident that the 2nd Defendant had purchased some plots from ***Miharati Development Co.Ltd*** and she later sold the said plots to different people. The 3rd Defendant purchased plot no. 13 and even constructed on it.

The Plaintiffs/applicants have sought for a declaration that ***Kwa Maji Plot No. 365 Self Help Group*** is the owner of the ***Plot no Nairobi/Block 126/365*** and all the sub plots thereon. However, it is not disputed that before the registration of ***Kwa Maji Plot 365 Self Help Group*** , the 2nd Defendant had purchased ***plots no. 10,11,12,13,& 14*** from ***Miharati Development Company Ltd*** who were selling the same on behalf of the owner of the suit property.

For the Court to decide whether the Defendants have lost their rights over the plots that they had purchased, their evident must be called. If after the evidence is called and the same is tested and the court indeed finds that the Defendants are indebted to ***Kwa Maji Plot 365 Self Help Group*** , then the court will issue the necessary orders or make necessary declaration . The 3rd defendant purchased plot no.13 from 2nd defendant and he should not be made to suffer because of the misunderstanding between the plaintiffs and the 2nd defendant herein. In any event , the 3rd Defendant has alleged that he has already constructed on the suit property and he should be allowed to enjoy the fruits of his labour as the Plaintiffs and 2nd defendant try to solve their differences. As has been severally held by courts, the purpose of injunction is

to maintain the status quo . If the 3rd Defendant had built on plot No. 13 before the suit was brought to court, that is the status quo that should be maintained. See the case of **Esso (k) Ltd Vs Mark Makwata Okiya , Civil Appeal No. 69 of 1991** where the court held that;-

“ Injunctions are not to be granted if the event meant to be restrained has taken place. The purpose of injunctions is to maintain status quo”.

Further in the case of **Mavoloni Co.Ltd Vs Standard Chattered Estate Management ltd Civil App. No 266 of 1997 ,** the court held that:-

‘ An injunction cannot be granted once the event intended to be injuncted has been overtaken by events’.

It is evident that the 2nd Defendant has sold her plots to different persons, 3rd defendant being one of them. It was not disputed that the 3rd Defendant had constructed on the suit property before the suit was filed. The events sought to be injuncted has already taken place. In any events if the Defendants are found to be indebted to the plaintiffs the court will issue necessary orders to even the situation. The Court finds that the plaintiffs have not established that they have a prima facie case with probability of success.

On the second limb, the court finds that the sub plots that are owned by 2nd Defendant and which have been sold to different people and plot no 13 now owned by the 3rd Defendant can be quantified and if the court do declare that ***Kwa Maji plot no. 365 Self-Help Group*** is the sole proprietor of ***plot no. 126/365***, then the Defendants will be ordered to pay for the quantified amount and or the amount that they would be owing to the Plaintiffs. The Plaintiffs can adequately be compensated with damages or costs if the Court finds in their favour. Courts have variously held that injunctions cannot be granted if the applicant can be compensated by costs. 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”.

On the 3rd limb of if the Court is in doubt to decide on a balance of convenience, the Court finds that 2nd Defendant had already purchased plots no. ***10,11,12,13,& 14*** from ***Miharati Development Co. Ltd.*** The said plots have been sold to different persons who have expectations of taking possession. The 3rd Defendant has already taken possession and constructed on his plot ***no. 13*** . Deciding on the balance of convenience, the court finds that it tilts in favour of 3rd Defendant who is in occupation and who has even constructed on the said suit property. As was held in the case of **James Jamwa Ndeda Vs Dorine Alouch, Kisumu High Court, Civil No. 136 of 2007,** held that:-

“ The balance of convenience would tilt in favour of the Defendant who is in actual occupation of the suit land rather than the Plaintiff who may be in occupation by remote control”.

This court will also adopt the above reasoning and finds that the balance of convenience tilts in favour of the Defendants who are in actual occupation.

Having now carefully considered the Instant Notice of Motion and the annexures thereto, the *written submissions*, and the *relevant provisions* of law, the Court finds that the applicants’ application dated ***1st July 2015***, is not merited. The same is consequently dismissed with costs to the Defendants/ Respondents. The interim orders in force are subsequently discharged and/or vacated accordingly.

It is so ordered.

Dated, Signed and Delivered this **30th** day of **November 2016**.

L.GACHERU

JUDGE

In the presence of ;-

Mr Mugisha holding brief for Mr Nyakiagana for the 1st , 2nd , and 3rd Plaintiff/Applicant

None attendance for the 1st, Defendant/Respondent though notified.

None attendance for the 2nd Defendant/Respondent though notified.

None attendance for the 3rd Defendant/Respondent though notified.

Court Clerk : Vincent

L.GACHERU

JUDGE