



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 875 OF 2014**

RACHEL CHEPKOSGEI MISOI.....1<sup>ST</sup> PLAINTIFF

WESLEY CHERUS MISOI.....2<sup>ND</sup> PLAINTIFF

VERSUS

LOFTIN KINYUA MWIRICHIA.....DEFENDANT

**RULING**

The Plaintiffs filed an application dated 2<sup>nd</sup> July, 2014 seeking orders that:

- a. *An order be issued against the Defendant and anyone claiming through or under him prohibiting each one of them from dealing in any manner with the suit property namely L.R No. 13746, Nairobi pending the hearing and determination of the suit.*
- b. *An injunction be issued directing the Defendant anyone claiming through or under him (and his agents/servants) to vacate the suit property and to hand over immediate possession of the same to the Plaintiffs.*
- c. *The Officer in Charge of Karen Police Station be directed to assist the Plaintiffs in ensuring that the order referred to in (c) above is carried out peacefully.*
- d. *Directions be given for hearing this application on a priority basis and proceed to hearing on a day to day basis.*
- e. *Such further or other orders (including for but not limited to contempt of court) as are just in the circumstances.*

The application is premised on grounds outlined on the face of the application and supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff. She deposes that she and the 2<sup>nd</sup> Plaintiff are the registered owners of the suit property and had erected a fence thereon. However, on 8<sup>th</sup> June 2014, the Defendant moved into the property and uprooted the fence and proceeded to fence and erected a temporary structure on the suit property claiming that the property belongs to him. The deponent states that her demands to the Defendant to produce documentary proof of ownership have been to no avail. The deponent states that the Defendant's dealings on the said suit property are illegal and they therefore stand to suffer irreparable loss

and damage unless the orders sought are granted.

The Defendant opposed the application by swearing a Replying Affidavit on 22<sup>nd</sup> July, 2014. The Defendant refuted the claims of ownership made by the Plaintiffs and deposed that the title documents exhibited are forged, fraudulently issued and back dated to appear authentic. The Defendant deposed that he is owner of suit property, **Plot No. 44 L.R. No. 13746** Karen originally known as **Plot No. 44 of L.R. No. 2259/145** Nairobi before survey and sub-division having been allocated by the Government on 24<sup>th</sup> July 1985, through an allotment letter vide reference number **33408/111/116** and attached plan number 33498/111/49a. The Defendant deposed that he accepted the offer, paid the requisite amount and was issued with Receipt No. B676753 dated 16<sup>th</sup> October 1985 and thereafter a file No. 114851 was opened at the Nairobi Lands Registry in respect to Plot Number 44 L.R. No. 13746. Subsequently, that he took possession in August 1985, and developed it by fencing around and put up a temporary house awaiting issuance of title.

The Defendant deposed that the title to his plot was never processed until 22<sup>nd</sup> November 2007, when the Commissioner of Lands wrote to the Director of Survey to forward the Deed Plan. As he was waiting for the title to be processed, the Defendant states that he received demand notices to pay land rent on **15<sup>th</sup> October 2003 for Kshs. 30,000/-, 2007 for Kshs. 70,000/-** which he paid on **26<sup>th</sup> March 2007 and 12<sup>th</sup> June 2014**, when he paid **Kshs. 10,570/-**. It is deposed by the Defendant that in 2004, he gave his wife and advocates a power of attorney to assist him to acquire the title but that all their efforts were frustrated by the officers at the Ministry of Lands.

It was deposed by the Defendant that he embarked on obtaining the title in 2014 and in the process visited the property only to find that the Plaintiffs had unlawfully encroached thereon, uprooted his fence and demolished his temporary house that he had constructed in 1985. It was his deposition that efforts to make reports at the Police Station in Karen were futile because his complaint, on the instruction of the OCS, was not recorded in the Occurrence Book. The Defendant states that on 12<sup>th</sup> March 2014, he went to the Lands Office to check on the progress of the title but that he was issued with a demand note for land rent of Kshs. 10,458 which he duly paid. Subsequently, however, that the officer who had served him with the demand note informed him that his folder was there but that the title documents were missing. The Defendant states that he was advised to go to the records department with his original documents for purposes of certification by the Lands Registrar to facilitate the reconstruction of a new file. In compliance with the direction, the Defendant states that he took the required documents on 18<sup>th</sup> June 2014, and was advised to confirm the progress in a week's time. That on 26<sup>th</sup> June 2014, when he returned, he was given another two weeks wherein no progress had been made.

The Defendant contends that the Plaintiffs have come to court with unclean hands by illegally taking his property and failing to disclose that he was already in possession thereof, and that as stated by the Plaintiffs, he is indeed in possession as he has always been since 1985. Further that the Plaintiffs have not explained their application process under which they acquired title to the suit plot since acquiring land from the Government is through an allotment letter. Additionally, that the Plaintiffs have not explained why they never took possession of the property yet they acquired the same in 1992, thus a clear indication that the title they hold was recently prepared using his documents in collusion with the officers at the Ministry of Lands.

The 1<sup>st</sup> Plaintiff swore a Supplementary Affidavit on 11<sup>th</sup> September 2014, in response to the Defendant's reply wherein she deposed that inquiries made at the National Land Commission (NLC) about the authenticity of the Defendant's letter of allotment dated 24<sup>th</sup> July 1985, reveals that there was no record in respect of the said Allotment Letter. Further that the letter of allotment and copies of receipts could not be authenticated by the Lands Office due to non-availability of the records. The Plaintiff deposed that the Defendant's claim of ownership was therefore unsubstantiated.

The Defendant swore a Supplementary Affidavit on 23<sup>rd</sup> October 2014, wherein he maintained that his documents are genuine. The Defendant referred to the letter of the Chairman from the NLC wherein the

Chairman referred to L.R. No. 2259/145, (Old No.44) deposing that the same was irrelevant as the subject matter herein in L.R. 13746. It was deposed that 2259/145 was the main title before the sub-division and its records may not be in existence because the title was surrendered during the sub-division. Further that the Chairman did not say that his allotment letter is not genuine neither did it explain why the said allotment of letter was missing from the file.

The Defendant also referred to the grant annexed to the Plaintiff's application and deposed that the same was a forgery as it is purported to have been registered and duly signed by the registrar of titles one G.G. Gachathi at 10:05hrs on 2<sup>nd</sup> February 2002, which day was a Saturday and not a working day. He deposed further that there was no evidence furnished by the Plaintiffs showing that Director of Surveys was authorized by the Commissioner of Lands to prepare a Deed Plan and therefore that the only authority that the Director of Surveyors had is the one dated 22/11/2007 for purposes of processing the grant in his favour. Consequently, that the Deed Plan annexed to the Plaintiff's affidavit prepared by the Director of Surveys without the authority of the Commissioner of Lands is null and void and without any legal foundation. The Defendant deposed that it was suspect for the Plaintiffs to pay land rents on 23<sup>rd</sup> May 2014 and 5<sup>th</sup> June 2014 for a plot they alleged to have acquired lease on 1<sup>st</sup> August 1985 and whose deed plan was signed on 12<sup>th</sup> March /1992 and the grant registered on a Saturday 2<sup>nd</sup> February 2002 almost 30 years later. Further that a grant or title could not be issued without payment of Government Revenue based on the allotment letter and therefore the grant annexed is null and void.

The application was canvassed by way of written submissions. Ndege & Company Advocates for the Plaintiffs filed submissions dated 1<sup>st</sup> October 2014 wherein counsel submitted that the allotment letter relied on by the Defendant could not be authenticated for lack of records at the Lands office and therefore the Defendant's claim of ownership based on the impugned letter of allotment is unsustainable. It was submitted that the Plaintiffs had exhibited that they are registered owners of the suit property as shown in the documents of title and in the absence of any other title documents they stood to suffer irreparable loss and damage if the orders sought are not granted.

M'Njau & Mageto Advocates for the Defendant filed submissions dated 3<sup>rd</sup> November 2014, wherein counsel submitted that the Defendant was in possession of the property and therefore a prayer for injunction cannot stand as an application for injunction looks at future actions and not the past. It was submitted that the Plaintiff had not established a prima facie case in view of the fraudulent title documents they furnished as evidence. Further that the Plaintiffs had not presented any documents to show that the acquisition and registration of grant in their favour was done following the procedures laid down in Section 7 of the Land Act which makes provision for acquisition of Government Land. Counsel submitted that the Plaintiffs had not established the kind of loss they stood to suffer noting that they had not been in possession nor made any developments thereon. Additionally that there as not evidence provided that the balance of convenience tilted in their favour.

From the narrative above, it is evident that the dispute between the parties is the ownership of the suit property. The Plaintiffs depose that they are the registered owners of the property and in support of that deposition they annexed a copy of title. The Plaintiffs also annexed copies of receipts showing payment of land rent. The Plaintiffs also deposed that they were in possession until 8<sup>th</sup> June 2014 when he Defendant moved in and destroyed their fence. The Defendant disputes the depositions made by the Plaintiffs and challenges the Plaintiff's annexures terming them as forged documents. It is the Defendant's contention that he is the rightful owner having been allotted the property in 1985. In support of his deposition, he furnished the court with copies of a letter of allotment in his favour dated 24<sup>th</sup> July 1985, a letter addressed to the Director of Surveys and copied to him dated 22<sup>nd</sup> November 2007, instructed the said Director to forward the Deed Plan for purposes of processing the grant; copies of receipts showing proof of payment of land rents, and an application dated 18<sup>th</sup> June 2014, for re-construction of his file at the Ministry of Lands. The Defendant maintains that he satisfied his requirements upon allocation including payment of rent as demanded but that processing of the title took a long time until recently when his file went missing at the Lands Office.

It is evident herein that facts as to ownership is highly contested. Though the Plaintiffs have exhibited that

they are the registered owners, the Defendant alleges that registration in their favour is in fact fraudulent. Indeed the Plaintiffs do not offer to this court any history as to how they acquired the property which brings the Defendant's depositions into sharp focus. Whatever the case, this court cannot make a proper finding at this stage of the proceedings. Such a finding can only be arrived at the trial where each party will be afforded an opportunity to testify and the veracity of their evidence tested on cross-examination. The Court finds that at this juncture, the proper finding is to Order that Status Quo be maintained. My finding is founded on the Court of Appeal decision in the case of **Ougo & anor -vs- Otieno(1987) KLR 1**, where their lordships held that the general principle is that where there are serious conflict of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.

The Court therefore finds as follows:-

- 1. An order of status quo be and is hereby entered to the effect that there shall be no development or demolition of any fence or structure constructed thereon. Further, the Plaintiff is hereby restrained from charging, disposing off or in any way alienate the L.R No. 13746 Nairobi pending the hearing and determination of the suit or until further orders of this court.***
- 2. Costs of the application shall be in the cause.***

Dated, Signed and delivered this 27<sup>th</sup> day of *February* 2015

**L GACHERU**

**JUDGE**

In the Presence of:-

Mr Kibet holding brief Mr Ndege for the Plaintiff/Applicant

Mr Kandere holding brief Mageto for the Defendant/Respondent

Lerionka: Court Clerk

**L.N. GACHERU**

**JUDGE**

**Court :**

Ruling Read in open Court in the presence of the above Counsel

**L.N. GACHERU**

**JUDGE**